

STUDY

Requested by the LIBE committee



The European Commission's legislative proposals in the New Pact on Migration and Asylum



Policy Department for Citizens' Rights and Constitutional Affairs
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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs on request of the Parliament's Committee on Civil Liberties and Justice, aims to provide a detailed mapping and analysis of the central legal changes and issues characterising the five main legislative proposals accompanying the Pact on Migration and Asylum, presented by the Commission in September 2020. The legislative instruments under consideration include a new Screening Regulation, an amended proposal for an Asylum Procedures Regulation, an amended proposal revising the Eurodac Regulation, a new Asylum and Migration Management Regulation, and a new *Crisis and Force Majeure* Regulation. As a second step, the study provides a critical assessment of the five proposals as to their legal coherence, fundamental rights compliance, and application of the principle of solidarity and fair sharing of responsibility enshrined in Article 80 TFEU.

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LIST OF ABBREVIATIONS

AFIS	Automated Fingerprint Identification System
AFSJ	Area of Freedom, Security and Justice
APD	Asylum Procedures Directive
APR	Asylum Procedure Regulation
AVRR	Assisted Voluntary Return and Reintegration
CEAS	Common European Asylum System
CIR	Common identity repository
CJEU	Court of Justice of the European Union
COM	European Commission
COREPER	Permanent Representatives Committee
Covid-19	Coronavirus disease 2019
DG IPOL	Directorate-General for Internal Policies of the Union
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard Agency
ECA	European Court of Auditors
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ECRIS	European Criminal Records Information System
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EES	Entry/Exit System

EP	European Parliament
EPRS	European Parliamentary Research Service
ESP	European Search Portal
ETIAS	European Travel Information and Authorisation System
EU	European Union
EUAA	European Union Agency for Asylum
EUCFR	Charter of Fundamental Rights of the European Union
eu-LISA	European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
FRA	European Union Agency for Fundamental Rights
Frontex	European Border and Coast Guard Agency
FRT	Facility for Refugees in Turkey
GDP	Gross domestic product
GDRP	General Data Protection Regulation
IOM	International Organization for Migration
JHA	Justice and Home Affairs
LED	Law Enforcement Directive
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MISAA	Migration Situational Awareness Analysis
MMST	Migration Management Support Team(s)
MS	Member State
RAMM	Regulation on Asylum and Migration Management
SAR	Search and Rescue
SIS	Schengen Information System

SWD	Staff Working Document(s)
TCN	Third-country National
TDAWN	Travel Documents Associated with Notices database (Interpol)
TFEU	Treaty on the Functioning of the European Union
TPD	Temporary Protection Directive
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VIS	Visa Information System

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EXECUTIVE SUMMARY

Background

The European Commission released the **New Pact on Migration and Asylum** on September 23, 2020. It constitutes the Commission's policy agenda aimed at setting up a "Common European Framework for Migration and Asylum Management" during the 9th Legislature.¹ The Pact pursues an 'integrated approach' blurring refugee and asylum with migration management and border controls policies. This has been translated into **a package of five legislative proposals** accompanying the Pact that this study critically examines:

1. A proposal on a new Screening Regulation
2. An amended proposal revising the Asylum Procedures Regulation;
3. An amended proposal revising the Eurodac Regulation;
4. A proposal for a new Regulation on Asylum and Migration Management;
5. A proposal for a new Crisis and *force majeure* Regulation.

Objectives and methodology

The *first objective* of this study is to provide a **legal mapping and analysis of the key legal changes included in the five legislative proposals accompanying the Pact**. These are compared with both relevant EU asylum and migration legislation currently in force, and legislative proposals on related subjects issued under the previous legislative term (2014-2019), notably those composing the 2016 Common European Asylum System (CEAS) legislative package. The analysis includes any provisional agreements reached by EU co-legislators on these previous CEAS reform proposals as well as the revamped role of EU agencies like Frontex (European Border and Coast Guard) and the EASO (European Asylum Support Office).

The *second objective* is to provide a critical assessment of the five proposals as to their **legal coherence, fundamental rights compliance**, and application of the **principle of solidarity and fair sharing of responsibility** envisaged in Article 80 of the Treaty on the Functioning of the European Union (TFEU). The study assesses if the legislative instruments of the Pact, both separately and as a whole, would allow fulfilling the self-stated objective of building a well-functioning Common European Asylum System (CEAS) that fully respects international refugee standards and the fundamental rights of immigrants and asylum seekers.

Key Findings

Whose Pact? Reversing Europeanisation and Fostering Intergovernmentalism

- ✓ The Commission chose not to accompany the Pact's proposals with an **impact assessment**, providing objective justification, independent evidence and assessing the potential added value and impacts of alternative policy options in each of these legislative proposals. Instead, the Pact was accompanied by a 'Staff Working Document', including **partial, erroneous and**

¹ European Commission, Communication on a New Pact on Migration and Asylum, COM(2020) 609 final, Brussels, 23.9.2020.

non-independent data which cannot be qualified as evidence. The choice not to accompany the New Pact with an impact assessment is not in line with the Commission's commitments under the **2016 Interinstitutional Agreement on Better Law-Making**, according to which any new legislative initiatives which are expected to have significant societal and fundamental rights impacts should be accompanied by robust evidence justifying their **coherency, necessity and proportionality, and compliance with the EU Charter of Fundamental Rights.**

- ✓ The process leading to the official launch of the Pact – revolving around bilateral negotiations between the Commission and Member States' Ministers of Interior – has been framed as a **'consensus building' exercise aimed at finding 'preliminary compromises'** on key controversial policy issues. By resurrecting **an artificial need to build consensus** among EU Member States in advance of the presentation of the actual legislative proposals, **the Pact can be understood as a form of 'reverse Europeanisation'.** It fosters **'intergovernmentalism' in policy domains that since the 2009 Lisbon Treaty fall squarely under shared EU-Member States competences and benefit from the 'Community method of cooperation'.**
- ✓ **Contrary to what is expressly stipulated in the EU Treaties, the Pact gives a disproportionate and 'flexible' role to the European Council and Member States' Ministries of Interior in these policy domains.** It does so by, for instance, unnecessarily calling for *de facto* unanimity or consensus building in EU policy areas benefiting from qualified majority voting (QMV) in the Council, with the European Parliament acting as co-legislator and policy agenda co-owner, and where there is already a very well-developed and solid body of legally binding EU standards. **The Commission's approach stands at odds with its envisaged role as 'guarantor of the Treaties' as well as the decision-making rules governing EU interinstitutional relations,** including the commitment to sincere interinstitutional cooperation throughout the entire legislative cycle.
- ✓ The study argues that **the terminology of 'the Pact' is confusing.** A 'Pact' implies an accord or agreement between relevant decision-making parties. **It is not clear precisely between whom the Pact has been concluded.** Indeed, the negotiations of the Pact during the German, Portuguese and now Slovenian Presidencies during the second half of 2020 and 2021 have clearly showed that agreement does not exist even among EU Member States. Member States continue to disagree on key structural aspects of the Pact, such as the newly proposed responsibility-sharing model and the 'seamless link' in the proposed asylum/migration framework. This is also the case with respect to the European Parliament, which has started to work on each respective legislative files only from the actual date of publication of the Pact in September 2020. Almost one year after its publication, it can be therefore concluded that **the Pact is in fact not a Pact at all.**
- ✓ The analysis of the legislative proposals conducted in this study puts into question the extent to which the Pact succeeds at 'comprehensively addressing all key dimensions of migration and asylum'. The analysis underlines how the key legislative provisions underpinning **the newly proposed system are driven by long-standing – and yet persistently unsuccessful – policy agendas** focused on limiting spontaneous arrivals of asylum seekers in the EU,

constraining and criminalising their free movement inside the Schengen area, and increasing the numbers of enforced return decisions. The priorities pursued by the New Pact display a **strong continuity with the key objectives pursued at the EU level since the launch of the 2015 European Agenda on Migration.**

- ✓ That notwithstanding, **a key novelty of the Pact emerges from its predominant intergovernmental nature.** The Pact contains policy proposals **drawing inspiration from existing policies in certain EU Member States,** such as those focused on **pre-entry screening and accelerated border procedures, and therefore giving early concessions to some Ministries with home affairs portfolios.** These have often led to expedited expulsions, illegal 'push backs', arbitrary detention in transit zones or border areas, and the criminalisation and policing of asylum seekers and refugees, **which violate rule of law, justice, and the human dignity of individuals subject to these malpractices.** Instead of questioning the legality of these national malpractices and **effectively enforce existing EU borders, asylum and migration *acquis* and the EU Charter of Fundamental Rights, the European Commission has strategically chosen to convert them into EU policy priorities and indirectly legitimatise their objectives and questionable use across the Union.**
- ✓ The Pact on Migration and Asylum has been presented as advancing an 'innovative approach', linking policies in the areas of migration, asylum, and border management through '**integrated policymaking**'. This study shows that this '**integrated approach**' and the so-called '**seamless link**' between asylum, migration enforcement, and border management characterising the Pact constitutes one of its most far-reaching flaws. First, the Pact is based on a **partial or questionable reading of available asylum statistics in the EU. This erroneously frames and securitises legitimate international protection seekers and beneficiaries as "mixed flows", and underestimates the share of legitimate international protection seekers and beneficiaries in the EU;** second, the Pact promotes '**hybridisation**' of distinct or separate EU and national policy domains (migration, asylum, and border controls) and their respective **legal basis in EU law. This leads to legal incoherency, legal uncertainty, and serious fundamental rights challenges** that run against the EU Better Regulation Toolbox and EU Treaty obligations.
- ✓ Empirically, the need for this 'integrated' framework is motivated by the Commission with reference to **the nebulous notion of "mixed flows"** of third-country nationals, and the related objective of ensuring that Member States are given the 'necessary tools' to effectively manage 'irregular migrants' in addition to international protection seekers. The Commission assumes that an increasing number of people arriving in the EU are not in need of protection by referring to a decrease in the **EU-wide first instance positive recognition rate over a five year period (2015-2019).**
- ✓ However, **the alleged increasing trend of "mixed flows" in the EU is baseless. First instance recognition rates only provide a partial picture of international protection needs in the EU,** since they disregard applicants that are granted a positive outcome in the appeal stage. In addition, a focus on first instance recognition rates does not consider the **many obstacles currently faced by people seeking protection to have access to protection, and to justice**

and effective remedies in the case asylum claims are decided negatively. Therefore, the Pact underestimates **the role played by restrictive migration management policies in co-creating or co-constructing 'irregularity'**.

- ✓ Furthermore, the Commission's approach **too easily assumes that third-country nationals can be easily and quickly distinguished between refugees" and "irregular immigrants"**. This disregards existing evidence of the challenges faced by Member States in identifying and assessing the **complex protection and humanitarian needs** of people arriving at their borders, notably in the context of border surveillance activities or sea arrivals or following search and rescue (SAR) disembarkation in the Mediterranean Sea. More broadly, a narrow focus on first instance recognition rates overlooks the **many faces of protection which goes beyond those two categories or statuses**, such as the possibility to receive **protection for humanitarian reasons** or the possibility, provided by the Schengen Borders Code, to be granted **entry on humanitarian grounds**.
- ✓ The Pact's 'seamless' interlinking of the asylum and return phases underestimates a **set of 'bottlenecks', which have in the past frustrated EU and Member States efforts to increase the 'effectiveness' of EU return policy**, narrowly understood in terms of increasing enforced removal orders. These bottlenecks include, in the first instance, **third countries' reluctance to align with EU objectives in the field of return**. This is due to their national sovereignty as well as geopolitical, economic, and societal factors in those countries, including the high political sensitivity of readmission issues at the domestic level and, in the case of Africa, their own regional integration processes aimed at freedom of movement. Second, the Pact does not question **the actual adequacy of the return decisions issued** and focuses uncritically on their enforceability. It does neither take into account that **people issued a return decision may be 'non-returnable' for a number of well-justified and legitimate reasons**, including humanitarian grounds and effective access to justice.
- ✓ **The 'integrated approach'** advocated by the Pact aims at artificially 'linking' policies falling under **distinct EU and Member States legal areas of migration, asylum, and border controls**. This is for instance reflected in the proposal for an Asylum and Migration Management Regulation (RAMM) aim to establish a **"common framework"** bringing together the management of the CEAS and that of migration enforcement policy. A similar approach can be found in the so-called **pre-entry phase** encompassing both the screening, and asylum and return border procedures. This creates a **problematic 'blurring' of asylum, returns and border control policies leading to legal incoherency**. **The hybrid legal basis of the Pact's legislative proposals challenges the current structural division of work** under these policy areas under EU primary and secondary law, where each of these domains pursue **specific objectives and separate operating conditions for applicability**. This **'hybridisation' also disregards** the negative impacts of the proposed integrated system on the **national specificities or composite landscape of national administrative and judicial actors** with different responsibilities for each of these fields of law across EU Member States.
- ✓ A majority of EU Member States operate with **professionalised or designated asylum authorities** which are a direct expression of their commitment to faithfully implement the

1951 Geneva Convention regime in their national legal systems, Council of Europe Recommendations and in some cases, the existence of a constitutional right to asylum. These national asylum authorities are often, by design, **independent from Ministries with home affairs competences**, and present **competences that differ from national authorities responsible for border controls and return** decisions, i.e., immigration enforcement authorities and **law enforcement and police (or border police) authorities**. **The Pact prioritises the role of migration enforcement authorities and of police (border police) authorities over those responsible for asylum decisions**. Furthermore, based on lessons learned in Greece since the implementation of the 2016 EU-Turkey Deal, **'hybridisation' negatively affects or unduly interferes with the independence of asylum authorities in EU Member States**.

Pre-entry phase: The proposal for a Screening Regulation and Amended Proposal on an Asylum Procedures Regulation

- ✓ A key novelty included in the Pact is the proposal to create a **new 'pre-entry phase'**, comprising a new procedure for ensuring the screening of third-country nationals (TCNs) arriving at EU external borders, the asylum border procedure, and the ensuing border procedure for carrying out return. The aim of the pre-entry phase is to establish a **'seamless link'** between all stages of the migration process from arrival to processing of asylum requests and granting of international protection or, where applicable, the return of those not in need of protection. The Pact frames border procedures as a key **'migration management tool' to face situations when a large share of asylum applicants** are citizens of countries with a low EU recognition rate.
- ✓ This study underlines how the pre-entry phase laid down in the New Pact raises a set of serious concerns when it comes to its adherence with the aims of the CEAS and the EU Treaties, as well as its possible impacts on the respect on the fundamental rights of asylum seekers and migrants under the EU Charter of Fundamental Rights (EUCFR) and national constitutions, most notably: **the principle of non-refoulement, the right to asylum, effective remedies, privacy, and the right to liberty and security**.
- ✓ According to the Pact, TCNs subject to pre-entry procedures would not be considered as being authorised entry into the Member State territory, **creating a legal fiction of "non-entry"**. The study concludes that this fiction of non-entry **does not absolve states authorities from responsibility when not upholding fundamental rights guarantees envisaged by EU and international law**. This is certainly the case in relation to **detention in transit zones or in the context of border procedures**, where the Court of Justice of the European Union (CJEU) has ruled that 'detention' is now an autonomous concept of EU law **unlocking EU Member States responsibilities and liabilities** in cases of violations with EU asylum legislation and the EU Charter of Fundamental Rights.
- ✓ The absence of clear rules in the Pact concerning the **right to remain and the legal position of individuals** subject to the screening may create an incentive for Member States to circumvent existing EU and national legal standards and carry out illegal practices – such as pushbacks and expedited expulsions contrary to *non-refoulement* and the prohibition against

collective expulsions. Indeed, the Commission's proposals fail to meet **the legal certainty criterion** as they do not include clear rules as to the qualification of the stay of those "held" or "kept" at the border in order to prevent entry into the territory. The screening proposal leaves the legal qualification of detention during screening to national law, while the amended APR proposal fails to clarify how non-entry in the context of asylum and return border procedures is to be ensured. It remains obscure **how Member States may prevent entry without placing the persons concerned in detention as understood by EU law**. The failure of the Pact to clearly address this major gap in the current system risks **perpetuating the systematic use of (de facto) detention in the context of border procedures, which runs contrary to existing EU asylum and border law**. Therefore, **the legal fiction of non-entry has no value added within the scope of EU law and should be deleted from the Proposal**.

- ✓ The amended APR proposal includes the **mandatory use of the asylum border procedure** when the applicant is from a third country, for which the share of positive asylum decisions in the total number of asylum decisions is **below 20%**. In that case, Member States will have to examine applications for international protection in an accelerated procedure. This study argues that the proposal to combine mandatory application of asylum border procedures with **accelerated examination based on purely statistical grounds** – and not a qualitative assessment of the general situation existing in the country of origin – is likely to exacerbate the deep shortcomings associated with border procedures, leading to a **reduction of the quality and fairness of decisions** taken on applications for protection. **The application of a statistical threshold fails to pass the proportionality test and is incompatible with the obligation not to discriminate among international protection applicants**.

Amended proposal revising the Eurodac Regulation

- ✓ The **2020 proposal amending the Eurodac Regulation**, read in conjunction with the previous 2016 proposal and the 2018 provisional agreement between co-legislators, aims at transforming Eurodac into a common EU database to support policies on asylum, resettlement, and irregular migration. Specifically, according to the text of the 2016 proposal, **widening the scope of searches to all categories of data**, including biometric data, aims at addressing 'onward movements' (intra-EU mobility by asylum seekers) in the EU and establish the identity of persons in absence of identity documents.
- ✓ Whereas Eurodac has been initially developed for the sole purpose of asylum policy and the implementation of the Dublin Regulation, the current proposal envisages **Eurodac to be used for a number of additional purposes covering other EU policy areas**. This includes providing assistance in '**controlling irregular migration**' and detecting so-called **onward movements** "by counting individual applicants rather than applications" and assist a Member State to re-document a third-country national for return purposes. With the 2020 proposal, **Eurodac is integrated in the general framework of the New Pact on Migration and Asylum** and its use is envisaged to support implementation of the RAMM and the Screening Proposals.
- ✓ Chapter 5 of this study underlines how, in spite of the substantial expansion of the scope and functions of Eurodac envisaged by current proposals, **the proposal is not based on robust**

evidence justifying its necessity and proportionality, and an **in-depth fundamental rights and data protection impact assessment** of neither the 2016 or 2020 proposals has been carried out. However, this **evidence should be an absolute requirement before its adoption especially when considering the wide and indiscriminate central storage of personal and biometric data on unsuspected persons, including refugees and children.**

- ✓ Similar to previous legislative proposals, another key concern of the Eurodac Proposal relates to furthering the **hybridisation or 'blurring' of distinct EU legal and policy areas which are different from asylum, i.e., migration, police cooperation, internal security, and even criminal justice.** The **increasing linkages between Eurodac and other EU large-scale databases** in the context of the Interoperability framework can be expected to **create even larger legal incoherencies.**
- ✓ **The current Eurodac reform, connected to the interoperability scheme, would change the scope and impact of Eurodac extensively both 'qualitatively', concerning the purposes for which Eurodac will be used, and 'quantitatively',** that is concerning the number of persons and personal data it will contain. The resulting integration of Eurodac into an **opaque ecosystem involving the processing, profiling and automated decision-making of biometric data would increase the future impact on individuals' right to data protection, in particular the principle of purpose limitation.** In addition, the proposed Eurodac reform would impact profoundly on another set of fundamental rights, including the right to human dignity and integrity, the best interest and rights of children, individual data protection rights, the right to effective judicial protection, as well as the right to non-discrimination.

Asylum and Migration Management Regulation (RAMM)

- ✓ The aim of the new proposal for an **Asylum and Migration Management Regulation (RAMM)** is to establish a "common framework for the actions of the Union and of the Member States in the field of asylum and migration management policies". **The hybrid legal basis of the RAMM exemplifies the 'blurring' of asylum and migration management policies** under the Pact, an approach that is in tension with the **international protection-driven approach of the CEAS** and risks diluting international protection safeguards enshrined in the EU asylum *acquis*.
- ✓ One of the key objectives pursued by the RAMM is to address **structural weaknesses in the design and implementation** of the Dublin system, which have been underlined by a substantial amount of evidence. However, this study shows how **the RAMM does not envisage an overhaul of the Dublin system's structure and logic of action.** Instead, key pillars underpinning the Dublin system 'survive' within the broader framework established by the RAMM.
- ✓ The RAMM retains the default connection between external borders management and responsibility for examining an asylum application, introducing compensatory solidarity measures as a way to correct imbalances determined by the system. Responsibilities for Member States of first entry is even strengthened through provisions limiting possibilities for cessation and shift of responsibility. **Preserving the first irregular entry criterion**, to which a cumbersome administrative bureaucracy at the external borders is added, **can hardly be seen**

as being 'fair' towards frontline countries, and thus in line with the principle of solidarity and fair sharing of responsibility under Article 80 TFEU.

- ✓ The new shapes of the '**solidarity mechanism**' laid down in the RAMM addresses different situations; disembarkations following SAR situations, migration pressure or risk of pressure. **The proposal broadens the scope of the EU principle of solidarity as enshrined in Article 80 TFEU**, going beyond its financial implications, institutionalising relocation, return sponsorship and other – vaguely defined – capacity building measures. It entails a complex combination of voluntary pledges and mandatory contributions. The latter is to be determined in line with a distribution key calculated on the basis of Member States' GDP and population and supplemented by 'a mass correction mechanism' to be activated when pledges under one specific form of solidarity (e.g., relocation or return sponsorship) fall short of the identified needs.
- ✓ The "**flexible yet mandatory solidarity**" approach of the RAMM reflects the effort to combine Member States' divergent and even opposite visions of solidarity, leading to a complex compromise at the expense of legal precision. **It also fosters a concept of asymmetric solidarity – allowing for Member States to pick and choose where and how to contribute in ways different from relocation – and therefore runs contrary to the notion of equal solidarity advanced by the CJEU in cases covered by Article 78.3 TFEU.** The RAMM **does not establish clear criteria and indicators for triggering the solidarity mechanism**, leaving the task of activating mandatory solidarity following a "holistic assessment" based on a broad set of criteria to the Commission. While from a political approach, this exercise may allow for 'convergence despite disagreement', legally speaking **it contradicts predictability and legal certainty.**
- ✓ From a fundamental rights perspective, **it is highly questionable whether or not the RAMM would** be able to address the fundamental rights gaps that had characterised the implementation of the Dublin system on the ground, and therefore **uphold solidarity towards individuals.** On the contrary, the RAMM still relies on **coercion and a sanction-based approach** to ensure applicants' compliance, including through the imposition of sanctions to ensure that asylum seekers comply with the obligation to apply for asylum in the Member State responsible. The fact that persons to be relocated under the solidarity mechanism have no say concerning the country of destination reflects a persisting **neglect of refugee agency** in the context of what is still considered as an administrative arrangement between states (inter-state solidarity).

Proposal for Crisis and Force Majeure Regulation

- ✓ According to the Commission, the proposal for a **Crisis and force majeure Regulation** aims at establishing a "toolbox" to address exceptional situations of mass influx of third-country nationals arriving in the EU due to **factors that operate outside of the control of the EU and its Member States.**
- ✓ The proposal aims to provide adaptations to the solidarity mechanism laid down in the RAMM (extending its scope and laying down a simplified activation procedure) and is characterised

by **'exceptionalism' by providing major procedural derogations** from 'ordinary' rules on asylum and return (by extending the scope and time limits of the asylum border procedure and an extension of the time limits of the return border procedure). Another objective of the proposal is to repeal the 2001 Temporary Protection Directive by replacing it with the **status of immediate protection**.

- ✓ Neither the 2020 Crisis proposal nor the Commission Staff Working Document accompanying the New Pact provide substantive evidence justifying the need for establishing a separate legal instrument dealing specifically with "situations of crisis" and *force majeure*. The Commission does not elaborate on the **necessity and added value of foreseen derogations** compared to the already existing legal provisions under secondary EU law allowing for adaptations in cases of emergency situations. **The proposal does not provide substantive or convincing arguments on the need and rationale for expanding border procedures, coupled with the likely expanded use of detention, as a way to address situations such as those envisaged in Article 78.3 TFEU.**
- ✓ The study expresses serious concerns on the ways in which the **proposal does not objectively define these notions, in particular that of *force majeure***. The few examples included in the proposal to support the need for adopting specific rules to address situations of *force majeure* include too general grounds such as the Covid-19 pandemic and "the political crisis witnessed at the Greek-Turkish border in March 2020". The assessment of a situation of *force majeure* is also left entirely in the hands of the Member States.
- ✓ **The 2020 Crisis proposal constitutes a magnifying glass of the fundamental rights issues** and challenges identified and examined in all the study chapters dealing with each of the Pact's legislative proposals. The expanded use of border procedures as a migration management tool in the context of situation of large number of entries exacerbate already identified protection deficits associated with the use of those procedures, most notably those related with shortened time limits and practical hurdles faced by asylum applicants in accessing procedural safeguards and effective remedies.
- ✓ **The inherent legal vagueness and subjectivity accompanying the notions of crisis and *force majeure*** and the very high level of discretion left to the Commission (in the case of crisis) and the Member States (in the case of *force majeure*) to determine the existence of such situations raise strong concerns from a legal point of view. This is not only the case regarding the possible negative societal and fundamental rights impacts of the envisaged derogatory rules on the uniform application of CEAS standards by the Member States, but also, more broadly, on the respect of the rule of law in the EU legal system.

Based on the analysis conducted and in light of the above-mentioned findings, this study puts forward a set of policy recommendations to EU co-legislators for each of the five legislative proposals. These policy recommendations aim to ensure adherence of the different proposals under consideration to EU Treaty aims and principles and currently applicable EU secondary legislation on migration, borders and asylum, including compliance with the EUCFR and international and regional refugee protection

and human rights standards, as well as the EU Better Regulation Toolbox. The policy recommendations put emphasis on the need to ensure that the proposals under the Pact better reflect a ***principled and rights-based understanding of solidarity***. This involves not only fairer and equal sharing of responsibility between Member States (**'equal solidarity'**), but also ensuring that the Pact is fully inclusive of **individuals' agency and unequivocally upholds third-country nationals' access to justice, human dignity, and international protection**.

1. INTRODUCTION

The European Commission released the **New Pact on Migration and Asylum** on September 23, 2020.² According to the Commission, the New Pact puts forward a reform agenda that aims at establishing a new comprehensive and sustainable approach to managing migration in the EU, which takes into account the key challenges faced by the EU in the field of migration and asylum as well as the specificities of the current migration situation.³ The Commission stresses the need for an **integrated approach** bringing together policies in the areas of migration, asylum and integration, and border management, 'recognising that effectiveness depends on progress on all fronts'.⁴

In the view of the Commission, 'the refugee crisis of 2015-2016 revealed major shortcomings, as well as the complexity of managing a situation which affects different Member States in different ways'.⁵ In addition, *ad hoc* responses, in particular in the field of solidarity and responsibility sharing, have proven not to constitute a sustainable answer to major structural weaknesses, both in the design and implementation, of Member States' asylum and return systems.⁶

Against this backdrop, the New Pact seeks to establish '**a common European framework and better governance of migration and asylum management**', including a new solidarity system that can address challenges both in normal times and in situations of pressure and crisis. It further aims to make asylum and return procedures at the border more consistent and more efficient, as well as ensuring a consistent standard of reception conditions across Member States.

The New Pact communication stresses the objective of creating 'faster, seamless migration processes and stronger governance of migration and border policies, supported by modern IT systems and more effective agencies'. Integrated border management is presented as a key component of a comprehensive migration policy and as a precondition for effective policy responses in the field of asylum and return.⁷ According to the New Pact, **unsafe and irregular entry** should be reduced in favour of sustainable and safe legal pathways for those in need of protection.⁸

The New Pact puts strong emphasis **on cooperation with third countries** in migration management and returns, on the premise that 'the internal and external dimension of migration are inextricably linked'.⁹ It calls for the establishment of comprehensive, balanced and tailor-made partnerships with third countries to address a variety of objectives: addressing the root causes of irregular migration, combatting migrant smuggling, helping refugees residing in third countries and supporting well-

² European Commission, Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020, online: https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en

³ European Commission, Communication on a New Pact on Migration and Asylum, COM(2020) 609 final, Brussels, 23.9.2020, p. 2; European Commission, Staff Working Document Accompanying the document Proposal on Asylum and Migration Management and amending Council Directive (EC) 2003/109, and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund] Brussels, 23.9.2020 SWD(2020) 207 final, p. 28.

⁴ European Commission, Communication on a New Pact on Migration and Asylum, p. 2

⁵ *Ibid.*, p. 1.

⁶ *Ibid.*, p. 3.

⁷ *Ibid.*, p. 11

⁸ *Ibid.*, p. 2.

⁹ *Ibid.*

managed legal migration, as well as concluding formal and informal readmission agreements and arrangements that would increase rates of returns.

The Communication laying down the new Pact was accompanied by a legislative package which includes the following **five legislative proposals** that are analysed in detail in this study:

- A proposal for a new Regulation on **Asylum and Migration Management (RAMM)**;¹⁰
- An amended proposal revising the **Asylum Procedures Regulation (APR)**;¹¹
- An amended proposal revising the **Eurodac Regulation**;¹²
- A proposal on a new **Screening Regulation**;¹³
- A Proposal for a new **Crisis and force majeure Regulation** (further referred to as 'Crisis proposal').¹⁴

In conjunction with the above-mentioned legislative proposals, the Commission published the following four non-legislative documents:

- A Recommendation on a Migration Preparedness and Crisis Blueprint;¹⁵
- A Recommendation on Legal pathways to protection in the EU;¹⁶
- A recommendation on Search and Rescue Operations by private vessels;¹⁷
- Guidance on the scope of the Facilitators Directive.¹⁸

¹⁰ Proposal for a Regulation on Asylum and Migration Management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (Text with EEA relevance) (SWD(2020) 207 final), COM(2020) 610 final.

¹¹ Amended proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final.

¹² Amended proposal for a Regulation on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM(2020) 614 final.

¹³ Proposal for a Regulation introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 final.

¹⁴ Proposal for a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum (Text with EEA relevance), COM(2020) 613 final.

¹⁵ Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration (Migration Preparedness and Crisis Blueprint), OJ L 317/26, 1.10.2020.

¹⁶ Commission Recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, OJ L 317/13, 1.10.2020.

¹⁷ Commission Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, OJ L 317/23 1.10.2020.

¹⁸ Communication from the Commission, Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence (2020/C 323/01), OJ C 323/1, 1.10.2020.

The above-mentioned instruments have been accompanied by a Commission Working Document describing the 'evidence and experience' underpinning the initiatives tabled in the framework of the New Pact.¹⁹

Over the following months, the Commission has published additional proposals that are linked to the Pact reform agenda. These include:

- An Action plan on Integration and Inclusion 2021-2027;²⁰
- An EU strategy on voluntary return and reintegration;²¹
- A strategy towards a fully functioning and resilient Schengen area.²²

1.1. Scope and objectives

The core objective of this study is to provide a detailed mapping and analysis of the legal changes included in the five main legislative proposals accompanying the New Pact on Migration and Asylum. In parallel, this study provides a critical assessment of the proposals with respect to their legal coherence, fundamental rights compliance, and application of the principle of solidarity and fair sharing of responsibility in the field of border checks, asylum and immigration as enshrined in Article 80 TFEU.

The analysis conducted in the study aims to assess if – in line with the objective set by the Commission – the legislative proposals of the New Pact hold the potential to establish a new, durable European framework in the areas of migration and asylum, which can work both in normal times and in situations crisis, and at the same time, whether it can 'provide certainty, clarity and decent conditions for the men, women and children arriving in the EU'.²³ The study also assesses if the legislative instruments under consideration, both separately and as a whole, allow for the fulfilment of the related objective of building a well-functioning Common European Asylum System (CEAS) that fully respects the fundamental rights of migrants and asylum seekers.²⁴

Based on the previously described assessment of the legislative proposals, the study develops a set of policy recommendations to inform future negotiations of the New Pact legislative package. The recommendations focus on ensuring that the aims and principles underpinning the CEAS, as interpreted in the case-law of the Court of Justice of the European Union (CJEU) and the ECtHR, are fully considered in the reform process of EU asylum and migration law initiated by the New Pact.

¹⁹ Commission Staff Working Document Accompanying the document Proposal for a regulation of the European Parliament and of the Council on Asylum and Migration Management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund], SWD(2020) 207 final.

²⁰ Communication from the Commission to the European Parliament, the Council, the European economic and social Committee, and the committee of the regions. Action plan on integration and inclusion 2021-2027, COM(2020) 758 final, Brussels, 24.11.2020.

²¹ Communication from the Commission to the European Parliament and the Council the EU. Strategy on Voluntary Return and Reintegration, COM(2021) 120 final, Brussels, 27.4.2021

²² Communication from the Commission to the European Parliament and the Council "A strategy towards a fully functioning and resilient Schengen area", COM(2021) 277 final, Brussels, 2.6.2021

²³ European Commission, Communication on a New Pact on Migration and Asylum, COM(2020) 609 final, Brussels, 23.9.2020, p.1.

²⁴ Commission Staff Working Document, p. 84.

1.1.1. Mapping of legal changes

The first objective of this study is to provide a mapping of the main proposed changes set out in the five legislative proposals tabled under the New Pact. The five proposals are compared with both the legislative initiatives on related subjects issued under the previous legislative term (2014-2019), notably the proposals composing the 2016 CEAS legislative package (including, when relevant, provisional agreements reached by co-legislators), and with relevant EU asylum and migration legislation currently in force.

The legal mapping carried out in the study follows a two-step approach:

- Firstly, the content of each proposal and its main objectives are described, taking into account the justifications provided by the Commission in the introductory sections as well as in the accompanying Commission Staff Working Document. The analysis then focuses on the key provisions included in the text, with a view to identify the most relevant normative aspects and issues covered by the proposal.
- Secondly, the analysis compares the provisions of the proposal under examination with those covering the same or related aspects included in the proposals of the 2016 reform package (taking into account provisional agreements between co-legislators), as well as with the provisions of legislative instruments currently in force. The analysis then highlights the most relevant changes brought about by the Pact on the identified key aspects.²⁵

1.1.2. Assessment of the five legislative proposals

The second key objective of this study is to provide a **legal assessment of the five legislative proposals under consideration** against the criteria of legal coherence, application of the principle of solidarity and fair sharing of responsibility (Article 80 TFEU), and compliance with fundamental rights enshrined in EU and international law.

The assessment of **legal coherence** considers how the legislative proposals work together and interact under the New Pact and in relation to existing EU legislative instruments in the field of asylum, migration, and border management. It also assesses the coherence of the proposals with the fundamental aims of the CEAS laid down in the Treaties, taking into account relevant CJEU case-law.

The in-depth assessment of the application of the **principle of solidarity** and fair sharing of responsibility enshrined in **Article 80 TFEU** considers the ways in which the Pact's proposals, both individually and as a whole, 'give substance' to, and operationalise the principle of solidarity, and assesses if the proposed approach conforms with the status and evolution of that principle under EU law and if is in line with CJEU jurisprudence on related matters.

As a last step, this study assesses the compliance of the legislative proposals **with fundamental rights**, having particular regard to the EU Charter of Fundamental rights and relevant case law of the CJEU and the ECtHR (see Table 1 below).

²⁵ The outcome of the mapping exercise is presented in the Table included in Annex 1 of this study. The Table provides a synthetic and systematic comparison of the key elements of the 2020 proposals with those in the 2016 CEAS reform, as well as legislation currently in force.

The assessment of the proposals considers the definitions of the above-mentioned criteria and the related assessment questions provided by the Commission in its 2017 **Better Regulation Guidelines**²⁶ and the corresponding parts of the **Better Regulation Toolbox**.²⁷ The Commission has developed a Fundamental rights checklist in Tool No. 28 of Better Regulation Toolbox to assess compliance and promotion of fundamental rights in EU legislation.

Table 1: List of assessment criteria and related research questions

1)	<p>Legal coherence</p> <p>How well do the legislative proposals of the New Pact work together? How well do they fit in with the rest of the asylum <i>acquis</i> and the aims of the CEAS? Are the legislative proposals under consideration in line with the fundamental aims of the CEAS laid down in the Treaties? Are the legislative proposals in line with CJEU jurisprudence and standards on asylum-related matters?</p>
2)	<p>In-depth assessment of the application of the principle of solidarity and fair sharing of responsibility (Article 80 TFEU)</p> <p>How does the proposed legislation apply the principle of solidarity and fair sharing of responsibility in border checks, asylum, and immigration matters (Article 80 TFEU)? How do the proposals affect the scope of the principle of solidarity and which 'kind' solidarity do they foresee? Are the proposed measures in line with the CJEU jurisprudence on that subject?</p>
3)	<p>Fundamental rights compliance</p> <p>Does the proposed legislation raise questions and challenges as to fundamental rights compliance? Key fundamental rights standards to be considered include respect of the right to asylum, <i>non-refoulement</i> and prohibition of collective expulsions, the right to liberty and security, privacy and data protection, and the right to an effective remedy and to a fair trial. Consideration will be also given to any rights-related provisions included in current EU secondary legislation.</p>

1.2. Methodology and structure

In light of the scope of this study and its focus on the legal mapping and assessment of the Pact proposals, **desk research** represents the key component of the adopted methodological approach. The relevant sources covered by the desk research include:

- EU primary and secondary law on asylum, migration, border management and fundamental rights;

²⁶ European Commission, Commission Staff Working Document Better Regulation Guidelines, SWD (2017) 350, Brussels, 7 July 2017.

²⁷ European Commission, Better Regulation "Toolbox", <https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox.pdf>

- Case-law of the Court of Justice of the European Union (CJEU) and of the European Court of Human Rights (ECtHR);
- Substitute impact assessments and Implementation assessments conducted by the European Parliament Research Service (EPRS) as well as studies commissioned by the European Parliament Directorate-General for Internal Policies of the Union (IPOL) on related policy and legal issues;
- Studies, evaluations, and reports produced by selected sources, including EU Commission and agencies, the European Court of Auditors (ECA) and international organisations (UNHCR and IOM);
- Relevant academic research; and
- Reports and evidence provided by civil society organisations and international and regional human rights organisations (United Nations and the Council of Europe).

Desk research has been combined with **10 semi-structured interviews** with the following key institutional actors: the European Commission, European Parliament administration, EU agencies (EASO and FRA), as well as Member States representatives. The interviews aimed to shed light on how different actors at the EU level understand the key changes brought about by the new Pact and their potential to address identified challenges affecting the implementation of EU legislation in the area of asylum and migration.

This study is divided into nine main chapters. After this Introduction, **chapter two introduces the New Pact on Migration and Asylum**. First, the chapter provides a description of key policy and legal developments preceding the adoption of the Pact, focusing on the initiatives adopted in the framework of the 2015 EU agenda on migration, as well as on the outcome of negotiations of the 2016 reform of the CEAS. Second, the chapter provides a critical analysis of the evidence and data used by the Commission to describe the ‘migration situation’ faced by the EU and support the reform priorities included in the Pact.

The following five chapters (3 to 7) focus on the legislative proposals tabled under the New Pact. As a first step, the chapters provide a detailed legal mapping of the key legal changes included in the legislative proposals. The proposals are then critically reviewed in light of the assessment criteria described above. Building on the analysis conducted in the preceding chapters, **chapter eight identifies and analyses a set of cross-cutting and structural legal issues** raised by the “common European Framework for Migration and Asylum Management” laid down the New Pact, both in terms of its coherence with the aim of the CEAS and its compatibility with fundamental rights. **Chapter nine concludes by providing a set of policy recommendations** on how to address the challenges identified in the context of the assessment of the proposed legislation, accounting for Member States’ obligations under EU and international law, as well as relevant jurisprudence of European courts.

2. WHOSE PACT? ORIGIN, OBJECTIVES AND ASSUMPTIONS

The promise of a 'fresh start' on EU migration and asylum policy was one of the main programmatic points included in the Political Guidelines for the Next European Commission (2019-2024) by the then candidate, President Ursula von der Leyen.²⁸ The choice to frame future EU reforms in those fields in terms of a 'Pact' reflects the attempt to overcome "difficult and divisive discussions" among Member States, most notably over the issue of solidarity and fair sharing of responsibility, which had ultimately prevented the finalisation of the comprehensive reform of the CEAS launched in 2016.

In parallel, the New Pact aims to address **structural weaknesses and shortcomings** in the design and implementation of EU asylum and migration policies. Notably, the Pact promises to overcome *ad hoc* and emergency measures that had characterised EU responses to the so-called 2015 'refugee crisis' with a "**comprehensive policy framework**" encompassing reform of EU asylum rules, initiatives in the field of return and the external dimension.²⁹

This chapter aims at shedding light on the **political and legal background** which saw the emergence of the New Pact, describing the most relevant initiatives undertaken at the EU level in the context of the 2015 European Agenda on Migration and the 2016 reform of the CEAS. In addition, this chapter also critically assesses the (lack of) **evidence used by the Commission** to substantiate and frame the "key challenges" faced by the EU in the areas of migration and asylum, and justification of the adoption of the package of legislative proposals accompanying the Pact. Contrary to the EU Better Regulation Guidelines, the Pact has not been accompanied by an impact assessment demonstrating the coherence, necessity, proportionality and fundamental rights compliance of the proposed legislative changes, a circumstance which raises profound questions regarding its overall legitimacy.³⁰

2.1. Background

2.1.1. The 2015 European Agenda on Migration

In 2015 and in the first half of 2016, an increasing number of people looking for international protection irregularly crossed the Eastern and Central Mediterranean. More than 1 million people arrived in 2015 and more than 370,000 in 2016.³¹ Member States' governments initially reacted with a number of unilateral and uncoordinated actions. Some Member States erected new fences along their borders with neighbouring countries outside the EU. A group of Member States unlawfully introduced and prolonged internal border controls within the Schengen area, in ways that run contrary to their legal commitments in the Schengen *acquis*.³²

²⁸ A Union that Strives for More. My Agenda for Europe, By Candidate for President of the European Commission Ursula von der Leyen. Political Guidelines for the Next European Commission 2019-2024, https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf

²⁹ European Commission, Communication on a New Pact on Migration and Asylum, p. 3.

³⁰ See European Commission, Staff Working Document accompanying the New Pact, SWD(2020) 207 final, p. 4.

³¹ UNHCR, Refugee & Migrants Sea Arrivals in Europe, Monthly Data update, June 2016, <https://reliefweb.int/report/greece/refugees-migrants-sea-arrivals-europe-monthly-data-update-june-2016>

³² E. Guild et al., "Internal border controls in the Schengen area: is Schengen crisis-proof?", Study requested by the LIBE Committee of the European Parliament, 2016; S. Carrera et al., The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016, Study requested by the LIBE Committee of the European Parliament, 2018.

At the EU level, policy responses to what became known as Europe's 'humanitarian refugee crisis' revolved around the **European Agenda on Migration**, presented by the Commission in May 2015.³³ The Agenda included both emergency actions and strategic priorities aimed at orienting EU action over a longer period.³⁴ The Commission opted for triggering, for the first time, the emergency response mechanism foreseen by Article 78(3) of the Treaty on the Functioning of the European Union (TFEU).³⁵ The proposed measure took the form of a temporary relocation scheme for persons in clear need of international protection, to the benefit of Italy and Greece.³⁶ The Council adopted a first Decision on 14 September 2015 on the relocation of 40,000 asylum seekers and a further Decision on 22 September 2015 on the relocation of an additional 120,000 asylum seekers from those same countries over a two-year period.³⁷

As reported by the Commission, however, only a total of **34,700 people were relocated** from Italy and Greece under the initiative.³⁸ The temporary nature of the mechanism (expiring after two years) and its narrow scope of application³⁹ made it difficult to identify suitable candidates for relocation. Additional political and legal factors, including the use of excessive discretion by some Member States to refuse relocation of applicants, also contributed to hampering the implementation process.⁴⁰

The emergency relocation mechanism was strongly opposed by a group of Member States (Slovakia, Hungary, the Czech Republic, and Romania), which voted against the second relocation decision in the Council and later refused to fulfil their commitments under the scheme. Slovakia and Hungary even brought a case before the CJEU, asking for an annulment of the decision. In its judgement of 6 September 2017, however, the CJEU dismissed in its entirety the actions brought by the two Member States, arguing, among other things, that the adoption of a binding relocation mechanism by the Council had to be considered as a lawful and proportionate measure under EU law to address the

³³ European Commission, A European Agenda on Migration, Brussels, 13.5.2015 COM(2015) 240 final.

³⁴ Anita Orav, "First measures of the European Agenda on Migration", June 2015, https://www.euro-parl.europa.eu/RegData/etudes/BRIE/2015/559509/EPRS_BRI%282015%29559509_EN.pdf

³⁵ Article 78(3) TFEU states that: "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

³⁶ European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, Brussels, 27.5.2015, COM(2015) 286 final; Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, Brussels, 9.9.2015 COM(2015) 451 final.

³⁷ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239/146 15.9.2015; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80, 24.9.2015. On 29 September 2016, the Council adopted an amending Decision, which permits Member States to fulfil their obligations in relation to 54,000 places under that second relocation decision by resettling Syrians refugees from Turkey rather than relocating asylum applicants from Italy and Greece as part of the EU-Turkey Statement. Council Decision 2016/1754 of 29, September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2016] OJ L268/82.

³⁸ European Commission, Progress report on the Implementation of the European Agenda on Migration, Brussels, COM(2019) 481 final, 16.10.2019.

³⁹ The two relocation mechanisms only covered applicants belonging to nationalities for which the EU average recognition rate, as established by Eurostat, was above 75%.

⁴⁰ E. Guild, C. Costello, V. Moreno-Lax, "Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece," Study Requested by the LIBE Committee of the European Parliament, 2017; European Court of Auditors, *Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results*, Special Report, 2019.

specific challenges to which Greece and Italy were subject at the time. The Court called for 'equal solidarity' by making it clear that EU emergency responses in the field of asylum "must, as a rule, be divided between all Member States".⁴¹

The European Agenda on Migration also laid down the controversial '**hotspot approach**' to provide operational support to Member States facing disproportionate migratory pressure at specific sections of their external border. The hotspot approach has been implemented in Italy and Greece based on a 'workflow', laying down the task and responsibilities of EU agencies – Frontex, EASO, Europol and Eurojust –: identification and screening of migrants, registration and referral of asylum seekers to the appropriate procedure (including the relocation process), collecting evidence, and conducting investigations on smuggling activities.⁴² The hotspot approach was initially rolled out in the absence of a specific legal framework regulating its scope and implementation, resulting in a lack of clarity and legal certainty as to the mandates and roles of the relevant actors involved, notably in relation to the respective responsibilities of those actors for potential fundamental rights violations in the context of their activities.⁴³

From the second half of 2018 onwards, initiatives under the European Agenda on Migration were influenced by political tensions between Member States over the **disembarkation of immigrants and asylum seekers rescued at sea in the Mediterranean**. Against this background, in June 2018, the European Council called on the Commission to explore '**regional disembarkation platforms**' and '**controlled centres**' as a means to address the business model of smugglers and eliminate the incentive to embark on perilous journeys.⁴⁴ While the 2018 Commission proposal on the reform of the European Border and Coast Guard Agency (Frontex) identified controlled centres (alongside 'hotspot areas') as places where Migration Management Support Teams (MMST) may be deployed to provide operational and technical support to Member States,⁴⁵ any reference to controlled centres was finally removed from the text of the EBCG Regulation, adopted in November 2019.⁴⁶

⁴¹ Court of Justice of the European Union, Judgement of the Court (Grand Chamber, Joined Cases C-643/15 and C-647/15, Slovakia and Hungary v Council), 6 September 2017. In the same judgment, the Court also recognised that the decisions should remain limited in time, a conclusion which ruled out any prospect of extending the duration of the relocation mechanism beyond the initially foreseen two-year period.

⁴² European Commission, Explanatory Note on the 'hotspot' approach, 2015, <https://www.sta-tewatch.org/media/documents/news/2015/jul/eu-com-hotspots.pdf>

⁴³ D. Neville, S. Sy and A. Rigon, "On the frontline: the hotspot approach to managing migration", European Parliament. Directorate General for Internal Policies, 2016; Campesi, G., 'Normalising 'the hotspot approach?' An analysis of the Commission's Most Recent Proposals', in S. Carrera, D. Curtin, A. Geddes (eds.), *20 years anniversary of the Tampere Programme: Europeanisation dynamics of the EU area of freedom, security and justice*, Florence: European University Institute, pp. 93-104.

⁴⁴ Controlled-centres' were initially presented by the Commission as "facilities of a temporary and ad-hoc nature" allowing for the rapid and secure processing of disembarked persons, without however providing any specification concerning the rules on detention or restrictions to freedom of movement to be applied in those settings. European Commission, non-paper on controlled centres in the EU – interim framework, 2018 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_non-paper-controlled-centres-eu-member-states_en.pdf See also Non-paper on regional disembarkation arrangements, https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/european-agenda-migration/20180724_non-paper-regional-disembarkation-arrangements_en.pdf, 2018.

⁴⁵ European Commission, Proposal for a Regulation on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, COM(2018) 631 final.

⁴⁶ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295/1 14.11.2019.

The implementation of the European Agenda on Migration has, from the outset, put a disproportionate focus on **reducing incentives for irregular migration and effectively returning migrants with no right to stay in the EU**.⁴⁷ Initiatives adopted by the Commission in the field of returns under the Agenda have included the provision of recommendations and guidance to Member States on how to conduct more effective return procedures. Among the recommendations provided was that of making full use of the maximum period of detention allowed for by the 2008 Return Directive (Directive 2008/115/EC), and reducing deadlines for lodging appeals against return decisions,⁴⁸ with little consideration given to the inherent rule of law and fundamental rights challenges of these proposals.

On the occasion of the EU Leader's meeting in Salzburg in 2018, the Commission presented a **proposal for a recast Return Directive**.⁴⁹ The Commission pointed out that despite efforts undertaken over previous years, little progress was achieved in increasing 'return rates' of third-country nationals (TCNs). 'Urgent amendments' to the return directive were thus needed to accelerate return procedures, including by establishing a return border procedure, closing 'loopholes' between asylum and return procedures and ensure a more effective use of measures to prevent absconding. Finalisation of negotiations of the recast Return Directive are identified by the Commission as a priority in the context of the EU approach on return laid down in the New Pact.⁵⁰

Two consecutive reforms of the **European Border and Coast Guard Agency (Frontex)**, completed in 2016 and 2019, have progressively expanded the mandate and responsibilities of the agency in the field of returns.⁵¹ The 2019 regulation, in particular, has granted the agency the power to coordinate and organise return operations with its own pool of forced return escorts and return monitors.⁵² Furthermore, Frontex has acquired an enhanced role in assisting Member States in a number of pre-return and return-related activities, including identifying irregularly staying third-country nationals, assisting in obtaining travel documents and preparing return decisions.⁵³

The focus on increasing the 'effectiveness' of policies in the field of return and readmission has also been at the core of **EU cooperation with third countries**. The 2016 Commission Communication on a Partnership framework with third countries under the European Agenda on Migration underlined the need to 'employ a mix of positive and negative incentives and the use of all leverages and tools' to

⁴⁷ Katharina Eisele, "The Proposed Return Directive (recast). Substitute Impact Assessment, European Parliament Research Service", 2019, pp. 1-3.

⁴⁸ European Commission, Recommendation of 7.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600 final; On a More Effective Return Policy in the European Union - A Renewed Action Plan, Brussels, 2.3.2017 COM(2017) 200 final; Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, OJ L 339/83, 19.12.2017. On the rule of law and fundamental rights challenges of the returns proposal refer to K. Eisele, et al, "The Proposed Return Directive (recast), Substitute impact assessment", European Parliament Research Service (EPRS) 2019.

⁴⁹ European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, Brussels, 12.9.2018, COM(2018) 634 final.

⁵⁰ European Commission, A New Pact on Migration and Asylum, p. 3.

⁵¹ Regulation (EU) 2019/1896 of the European Parliament and of The Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295/1, 14.11.2019.

⁵² Ibid., Article 2(16), 10(1)(j).

⁵³ Ibid., Article 48.

increase readmission to countries of origin and transit.⁵⁴ The Communication fully supported the ongoing trend towards the conclusion of EU-wide, non-legally binding, tailor-made informal arrangements with third countries linked to readmission.⁵⁵

Enhanced cooperation with third countries through political dialogues, diplomatic initiatives and informal arrangements has been accompanied by a substantial **mobilisation and reorientation of EU external funding**, including from development baskets. EU-funded initiatives have focused on improving migration management (return and readmission), addressing the 'root causes of irregular migration and forced displacement' and supporting third countries hosting large numbers of refugees.⁵⁶ Notable examples include the EU Emergency Trust Fund for stability; the EU Trust Fund for Africa, addressing the root causes of irregular migration and displaced persons in Africa (established in the context of the EU–Africa Summit on migration held in La Valetta in November 2015); and the Facility for Refugees in Turkey (FRT), which has been linked to the implementation of the 2016 EU-Turkey Statement.⁵⁷

2.1.2. The 2016 CEAS reform package

In 2016, the Commission launched an **overall reform of the CEAS**, through a third phase of harmonisation of the EU asylum *acquis*. In this instance, the Commission underlined how large-scale, irregular arrivals of people looking for international protection over 2015-2016 had exposed major weaknesses in the design and implementation of the CEAS and of the Dublin system in particular. It also underlined how the CEAS is still characterised by wide divergences in positive recognition rates, as well as on aspects such as the length of asylum procedures and reception conditions of asylum seekers across the EU.⁵⁸

The Commission adopted a **first package of proposals** in May 2016: these included a proposal for a regulation reforming the Dublin system, a proposal for a regulation amending Eurodac, and a proposal for a regulation establishing an EU Asylum Agency (EUAA). A **second reform package** was presented in July 2016: it included proposals for a new regulation replacing the Asylum Procedures Directive, a

⁵⁴ European Commission, Communication on Establishing a new Partnership Framework with third countries under the European Agenda on Migration, 2016, COM(2016) 385 final.

⁵⁵ J.P. Cassarino and M. Giuffrè, "Finding Its Place in Africa: Why has the EU opted for flexible arrangements on readmission?", FMU Policy Brief No. 01/2017, <https://www.nottingham.ac.uk/hrlc/documents/pb-1-finding-its-place-in-africa.pdf>

⁵⁶ For a detailed discussion and critical analysis of the framework of cooperation, priorities, and initiatives of EU cooperation with third countries in the field of migration and border policy see V. Moreno-Lax et al., "The EU Approach on Migration in the Mediterranean", Study requested by the LIBE Committee, 2021, Ch. 6.

⁵⁷ For a review of the processes that led to the establishment of EU Trust Funds and their links with the implementation of arrangements with third countries on migration management see Carrera et al., Oversight and Management of the EU Trust Funds Democratic Accountability Challenges and Promising Practices, Study requested by the LIBE Committee, 2018. In an Opinion of May 2021, the EP LIBE Committee expressed a number of concerns regarding the use of EUTFs and the FRT for addressing the root causes of migration and forced displacement. The Opinion notes that "EU funds have been used to put pressure on partner governments to comply with the EU's internal migration objectives and highlights the increasing recourse to enhanced conditionality between development cooperation and migration management since 2016". Concerning specifically the implementation of the EUTF for Africa, the Opinion regretted "the fact that the EUTF for Africa has had little impact in increasing economic opportunities and employment, as pointed out in the mid-term review, despite this being one of the four main objectives of the fund". See Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Foreign Affairs, the Committee on Development and the Committee on Budgets on the implementation report on the EU Trust Funds and the Facility for Refugees in Turkey (2020/2045(INI)).

⁵⁸ European Commission, Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, COM(2016) 197 final.

new regulation replacing the Qualification Directive, a proposal recasting the Reception Conditions Directive and, finally, a proposal for a regulation on an EU resettlement Framework.⁵⁹

During the 2014-2019 legislative term, **provisional agreements** between the Council's Presidency and the European Parliament's rapporteurs were reached on five of the seven proposed legislative files – the Qualification Regulation, the recast Reception Conditions Directive, the Union Resettlement Framework Regulation,⁶⁰ the EUAA Regulation, and the Eurodac Regulation. However, provisional agreements on the Qualification Regulation, Reception Conditions Directive and Union resettlement framework were eventually not endorsed by the Permanent Representatives Committee (COREPER), a circumstance which resulted in those files being returned to negotiations at the technical level.⁶¹ The European Parliament, however, refused to reopen negotiations on the files on which a provisional agreement had previously been reached. In its Communication on the New Pact, the Commission expressed support for the provisional political agreements reached on the Qualification Regulation and the Reception Conditions Directive, calling for the adoption of those proposals as 'soon as possible'.⁶²

The EUAA Regulation

While co-legislators had reached a **provisional agreement on the EUAA Regulation already in June 2017**, the Commission adopted an amended proposal on the same file in September 2018.⁶³ The second Commission's proposal, however, did not gain enough support in the COREPER due to reasons of substance – such as the newly envisaged monitoring role of the Agency – and because of the 'package approach' endorsed by a group of Southern European Member States in the Council, according to which all the proposals of the CEAS legislative reform should be adopted 'as a package'. The EP LIBE Committee also rejected the amendments included in the amended EUAA proposal in December 2018.⁶⁴

⁵⁹ See European Parliament, Legislative train schedule, Reform of the Common European Asylum System (CEAS), [https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-reform-of-the-common-european-asylum-system-\(ceas\)](https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-reform-of-the-common-european-asylum-system-(ceas))

⁶⁰ Proposal for a Regulation of the European Parliament and the Council of the European Union establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014, COM(2016) 468 final, 13.7.2016. This proposal reached a partial provisional agreement during the Bulgarian Presidency of the EU in the first half of 2018. However, as COREPER did not formally endorse it, negotiations at the technical level continued during the Austrian Presidency. According to a 2019 Council Progress Report "Based on these talks, new compromise proposals were presented to Parliament. However, after a first technical trilogue, the Parliament informally indicated that in principle and for the time being it stands by the provisional agreement reached in the June trilogue. On 9 October 2018, JHA Counsellors discussed possible compromise amendments focusing on the key concerns expressed by the Member States during the bilateral meetings." See Council of the EU, Reform of the Common European Asylum System and Resettlement, 6600/2019, 26 February 2019, Brussels. The Council continues to deal with this legislative file under the 'package approach'.

⁶¹ See K. Pollet, "All in vain? The fate of EP positions on asylum reform after the European elections", EU Immigration and Asylum Law and Policy Blog, 23 May 2019, <https://eumigrationlawblog.eu/all-in-vain-the-faith-of-ep-positions-on-asylum-reform-after-the-european-elections/>

⁶² European Commission, a New Pact on Migration and Asylum, p. 3.

⁶³ Amended proposal for a Regulation of the European Parliament and of the Council on the European Union, Agency for Asylum and repealing Regulation (EU) No 439/2010 A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM(2018) 633 final.

⁶⁴ Pollet, "All in vain?".

On June 29, 2021, the Portuguese Presidency of the Council and the **European Parliament reached a new provisional agreement on the EUAA Regulation**, building on the previous 2017 agreement.⁶⁵ Such development has been welcomed as a potential departure from the Council 'package approach' on the CEAS reform. However, as reported by media sources, a 'green light' from the group of so-called 'Med 5 countries' in the Council (Cyprus, Greece, Spain, Italy, and Malta) could only be obtained by including a 'sunrise clause' in the provisional agreement, which establishes that the application of some of the provisions of the Regulation (most notably those related to the new monitoring functions granted to the Agency) will be deferred to a later date.⁶⁶

The Eurodac Regulation

In the case of the **proposal for an Amended Eurodac Regulation**, technical work on the (partial) provisional agreement, reached in June 2018, continued under the following presidencies of the Council throughout 2018 and 2019. No result was reached however at the political level, and no further political 'trilogues' were organised due to the 'package approach' endorsed by the Member States.⁶⁷

On the two remaining proposals of the 2016 package, the **recast Dublin Regulation** and the **Asylum Procedures Regulation**, no agreement could be found among Member States in the Council, which prevented those files from progressing to interinstitutional negotiation.

The recast Dublin Regulation

The most prominent issue of contention in the context of the Dublin Reform has concerned the proposed **measures dealing with solidarity and fair sharing of responsibility**. The 2016 Commission proposal maintained the '**irregular entry criterion**' and concentrated additional responsibilities on the states of first application.⁶⁸ In parallel, the proposal envisaged a **compulsory corrective allocation mechanism** that, based on a reference key, would be triggered when asylum applications in a Member State exceeds 150% of its reference number.⁶⁹ In spite of a number of compromise proposals elaborated by successive presidencies of the Council, which softened the automatic and compulsory character of the mechanism and introduced the possibility for Member States to contribute with a range of solidarity measures other than relocation, Member States were unable to find a common approach and the finalisation of negotiations was put on hold.⁷⁰

Debates concerning the shape of a solidarity mechanism were intertwined with proposals on the reform of existing **rules on cessation or 'shifting' of responsibility** under the current Dublin system.

⁶⁵ See Council of the EU, Extended negotiation mandate for negotiations with the European Parliament, 9905/21, 17 June 2021, Recital 48; see also Council of the EU Press release, EU asylum agency: Council agrees extended mandate for negotiations with the European Parliament, 515/21, 16 June 2021.

⁶⁶ J. Barigazzi, "EU at long last agrees on reform of asylum agency Parliament and Council agree to create European Union Agency of Asylum", *Politico*, 29 June 2021, <https://www.politico.eu/article/after-5-years-eu-finds-deal-to-launch-asylum-agency/>

⁶⁷ European Parliament legislative observatory, 'Recast Eurodac Reform, Legislative train schedule' [accessed 14 July 2021].

⁶⁸ F. Maiani, "The Reform of the Dublin III Regulation," Study requested by the LIBE Committee, 2016, p. 28.

⁶⁹ European Commission, Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final; See F. Maiani, "The Reform of the Dublin III Regulation," Study requested by the LIBE Committee of the European Parliament, 2016, p. 34.

⁷⁰ Eszter Zalan, "EU ministers try to crack asylum deadlock," *euObserver*, 5 June 2018, <https://euobserver.com/migration/141985>; Council of the EU, New Dublin: Reversing the Dynamics, Document 7674/18 Brussels, 9 April 2018.

The 2016 Commission's proposal suggested establishing **a system of 'stable' responsibility** deleting existing clauses on cessation of responsibility.⁷¹ Member States located at the EU external border, however, opposed rules on stable or even 'prolonged' responsibility for asylum claims out of concern that it would result in a disproportionate burden placed on their asylum systems.⁷²

The European Parliament adopted its report on the Dublin reform in 2017.⁷³ As a key shift from the current Dublin system, the report called for **deleting the irregular entry criterion** from the hierarchy of criteria assigning responsibility under the Regulation, while putting a strong focus on asylum seekers' 'meaningful links' (including family ties, previous legal residence, and education diplomas). The report further called for the introduction of a **stable relocation mechanism between Member States** (based on a reference key) as the default rule when none of the criteria laid down in the revised Dublin's hierarchy would apply. Furthermore, the EP report would grant applicants who do not have 'meaningful links' with any Member State **a limited right to choose** the Member State in which to lodge an application among those which have received the lowest amount of applications in relation to their fair share.

The Asylum Procedures Regulation

The Commission's proposal on an **Asylum Procedure Regulation** was the other legislative file of the 2016 CEAS on which the Council could not adopt a negotiating mandate.⁷⁴ Article 41 of the proposed Regulation concerning the **border procedure** proved to be contentious on several grounds, the most divisive one being whether the application of the border procedure should be optional or mandatory.⁷⁵ Article 36 of the proposal also proved to be controversial: in conjunction with the 2016 Dublin proposal, it would oblige Member States to assess and reject an application for international protection as inadmissible when an applicant comes from a 'first country' of asylum or a 'safe third country', before applying the criteria for determining the Member State responsible under the Dublin Regulation.⁷⁶

The LIBE Committee adopted its report on the Asylum Procedures Regulation on April 25, 2018.⁷⁷

The EP Report would keep the application of the border procedure and the use of admissibility procedures optional. The EP report also set a higher threshold in terms of the level of protection that

⁷¹ See F. Maiani, The Reform of the Dublin III Regulation, p. 32; Meijers Committee, Note on the proposed reforms of the Dublin Regulation (COM (2016) 197), the Eurodac recast proposal (COM (2016) 272 final), and the proposal for an EU Asylum Agency (COM(2016)271 final), p. 4.

⁷² Dublin Regulation, Position paper of Cyprus, Greece, Italy, Malta and Spain on the Proposal recasting the Dublin Regulation, <https://www.politico.eu/wp-content/uploads/2018/04/Position-paper-Dublin.pdf>

⁷³ European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)(COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)).

⁷⁴ European Commission, Proposal for a Regulation on establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final.

⁷⁵ Council of the EU, Border procedures, 13376/18 LIMITE, Brussels, 19 October 2018

<https://www.statewatch.org/media/documents/news/2018/oct/eu-council-ceas-asylum-border-procedure-13376-18.pdf>

⁷⁶ European Commission, Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final, Brussels, 13.7.2016, p. 16.

⁷⁷ European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016)0467 – C8-0321/2016 – 2016/0224(COD)), 22 May 2018.

should be available in a third country to be considered as 'safe' for the sake of returning asylum applicants, compared to the standards included in the Commission proposal.

As mentioned above, during negotiations on the CEAS reform, Member States in the Council endorsed a **'package approach'**, refusing to formally adopt any of the Commission proposals separately until an agreement on all the other files had been reached.⁷⁸ On several occasions, the Commission called on the Council to abandon the 'package approach' and adopt those legislative proposals on which an interinstitutional agreement between the co-legislators had been found.⁷⁹ The LIBE Committee of the European Parliament also reminded the Austrian Presidency that the legislative files under negotiation fell under ordinary legislative procedure and, in line with the principle of sincere cooperation among EU institutions, had to be adopted by the Council by **qualified majority voting rather than on the basis of unanimity or consensus by the Council**.⁸⁰

2.1.3. Building 'consensus' on the New Pact

After the new European Commission took office in December 2019, Vice-President Margaritis Schinas and Commissioner for Home Affairs Ylva Johansson held **two rounds of visits and bilateral consultations** with each Member State to address outstanding issues and identify possible 'compromise' solutions on the New Pact reform agenda. Bilateral dialogue between the Commission and the Member States was accompanied by several informal position papers and official statements reflecting Member States' 'red lines' on a set of key issues that had already emerged during negotiations of the 2016 reform of the CEAS. The scope and design of the solidarity system, to be introduced within the framework of Dublin's reform, and most notably the alternative between binding or voluntary relocation, as well as the mandatory/optional use of the border procedure, continued to represent major points of contention among groups of Member States in the Council.⁸¹

While the Pact was initially expected to be published in April 2020, the date of release was progressively postponed, initially to give priority to the EU response to the Covid-19 pandemic and then, following Member States' requests, to reach a preliminary agreement on the next 2021-2027 Multiannual Financial Framework (MFF) before starting discussions on the Pact.⁸²

⁷⁸ Council of the European Union, Reform of the Common European Asylum System and Resettlement, Progress Report, 6600/19.

⁷⁹ European Commission, Managing migration in all its aspects: Progress under the European Agenda on Migration, Brussels, COM(2018) 798 final.

⁸⁰ European Parliament, Letter by Claude Moraes (Chair of the LIBE Committee in the European Parliament) to Ambassador Dr Nikolaus Maschik, Permanent Representative of Austria to the EU, 3 December 2018, IPOL-COM-LIBE D(2018) 46538 (in possession of the authors); European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)(COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)), p. 112.

⁸¹ J. Barigazzi, 4 largest EU countries issue joint proposal to unlock asylum impasse, Politico Europe, 16 April 2020, <https://www.politico.eu/article/4-largest-eu-countries-issue-joint-proposal-to-unlock-asylum-impasse/>; Non-paper on the reform of the Common European Asylum System in the perspective of an EU migration and asylum policy (CY-EL-ES-IT-MT), <https://www.statewatch.org/media/documents/news/2020/apr/eu-ceas-cy-el-es-it-mt-non-paper-4-20.pdf>; Ministry of Interior of Italy, Spain, France and Germany, Letter to Commissioner Schinas and Commissioner Johansson, 9 June 2020, <https://www.statewatch.org/media/documents/news/2020/apr/eu-ceas-de-es-fr-it-letter-to-com-4-20.pdf>, Government of Germany, Food for Thought (13 November 2019), Outline for reorienting the Common European Asylum System, <https://www.statewatch.org/media/documents/news/2019/dec/eu-asylum-FoodForThought-GermanNoPaper.pdf>

⁸² C. Nicholson, 'Europe cannot allow itself to fail twice' on migration, EU Commission VP Schinas says, France 24, 15/06/2020, <https://www.france24.com/en/europe/20200615-eu-hopes-to-promote-social-diversity-more-actively-commission-vp->

Nonetheless, on September 23, 2020, Vice-President Margaritis Schinas presented the New Pact's proposals as a "compromise" taking into account the concerns of Member States' Ministries of Interior and thus providing a "solid basis" for the upcoming negotiation process. He further admitted that the Commission made a mistake with its 2016 reform package in focusing only on the solidarity dimension of the CEAS, "without the corresponding responsibility elements in the form of border and screening procedures".⁸³

The early reactions of European capitals to the New Pact and its proposals, however, revealed that the **disagreements and fault lines that had emerged during the previous legislative term had not yet been resolved**.⁸⁴ Indeed, the negotiations that followed the publication of the Pact during the German, Portuguese, and now Slovenian Presidencies (second half of 2020 and 2021) underlined the persistence of major disagreements among Member States over some of the key elements of the 'New Pact'.⁸⁵ Almost one year after its publication, it can be therefore concluded that **the Pact is in fact not a Pact at all**.⁸⁶

It should be recalled here that the choice to **frame the reform of EU policies in the areas of migration and asylum policy in terms of a 'Pact'** to be struck between Member States is not new.⁸⁷ Back in 2008, the European Council adopted a European Pact on Immigration and Asylum.⁸⁸ The initiative, inspired by the then French Presidency of the EU, aimed at giving 'new impetus' to the definition of a common immigration and asylum policy, taking into account both the collective interest of the EU as well as the specific needs of Member States.

The '2008 'Pact' reflected the central role traditionally played by the European Council in setting policy priorities in the Area of Freedom, Security and Justice (AFSJ) since the entry into force of the 1999 Amsterdam Treaty.⁸⁹ The intergovernmental logic driving the French initiative did not fit well with the advanced process of Europeanisation in the areas of migration, borders and asylum, ongoing at the

[schinas-says](https://www.politico.eu/article/migration-reform-to-be-postponed-after-a-deal-on-the-eu-budget-said-commissioner-ylva-johansson/); J. Barigazzi, EU migration reform plan postponed until after budget deal, Politico Europe, 19 June 2020, <https://www.politico.eu/article/migration-reform-to-be-postponed-after-a-deal-on-the-eu-budget-said-commissioner-ylva-johansson/>; Nikolaj Nielsen, 'New EU migration pact set for start of summer', *euObserver*, 19 May 2020, <https://euobserver.com/migration/148403>

⁸³ Speech by Vice-President Schinas on the New Pact on Migration and Asylum, Speech by Vice-President Schinas on the New Pact on Migration and Asylum, 23 September 2020, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1736

⁸⁴ Schengenvisa.info news, EU Member States Show Mixed Reactions to New Migration Pact, 30 September 2020, <https://www.schengenvisa.info/news/eu-member-states-show-mixed-reactions-to-new-migration-pact/>; S. Sertan Sanderson, Countries on EU's southern borders demand more help from EU pact on migration, *Infomigrants*, 27 November 2020, <https://www.infomigrants.net/en/post/28800/countries-on-eu-s-southern-borders-demand-more-help-from-eu-pact-on-migration>; C. Hauswedell, EU asylum policy: Portugal pushes forward to find common ground, *Infomigrants*, 6 January 2021, <https://www.infomigrants.net/en/post/29470/eu-asylum-policy-portugal-pushes-forward-to-find-common-ground>

⁸⁵ Agence Europe, EU countries' positions on Pact on Migration and Asylum remain "far apart" admits Slovenian Interior Minister, 16 July 2021, <https://agenceurope.eu/en/bulletin/article/12763/16>

⁸⁶ S. Carrera, "Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum", CEPS Policy Insight, September 2020.

⁸⁷ *Ibid.*; S. Carrera and E. Guild, "The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights?", CEPS Policy Brief, No. 170, 2008.

⁸⁸ European Pact on immigration and asylum, version dated 4 July 2008, <https://www.state-watch.org/media/documents/news/2008/jul/eu-european-pact-on-immigration-verll.pdf>

⁸⁹ S. Carrera and E. Guild, "Does the Stockholm Programme matter? The Struggles over Ownership of AFSJ Multiannual Programming", CEPS Working Paper, No. 51/December 2012, p. 2, <https://www.ceps.eu/ceps-publications/does-stockholm-programme-matter-struggles-over-ownership-afsj-multiannual-programming/>

time and enshrined in the Treaties.⁹⁰ Only one year later, in 2009, the entry into force of the Lisbon Treaty established the European Parliament as a full co-legislator and policy co-owner in the fields of border controls, asylum and immigration. The 'Lisbonisation' of Justice and Home Affairs (JHA) policies signalled the intention to depart from the intergovernmental modes of cooperation that had previously characterised EU initiatives in these domains.

More than a decade since the adoption of the Lisbon Treaty, the use of the terminology of a 'Pact' in the field of migration and asylum brings back an **intergovernmental logic in a policy field that is supposed to be 'normalised', i.e., following standard EU decision-making principles and procedures in which the European Council and Member States Ministries of Interior should no longer have a key deciding role.** By resurrecting an artificial need to build consensus or de facto unanimity among EU Member States in advance of the presentation of formal legislative proposals, the approach adopted by the Commission stands in tension with its envisaged role as guarantor of the Treaties as well as the decision-making rules and principles governing EU interinstitutional relations in the AFSJ, including the commitment to sincere and transparent interinstitutional cooperation throughout the entire legislative cycle.⁹¹

Since the outbreak of the 2015 'humanitarian refugee crisis', intergovernmentalism has gained increased traction in both the internal and external dimension of migration and asylum policies, driven by **attempts of the European Council and Member States' interior Ministers to 'upload' controversial national policy priorities focused on 'containment' at the EU level, which run contrary to currently existing EU borders and asylum legal standards/guarantees and the EU Charter of Fundamental Rights.**⁹²

The 'consensus-building' methodology applied in the Pact, relying on the implicit promise of 'early concessions' to Member States before the start of interinstitutional negotiations with the European Parliament, has provided further room and legitimacy for the inclusion on the EU reform agenda of **national policy priorities that have been criticised for leading to rule of law and human rights violations.** This outcome runs contrary to the expectation that long-awaited reform in the field of EU asylum and migration conforms with the Treaty objective of establishing a genuine 'common policy' based on EU rule of law values and fundamental rights.

The previous sections of this chapter have underlined how the New Pact on Migration and Asylum finds its roots in an attempt to overcome the causes which led to the deadlock of the 2016 reform of the CEAS, in particular the lack of a shared approach between Member States and EU institutions regarding how to re-frame the **relation between solidarity and responsibility** in the CEAS. The New Pact should

⁹⁰ S. Carrera and E. Guild, "The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights?", CEPS Policy Brief, No. 170, 2008, <https://www.ceps.eu/ceps-publications/french-presidencys-european-pact-immigration-and-asylum-intergovernmentalism-vs/>

⁹¹ Interinstitutional Agreement between the European Parliament, the Council of the European Union, and the European Commission on better law-making, Interinstitutional Agreement of 13 April 2016 on Better Law-Making, OJ L 123/1, 12.5.2016.

⁹² These include the increasing use of accelerated and border procedures allowing for unlawful expedited expulsions and pushbacks and other infringements of the prohibition of refoulement and collective expulsion; expanded use of arbitrary detention (including de facto detention) and; forms of cooperation with third countries aimed at curtailing in different ways asylum seekers' mobility and preventing access to EU territory. Carrera, "Whose Pact?", 2020; Lax et al., "The EU Approach on Migration in the Mediterranean" Ch. 4,5,6; R. Cortinovis, *Pushbacks and lack of accountability at the Greek-Turkish borders*, CEPS Paper in Liberty and Security in Europe, 2021, <https://www.ceps.eu/ceps-publications/pushbacks-and-lack-of-accountability-at-the-greek-turkish-borders/>

be considered primarily as the outcome of a political strategy aimed at circumventing Member States' 'red lines' in the field of asylum, while at the same time expanding the space for a compromise on those subjects by linking more closely policy initiatives in the field of asylum, return, and border management.

2.2. Policy-based evidence making: the lack of 'evidence' in the Pact

Under the **2016 Interinstitutional Agreement on Better Law-Making**, the Commission committed to carry out impact assessments of its legislative and non-legislative initiatives which are expected to have significant economic, environmental or social impacts.⁹³ In spite of such commitment, the Commission did not opt to accompany the New Pact's proposals with an **impact assessment**, opting instead to release a so-called 'Staff Working Document', which includes what the Commission calls 'evidence and experience' derived from a range of different sources, including among others the above-mentioned bilateral consultations with Member States, as well as some publicly available data and statistics.

The choice not to produce an impact assessment of the proposals included in the Pact raises a number of questions concerning the **legitimacy of EU action and in particular regarding the coherence, effectiveness, efficiency and fundamental rights compliance of the proposed legislative measures**.⁹⁴ This is even more the case considering the complex and contested nature and effects of some of the key policy choices proposed in the Pact and their potential impacts on a set of key societal and legal dimensions, most notably on the **fundamental rights and dignity of migrants and asylum seekers in the EU**.

Concerning the requirement of the Commission to conduct impact assessments before publishing new legislation, it should be noted that in its **2021 Better Regulation communication**, the Commission acknowledged that several recently adopted initiatives had not been accompanied with an impact assessment, also due to the need to adopt such initiatives as a matter of urgency 'due to the Covid-19 pandemic'.⁹⁵

In the same communication, the Commission committed to explain the absence of an impact assessment in the explanatory memorandum of a legislative proposal and set out the analysis and all supporting evidence in a Staff Working Document published with the proposal or at the latest within 3 months of its publication. The Staff Working Document should also set out clearly how and when the legislative proposals accompanying the Pact will subsequently be evaluated.⁹⁶

The Communication however fails to make clear that the absence of an impact assessment should remain an exception, in particular in light of the Commission's impact assessment commitments set

⁹³ Interinstitutional Agreement between the European Parliament, the Council of the European Union, and the European Commission on better law-making, point 13. According to the Interinstitutional agreement: "Impact assessments should cover the existence, scale and consequences of a problem and the question whether or not Union action is needed. They should map out alternative solutions and, where possible, potential short and long-term costs and benefits, assessing the economic, environmental and social impacts in an integrated and balanced way and using both qualitative and quantitative analyses. The principles of subsidiarity and proportionality should be fully respected, as should fundamental rights", point 12.

⁹⁴ On the implications of a lack of impact assessment of the proposals under the Pact, with a focus on asylum procedures at the border, see G. Cornelisse and M. Reneman, "Border procedures in the Commission's New Pact on Migration and Asylum: A case of politics outplaying rationality?", *European Law Journal*, 2021, 1-18.

⁹⁵ European Commission, *Better Regulation: Joining forces to make better laws*, 2021.

⁹⁶ *Ibid.*, p. 14.

out in the above-mentioned 2016 Interinstitutional Agreement on Better Law Making.⁹⁷ Moreover, as mentioned above, the official publication of the Pact was substantially delayed from its originally foreseen timetable, which gave ample time for the Commission to duly fulfil its obligations under the EU Better Regulation agenda.

In the case of the New Pact, the implementation gaps and structural challenges that have impacted the functioning of the CEAS since its inception and subsequent development, which are acknowledged by the Commission in its analysis, would have required a more detailed description of the process leading to the identification of a set of suitable policy options to effectively address those challenges and remedy existing shortcomings. Grounding the proposed reform of EU asylum and migration policy in a rigorous ex-ante assessment of the impacts of proposed policies would also have signalled a much-needed **departure from the emergency or 'crisis' driven policy approach that has characterised EU policy responses to the 2015-2016 'refugee crisis'**, substantiating the Commission's promise of a 'fresh start'.

It is not the first time that major proposals in the field of migration and asylum have not been accompanied by a Commission impact assessment – recent examples include the proposal for a recasting of the **Eurodac Regulation, the proposal for a recast Return Directive, and the proposal for a Regulation on Asylum Procedures**.⁹⁸ This has been criticised by the European Parliament in its report on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making of May 2018.⁹⁹

A critical discussion of the supporting evidence and an examination of the legal coherence, solidarity and fundamental rights impacts provided by the Commission to back the reform priorities of the New Pact is included in the analysis of the five legislative proposals conducted in the following five chapters of this study. The remaining part of this section focuses on a critical assessment of the Commission's non-analysis of the **'current migration situation in the EU'** included in section 2 of the Staff Working Document, which paves the way to the Commission's identification of 'key challenges' faced by the EU in these policy areas (see Box 1 below).¹⁰⁰ It discusses the key migration and asylum dynamics identified in the document and considers the extent to which the analysis provided therein is based on a thorough review and consideration of existing evidence from a variety of reliable and relevant sources.

⁹⁷ Vettorazzi, S, Anglmayer, I. Ritter T., "New European Commission communication on Better Regulation: Joining forces to make better laws Better Regulation: A dynamic agenda," European Parliament Briefing, May 2021.

⁹⁸ Eisele et al., The proposed Return Directive (recast), Substitute Impact Assessment, Study, European Parliament Research Service, 2019, p. 5, [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU\(2019\)631727_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf); W. van Ballegooij and K. Eisele, "Asylum procedures at the border", European Implementation Assessment, p. 11, [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2020\)654201](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2020)654201)

⁹⁹ European Parliament, 'Report on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making (2016/2018(INI))', rapporteurs Pavel Svoboda and Richard Corbett (15 May 2018), para. 22.

¹⁰⁰ European Commission, Staff Working Document, p. 28.

Box 1: Challenges faced by the EU in the area of migration and asylum, and policy responses as identified by the European Commission

Challenges faced by the EU

1. Lack of an integrated approach to implement the European asylum and migration management

- *Unlevel playing field across Member States, hampering efforts to ensure access to procedures, equal treatment, clarity and legal certainty*

2. National inefficiencies and lack of EU harmonisation in asylum and migration management

- *Challenges of the return and asylum nexus*
- *Limited use of assisted voluntary return programmes*
- *Lack of streamlined procedures upon arrival*
- *Delays in accessing the appropriate asylum procedure and slow processing of applications*
- *Difficulty in using the border procedure*

3. Absence of a broad and flexible mechanism for solidarity

- *Relocation is not the only effective response to deal with mixed flows*

4. Inefficiencies in the Dublin system

- *Lack of a sustainable sharing of responsibility under the current system*
- *Current rules on the shift of responsibility contribute to unauthorised movements*
- *Inefficient data processing*
- *Procedural inefficiencies of the Dublin system create an administrative burden*

5. Lack of targeted mechanisms to address extreme crisis situations

- *EU's difficulty in ensuring access to asylum or other procedures at the borders during situations of extreme crisis*

6. Lack of a fair and effective system to access fundamental rights

Addressing the challenges

1-2. A more efficient, seamless and harmonised migration management system

- *A comprehensive approach for efficient asylum management ⇒ **Proposal for a Regulation on asylum and migration management***
- *A seamless asylum-return procedure and an easier use of accelerated and border procedures ⇒ **Amended Proposal for a Regulation establishing a common procedure for international protection in the Union***
- *A coordinated, effective, and rapid screening phase ⇒ **Proposal for a Regulation introducing a screening of third-country nationals at the external borders***

3. A fairer, more comprehensive approach to solidarity and relocation

- *A solidarity system, allowing for compulsory solidarity with a broader scope ⇒ **Proposal for a Regulation on asylum and migration management***

4. Simplified and more efficient rules for robust migration management

- *A wider and fairer definition of responsibility criteria, reducing the cessation and shift of responsibility ⇒ **Proposal for a Regulation on asylum and migration management***
- *More efficient data collection/processing, allowing for counting applicants rather than applications, and including a specific category for SAR ⇒ **Amended Proposal for a Regulation on the establishment of 'Eurodac'***
- *Improved procedural efficiency ⇒ **Proposal for a Regulation on asylum and migration management***

5. A targeted mechanism to address extreme crisis situations

- *[...] **Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum***

6. Improved access to fundamental rights of migrants and asylum seekers

Source: European Commission, SWD(2020) 207 final.

2.2.1. A changing composition of asylum and migration flows to the EU?

That the composition of 'migration flows' to the EU has substantially changed since the so-called refugee crisis of 2015-2016 constitutes a central premise of the analysis of the 'migration situation' provided in the Commission Staff Working Document accompanying the Pact. The document refers to the **increasingly 'mixed' character of flows**, as evidenced by the increasing number of migrants who are not in need of international protection.

As underlined throughout this study, reference to the increasingly 'mixed' character of entries is used by the Commission to back some of the key policy priorities pursued under the Pact, including: the focus on pre-entry screening at the border, the expansion of asylum and return border procedures, as well as the inclusion of support in the field of return (return sponsorship) besides relocation in the RAMM solidarity mechanism.

To support the claim of an increase in mixed character arrivals in the EU, the Commission underlines how, while the number of irregular arrivals in the EU has substantially decreased from 2015 to 2019,¹⁰¹ **the share of third-country nationals arriving from countries with a recognition rate lower than 25%** had risen over the same period: it was 14% in 2015, 43% in 2016 and 67% in 2017. However, the same figure decreased in the following two years, to 57% in 2018 and 26% in 2019.¹⁰²

It is doubtful if the evolution and changing character of entries over a relatively short timeframe (2015-2019) may be used as an accurate predictor of future trends, and thus as a ground upon which to build a long-term revision of EU asylum rules. On the contrary, a major lesson learnt over the last six years, and specifically from the sudden increase of numbers in the period 2015-2016, is that level and composition of flows across the main migration routes to the EU is subject to significant variations, reflecting a complex set of geopolitical, economic, and social factors in countries of origin, as well as a mix of policy and legal measures adopted in main countries of transit and destination.¹⁰³

Importantly, the Staff Working Document further underlines how the **EU-wide first instance recognition rate** fell to 30% in 2019 from a peak of 56% in 2016. According to the Commission, the increasing proportion of applicants who are unlikely to receive protection in the EU, reflected in the above-mentioned figure, has resulted in increased pressure on Member States' administrations and reception systems, producing delays and impacting the efficiency of asylum and return procedures.

¹⁰¹ As reported by Frontex, arrivals in the EU further decreased by 13% in 2020 compared to 2019 due to the impact of Covid-19 mobility restrictions put in place by Europe. The total number of irregular crossings in 2020, around 124 000, was the lowest number since 2013. See Frontex Press Release, Irregular migration into EU last year lowest since 2013 due to Covid-19, 8 January 2021, <https://frontex.europa.eu/media-centre/news/news-release/irregular-migration-into-eu-last-year-lowest-since-2013-due-to-covid-19-j34zp2>

¹⁰² Commission Staff Working Document, p. 28.

¹⁰³ For statistics on migrants and refugee flows in Europe see: UNHCR, Mediterranean Situation, <https://data2.unhcr.org/en/situations/mediterranean>; IOM, Flows Monitoring Europe, <https://migration.iom.int/europe?type=arrivals>. For an analysis of recent dynamics and drivers of mixed flows to Europe see: Mixed Migration Centre, Destination Unknown: Afghans on the move in Turkey, 23 June 2020, p. 17, https://mixedmigration.org/wp-content/uploads/2020/07/115_destination_unknown_research_report.pdf; 'On this journey, no one cares if you live or die' Abuse, protection, and justice along routes between East and West Africa and Africa's Mediterranean coast, June 2020, <https://mixedmigration.org/resource/on-this-journey-no-one-cares-if-you-live-or-die/>; UNHCR, Routes Towards the Western and Central Mediterranean Sea, Working on alternatives for dangerous journeys for Refugees, UNHCR's Updated Risk Mitigation Strategy and Appeal, January 2021, <https://reporting.unhcr.org/sites/default/files/UNHCR%20Western%20and%20Central%20Mediterranean%20Appeal%202021.pdf>; EASO, Annual Report 2020, p. 63, <https://easo.europa.eu/sites/default/files/EASO-Asylum-Report-2020.pdf>

A focus on the evolution of EU-wide first instance recognition rate, however, only provides a partial picture of the international protection needs of asylum seekers arriving the EU. The figure provided by the Commission only includes people who have been granted refugee or subsidiary protection status, but not people who have been granted **protection for 'humanitarian reasons'**.¹⁰⁴ If beneficiaries of protection for humanitarian reasons would be included in the figure, in line with the approach followed by Eurostat and EASO, the EU-wide recognition rate at first instance in 2019 would increase from 30% to 38.1%.¹⁰⁵

Another limitation of a focus on first instance recognition rate is that such an indicator does not consider the significant **share of negative decisions at first instance which are then successfully challenged on appeal**.¹⁰⁶ According to Eurostat, **30% of the total decisions on appeal (91,030) in 2019 were positive**. While Eurostat specifies that available data does not allow for the calculation of the overall recognition rate for all stages of the asylum procedure, it is clear that when also considering the appeal stage, the actual share of applicants who receive protection in the EU is **significantly higher** than that reflected by only first instance decisions.¹⁰⁷

Another widely identified factor to be considered in the analysis of the data on international protection in the EU concerns **persisting disparities in positive recognition rates across Member States**, including among applicants with the same nationality, as well as the **substantial legal and administrative challenges faced by people looking for international protection in gaining access to justice and effective remedies in the appeals phase**.¹⁰⁸ By way of example, recognition rates for Afghan nationals in 2019 ranged from 32% in Belgium to 97% in Switzerland. Almost all applicants (more than 90%) from Turkey were granted international protection in the Netherlands, Norway, and Switzerland, while only 51% of Turkish nationals were granted a form of protection in Germany compared to 26% in France.¹⁰⁹

The current differences in recognition rates for applicants of the same nationality across Member States underlines the limitations associated with taking an EU average first instance recognition rate as a solid

¹⁰⁴ According to Eurostat: "Persons granted authorisation to stay for humanitarian reasons includes persons who are not eligible for international protection as currently defined by the Qualification Directive but are nonetheless protected against removal under the obligations that are imposed on all Member States by international refugee or human rights instruments or on the basis of principles flowing from such instruments. Examples of such categories include persons who are not removable on ill health grounds and unaccompanied minors' See Eurostat 'Glossary: Asylum decision', https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Asylum_decision

¹⁰⁵ See data provided by EASO in its Annual Report on the Situation of Asylum in the European Union 2020, p. 72. According to Eurostat, "for the purpose of the Asylum data collection the concepts of first instance decision and final decision also include data on decisions granting or rejecting 'Humanitarian status' under national law concerning international protection. See Eurostat 'Glossary: Asylum decision', https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Asylum_decision

¹⁰⁶ ECRE, asylum statistics in Europe, 2020, <https://www.ecre.org/wp-content/uploads/2020/06/Statistics-Briefing-ECRE.pdf>

¹⁰⁷ EUROSTAT specifies that calculation of the overall recognition rate for all stages of the asylum procedure cannot be made due to lacking information linking the outcomes at first instance and final on appeal for each person concerned. As some applicants rejected at the first instance and who lodged an appeal in the same year receive a final negative decision, it would lead to multiplication of rejected applicants and would cause underestimation of the overall recognition rate. Final decisions on appeal statistics broken down by the year of the first instance rejection would be required to avoid this multiplication. See, Eurostat, Asylum Statistics 2019.

¹⁰⁸ Report of the Special Rapporteur on the human rights of migrants, A/73/178/Rev.1, 25 September 2018.

¹⁰⁹ See EASO, Annual Report 2020, p. 72. According to EASO, in 2019 recognition rates and the types of protection granted in positive decisions varied considerably across citizenships. While the situation likely reflects differences in caseloads in terms of the nationalities of applicants and their protection needs, it may also signal a lack of harmonisation across EU+ countries in the implementation of CEAS.

indicator of the state of international protection in the EU and for justifying the requirement, as in the amended Asylum Procedure Regulation analysed in chapter 4 of this study, that applicants from countries with low recognition rates be channelled to accelerated procedures at the border.¹¹⁰

2.2.2. Addressing 'onward movements' in the EU

Another key aspect of the current migration situation in the EU as presented by the Commission relates to the **phenomenon of so-called onward or 'secondary movements' of asylum seekers between Member States**. The Commission underlines how a key explanation of the increasing ratio between the number of first-time asylum applications in the EU and the number of irregular arrivals recorded in the period 2016-2019 is to be found in multiple asylum applications within the same or another EU Member State, following unauthorised movements.¹¹¹

The New Pact includes a set of measures aimed at limiting onward movements that span across different legislative proposals. The RAMM proposal, in line with the 2016 proposal for recasting the Dublin Regulation, includes an obligation for an asylum seeker to apply for asylum in the Member State of first entry or legal stay, and to remain in the Member State determined as responsible. In case of non-compliance, the applicant will only be entitled to material reception conditions in the Member State where he/she is required to be present.¹¹²

Concerns associated with onward movements also lie behind the requirement included in the proposal for a Screening Regulation and in the amended proposal for an Asylum Procedures Regulation, which state that applicants subject to screening and then channelled to the asylum and return border procedure must be refused entry into the territory. The rationale for the adoption of 'non-entry' is explained in the recently-published European Parliament Implementation assessment on 'Asylum procedure at the border' as follows: **'in border procedures entry is refused [...]** in order to prevent free movement within the territory of the Member State (and the potential for subsequent irregular movements in the Schengen area).¹¹³

In spite of the prominence acquired by onward movements in EU political debates and the relevance attached to this issue by Member States of destination in Central and Northern Europe, **current evidence on the scale, scope and dynamics of 'secondary movements' is limited.**¹¹⁴ The

¹¹⁰ See Chapter 4, section 4.1.2., point b.

¹¹¹ European Commission, 'Staff Working Document', p. 33.

¹¹² See Article 9-10 RAMM. Provisions included in the RAMM proposal should be read in conjunction with the set of measures aimed at discouraging onward movements included in the 2016 proposals on an Asylum Procedures Regulation and on the Recast Reception Conditions directive. For an analysis of measures aimed at discouraging onward movements in the 2016 CEAS reform package see S. Carrera, M. Stefan, R. Cortinovis, C. Luk,, Problematising asylum seekers' secondary movements and their criminalisation in the EU, CEPS Working Paper, 2019, p. 8; For a critical review of the amendments included in the provisional agreement on the Recast reception conditions directive reached by co-legislators in 2018 see L. Slingenbergh, 'Political Compromise on a Recast Asylum Reception Conditions Directive: Dignity Without Autonomy?', EU Immigration and Asylum Law Blog, 3 March 2021, <https://eumigrationlawblog.eu/political-compromise-on-a-recast-asylum-reception-conditions-directive-dignity-without-autonomy/>

¹¹³ Van Ballegooij and Eisele, "Asylum Procedures at the Border", European Implementation Assessment, 2020, p. 28; See also ECRE, *Relying on a fiction: New Amendment to the Asylum Procedures Regulation*, Policy Note, 2020, <https://www.ecre.org/wp-content/uploads/2020/12/Policy-Note-29.pdf>

¹¹⁴ On the limitations of existing data on onward movements see also M., Wagner., J., Perumadan and P. Baumgartner, "Secondary Movements. Ceaseval Research on the Common European Asylum System," 34, 2019, http://ceaseval.eu/publications/34_SecondaryMovements.pdf; M. Takle, M. L. Seeberg, "All European countries are not the

Commission itself recognises that **data provided by Member States concerning secondary movements cannot be exactly quantified.**¹¹⁵

The Commission's analysis further specifies that given that **there are currently no precise numbers with respect to how many asylum applicants there are in the EU and how many move from one Member State to another**, any attempts at analysing the phenomenon (e.g. motives behind such moves, profiles, preferred destinations) are by default '**speculative**' in their nature. Consequently, the Commission concludes that "the identification of the appropriate policy responses for tackling such movements lacks both focus and justification".¹¹⁶ In an attempt to remedy the identified evidence gaps, the Commission has chosen to focus on reforming the Eurodac database. As discussed in chapter 5 of this study, the amendments being discussed aim, among other things, to use data recorded in Eurodac to assist with the mapping of onward movements within the EU. However, the Commission has not accompanied the proposed amendments with evidence of their necessity, proportionality, or fundamental rights impacts.¹¹⁷

In spite of the lack of consolidated evidence on the dynamics and underlying causes of onward movements inside the EU, an expanding literature from both academic and other sources has pointed to **the complex set of factors (social, legal, and economic) shaping asylum seekers' motivations for seeking protection in a specific state different from the one allocated under the EU Dublin Regulation.** These may include a number of protection-related considerations such as: **dysfunctional asylum and reception conditions systems**, degrading living conditions, social exclusion, poverty, lack of secure residence, institutionalised discrimination, and lack of lasting life opportunities.¹¹⁸

The increasing amount of evidence pointing to the complex set of factors influencing asylum seekers' mobility decisions lends support to **the establishment of a comprehensive and human rights-compliant approach to onward movements within the EU.**¹¹⁹ Existing independent evidence should be used in particular to fully assess the added value and implications (including on individuals' fundamental rights) of punitive measures towards asylum seekers engaging in onward movements, that have characterised EU policy responses as part of the 2016 CEAS reform and continue to be a core component of the approach laid down in the new Pact.¹²⁰

same! The Dublin Regulation and onward migration in Europe," NOVA Report 12/15, 2015 https://www.udi.no/globalassets/global/forskning-fou_i/asyl/al-european-countries-are-not-the-same.pdf

¹¹⁵ Staff Working Document, p. 33, footnote 53.

¹¹⁶ The European Commission refers to the limitations of the current analysis in the EASO's report on secondary movements, which has not been released to the public.

¹¹⁷ See Chapter 5 on the proposal for an amended Eurodac Regulation, Section 5.2.1.

¹¹⁸ In the EU context, the system for allocating responsibility among Member States established by the Dublin Regulation is based on the general principle of 'mutual trust', which presumes that fundamental rights are respected fully by all EU Member States across the European Union. The implementation of the Dublin system over the previous two decades, however, has demonstrated that such 'presumption of safety' has been a source of protective failures due to deficiencies in the functioning of domestic asylum systems, which have exposed individuals subject to Dublin procedures to violations of their fundamental rights. See European Court of Human Rights, Factsheet – "Dublin" cases, June 2016; Garlick, M. (2016). "The Dublin System, Solidarity and Individual Rights", in V. Chetail, P. De Bruycker and F. Maiani (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, Boston/Leiden: Martinus Nijhoff Publishers, pp.159-194.

¹¹⁹ S. Carrera, M. Stefan, R. Cortinovis, C. Luk, "When mobility is not a choice. Problematising asylum seekers' secondary movements and their criminalisation in the EU", CEPS Working Paper, 2019, p. 30.

¹²⁰ D. Thym, "Secondary Movements: Overcoming the Lack of Trust among the Member States?", EU Immigration and Asylum Law and Policy Blog, 29 October 2020, <https://eumigrationlawblog.eu/secondary-movements-overcoming-the-lack-of-trust-among-the-member-states/>; F. Maiani, A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact, EU

The overarching focus by some Member States on the need to limit onward movements within the EU has been recently criticised by the Greek Minister of Migration and Asylum, Notis Mitarachi in his reply to a letter dated 1 June 2021 signed a group of Member States Ministers responsible for Migration (Germany, France, Belgium, Luxembourg, Netherlands). In response to concerns by those Member States related to an increasing number of people granted international protection in Greece and using "Greek refugee travel documents" to enter another Member State and apply for asylum there, Mitarachi stated that "issuing travel documents to recognised refugees is an obligation on the state of refugee under the 1951 Geneva convention as well as the European asylum *acquis*". The Minister added that "if we are taking fundamental rights seriously there is very little space for measures restricting refugees' right to a travel document" and that **"if we want to create a system based on solidarity, then the right to mobility of refugees would be the way forth"** (Emphasis added).¹²¹

2.2.3. A disproportionate focus on returns

The **'low' return rate of migrants with no right to stay in the EU** is identified in the Staff Working Document as a third major challenge for which Pact proposals aim to respond. The alluded lack of 'effectiveness' of EU return policy is argued based on data on return rates; that is, **the percentage of people effectively removed in comparison to those issued a return order**. According to the Commission, "in spite of significant financial and political efforts and the implementation of action plans, the return rate remains low and for some third countries has even decreased between 2016 and 2019". The data provided shows, in particular, how the overall return rate in the EU has decreased over a four-year period: from 47% in 2016 to slightly above 30% in 2019.¹²²

In order to address the limited results of EU efforts in the field of return, the Pact proposes setting up a **'seamless procedure', merging the asylum and return border procedure in a single process**.¹²³ The official purpose of the integrated asylum-return procedure at the external border is to quickly assess asylum requests that are considered 'abusive' or inadmissible, or that have been lodged by applicants from countries with a low recognition rate, in order to swiftly return those without a right to stay in the EU.¹²⁴

The previously described legislative changes are accompanied with the promise of targeted EU financial operational support to ensure that the asylum and return phases of the border procedure are closely connected to each other, e.g., by keeping those whose applications have been rejected in border facilities, until the enforcement of the return decision.¹²⁵

Immigration and Asylum Law and Policy Blog, 20 October 2020, <https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>

¹²¹ See letter sent by the Greek Minister for Migration and Asylum, Notis Mitarachi to the Vice-President of the European Commission, Margaritis Schinas, and European Commissioner for Home Affairs, Ylva Johansson of 4 June 2021, <https://www.politico.eu/wp-content/uploads/2021/06/06/20210604-YMA-Ministers.pdf> ; See also the letter by Federal Minister of the Interior, Horst Seehofer Building and Community of 1 June 2021, <https://www.statewatch.org/media/2485/letter-six-schengen-states-to-european-commission-secondary-movements-1-6-21.pdf>

¹²² European Commission, Staff Working Document, p. 37.

¹²³ See Chapter 4 below, section 4.1.2.

¹²⁴ European Commission, 'Staff Working Document', p. 72.

¹²⁵ According to the Commission, irregular migrants in a return border procedure would not be subject to detention as a rule: however, they may be subject to detention when it is necessary to prevent irregular entry already during the assessment of

The approach put forward by the Commission **to increase the number of enforced expulsions focuses on downgrading current procedural and logistical aspects of asylum and return procedures.** However, a substantial body of independent research and analysis has underlined how EU return policy's lack of 'effectiveness' is due to a set of complex factors, many of which are out of the control of Member States and of TCNs themselves, **rendering the disproportionate focus on return, by and large, unrealistic and unfeasible.**

The New Pact communication acknowledges that the effectiveness of EU return policy **depends largely on the cooperation of third countries** in identifying, providing documentation to, and readmitting their citizens. In line with the 2017 Partnership Framework under the European Agenda on Migration, the Pact relies heavily on a conditionality (migration management) approach; that is, on the mobilisation of all relevant foreign policies and tools available to the EU and its Member States (including visa policies) to secure third countries' cooperation in the field of readmission.¹²⁶

The Pact reliance on conditionality, however, disregards the fact that such an approach has thus far proved both naïve and unsuccessful.¹²⁷ It fails to account for third countries' sovereignty and their reluctance to align with EU demands, often motivated by country and region-specific economic, social, and political concerns, including the high political sensitivity of readmission at the domestic level and their own regional integration processes on free movement.¹²⁸

Furthermore, readmission issues cannot be isolated from the broader framework of relations with third countries, which include other strategic issue areas (such as energy and trade) as well as other diplomatic and geopolitical concerns. In this context, placing readmission at the heart of EU relations with third countries – in line with the approach laid down in the Pact – may even turn out to be a counterproductive endeavour from a strategic point of view, as **it may disrupt cooperation on other, perhaps more crucial foreign policy priorities.**¹²⁹

From a fundamental rights and rule of law perspective, the focus of the Pact on increasing the effectiveness of return does not consider that **individuals may be 'non-returnable' for a number of legitimate reasons**, which may have nothing to do with the 'unwillingness' of the third country or the individual to return, or even from a deliberate attempt to 'abuse the system'. Sometimes reasons preventing return are of an administrative nature: for example, the inability or refusal of the various national authorities of the country of return to issue the relevant documentation, without which return cannot be executed.¹³⁰ In other cases, people who do not qualify for international protection in the EU

the asylum application, or there is a risk of absconding, of hampering return, or a threat to public order or national security (see chapter 4 of this study).

¹²⁶ European Commission, 'A New Pact on Migration and Asylum', 21.

¹²⁷ S. Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*, Springer Briefings in Law Book Series, 2016.

¹²⁸ See S. Carrera and A. Geddes, "The new EU Pact on Migration and Asylum in light of the UN Global Compact on Refugees", Florence: European University Institute, 2021, in particular the following chapters: T. Spijkerboer, "I wish there was a treaty we could sign", Ch. 4; A. Bisong, "EU external migration management policies in West Africa: How migration policies and practices in Nigeria are changing", Ch. 23; T. Tadesse Abebe and A. Mbiyozo, "New Pact's focus on migrant returns threatens Africa-EU partnership", Ch. 19.

¹²⁹ J.P. Cassarino & M. Giuffré, "Finding Its Place In Africa: Why has the EU opted for flexible arrangements on readmission?", FMU Policy Brief No. 01/2017, <https://www.nottingham.ac.uk/hrlc/documents/pb-1-finding-its-place-in-africa.pdf>

¹³⁰ S. Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*, Springer Briefings in Law Book Series, 2016; M. Vanderbruggen et al., "Point of no return: The futile detention of unreturnable

cannot be returned on humanitarian grounds, including the protection of private and family life, medical and health conditions, humanitarian considerations relating to the country of origin, as well as reasons of 'best interests'.¹³¹

When highlighting the statistical gap between the number of return decisions issued and removal orders, the Pact does not question **the actual adequacy of the increasing number of return decisions issued by relevant national authorities**.¹³² Instead, the EU's narrow focus on increasing removal orders in previous years has fostered the adoption of increasingly restrictive measures, including the extended use of detention, reduced rights of appeal – effective remedies – and the expansion of border procedures, which finds its latest expression in the New Pact. **Existing independent evidence does not support the conclusion that restrictive approaches improve the effectiveness of returns and ensure their sustainability**.¹³³

On the contrary, rather than focusing merely on increasing return rates, the effectiveness of returns should be assessed in relation to the legality and feasibility of a return process in full compliance with national and EU constitutional principles and rights.¹³⁴ Along the same lines, the European Parliament in its draft report on the 2018 proposal for recasting the Return Directive, posited that the goal of **increased effectiveness should be accompanied by "unambiguous and enforceable fundamental rights safeguards", which overall are presently lacking**.¹³⁵

2.3. Conclusions

This chapter has set the stage for the legal analysis carried out in the following chapters comprising this study. It has analysed **the political, legal, and institutional background against which the New Pact on Migration and Asylum needs to be read**. The first part of the chapter has focused on the key policy and legal initiatives undertaken in the framework of the European Agenda on Migration from 2015 onwards; it has then provided an overview of the negotiations of the 2016 CEAS reform, highlighting a set of major unresolved issues that prevented its finalisation.

The New Pact has been presented as a 'fresh start' in the field of migration and asylum. While the reform package proposed by the Commission undeniably puts forward several new elements compared to the *status quo*, it also displays a **high level of continuity with the priorities, objectives and initiatives pursued at the EU level over the previous years**. This becomes evident if one considers the emphasis of the new Pact on increasing the effectiveness of EU return policy, the focus on the rapid

migrants," 2014, https://www.ecre.org/wp-content/uploads/2014/01/pointofnoreturn.eu_wp-content_upload_s_2014_01_Point_of_no_return.pdf

¹³¹ European Union Agency for Fundamental Rights, 'Fundamental rights of migrants in an irregular situation in the European Union, Comparative Report, 2011, p. 27, <https://fra.europa.eu/en/publication/2012/fundamental-rights-migrants-irregular-situation-european-union>

¹³² S. Carrera, Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights, Springer Briefings in Law Book Series, 2016.

¹³³ ECRE, Return Policy: Desperately Seeking evidence and balance. ECRE's assessment of latest developments in EU policy and law on returns, Policy Note, 2019, <https://www.ecre.org/ecre-policy-note-return-policy-desperately-seeking-evidence-and-balance/>; Return: No safety in numbers: ECRE'S analysis of recent developments in EU policy on return of migrants, Policy Note, 2017, <https://www.ecre.org/wp-content/uploads/2017/11/Policy-Note-09.pdf>

¹³⁴ K. Eisele, "The proposed Return Directive (recast)", p. 9.

¹³⁵ European Parliament, on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) (COM(2018)0634 – C8-0407/2018 – 2018/0329(COD)), Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Tineke Strik, 21.2.2020, p. 89.

processing of asylum claims at the border in continuity with the hotspot approach, and the reliance on cooperation with third countries for achieving EU priorities in the field of migration management and border control.

The New Pact is inextricably linked to the 2016 CEAS reform: it preserves many building blocks of that reform while at the same time seeking **'alternative solutions' to overcome Member States' divergences on the Dublin reform** and, more broadly, on the link between solidarity and responsibility in the CEAS.

The main novelty characterising the Pact relates instead to its role in reversing the process of 'Lisbonisation' and re-injecting intergovernmentalism in EU external borders, asylum, and migration policies. This chapter has underlined the risks associated with the 'consensus building' approach promoted by the Commission in the Pact, and specifically with the search for possible **'compromises' between Member States' Ministries of Interior in advance of the actual presentation of legislative proposals**. This approach stands at odds with the current advanced stage of European integration in the areas of migration and asylum.¹³⁶ The analysis conducted in the following chapters will illustrate how the Pact's attempt to reconcile highly divergent priorities has negatively impacted heavily on both the form and substance of the key legislative proposals under consideration.

The framing of the New Pact as a compromise between Member States national priorities raises a number of issues concerning **the compliance of its proposals with EU Better Regulation standards**. This is even more the case as **the Pact has not been accompanied by an impact assessment as foreseen by the 2016 EU interinstitutional agreement on Better Law-Making**. To remedy the situation, the European Parliament has requested a Horizontal Substitute Impact Assessment focusing on the social, economic, territorial, and fundamental rights impacts of the legislative provisions included in the Pact.¹³⁷

The European Commission has instead opted for accompanying the proposals under the Pact with a **Staff Working Document**. The analysis of this chapter has shown how the analysis of the 'migration situation' faced by the EU **fails to comprehensively take into account existing evidence on international protection needs**, focusing narrowly on first instance recognition rates on the basis of the nationality of applicants. The priority of preventing onward movements, which stands out as a major priority of the New Pact, is supported in the **absence of reliable evidence on the scale and dynamics of this phenomenon** and without acknowledging the range of factors that may induce applicants to seek asylum in another Member State, most notably inadequate reception conditions, substandard asylum procedures and lack of integration prospects. Finally, the focus on improving the **effectiveness of returns** which cut across all the proposals of the New Pact is driven by the objective of increasing 'return rates', without a broader reflection on the range of 'bottlenecks' characterising cooperation with third countries in this field, as well as the requirement to ensure returns processes in line with EU and Member States fundamental rights and rule of law standards.

¹³⁶ Carrera, "Whose Pact?".

¹³⁷ See LIBE Committee Hearing on the New Pact on Migration and Asylum, 27 May 2021.

3. PROPOSAL FOR A NEW PRE-ENTRY SCREENING REGULATION

3.1. Legal mapping

3.1.1. Context and scope

The Commission is proposing the introduction of a **procedure for ensuring the screening of TCNs arriving at EU borders**.¹³⁸ According to the proposal, the screening will help relevant border authorities to establish identity, health, and security risks and then refer TCNs to the appropriate procedure, be it asylum, refusal of entry, or return. The proposal, which is presented as enhancing and standardising border control practices adopted by Member States, should be read in close connection with the amended proposal for a Regulation on Asylum Procedures.¹³⁹ In the Commission's view, taken together, these proposals will contribute "to a comprehensive approach to migration by establishing a seamless link between all stages of the migration process, from arrival to processing of requests for international protection until, where applicable, return".¹⁴⁰

To a large extent, the proposal of a screening procedure can be interpreted as an adaptation and generalisation of the border control practices implemented following the launching of the '**hotspot approach**' in 2015,¹⁴¹ whose legislative underpinning is now to be found in the Regulation on the European Border and Coast Guard Agency (EBCG).¹⁴² According to this Regulation, in circumstances of "disproportionate migratory challenges at particular hotspot areas of its external borders characterised by large inward mixed migratory flows", Member States may "request technical and operational reinforcement by migration management support teams composed of experts from relevant Union bodies, offices and agencies that shall operate in accordance with their mandates" for the screening of third-country nationals arriving at external borders.¹⁴³

Commission guidelines and best practices further specify that screening procedures should be organised in such a way as to establish "a closer nexus between the initial steps of the hotspots approach and the asylum and return procedures which should follow these initial steps in order to expedite processes and ensure efficiency gains".¹⁴⁴ Asylum and return procedures should therefore

¹³⁸ European Commission, *Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817*, COM(2020)612 final, Brussels 23.9.2020 [hereinafter: Screening proposal].

¹³⁹ See Chapter 4. European Commission, *Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, COM(2020)611 final, Brussels 23.9.2020 [hereinafter: Asylum procedure proposal].

¹⁴⁰ Screening proposal, p. 7.

¹⁴¹ D. Neville, S. Sy and A. Rigon, "On the frontline: the hotspot approach to managing migration", European Parliament. Directorate General for Internal Policies, 2016.

¹⁴² Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (OJ L 295, 14.11.2019) [hereinafter: EBCG Regulation].

¹⁴³ Article 40, EBCG Regulation.

¹⁴⁴ European Commission, *Best practices on the implementation of the hotspot approach*, SWD(2017)372 final, Brussels, 15.11.2017, p. 4.

follow the initial identification, registration and fingerprinting of the persons concerned, and possibly be finalised in the hotspots.¹⁴⁵

A similar rationale inspires the proposal on the screening procedure, whose main purpose is to ensure that the identity of the person, as well as any health and security risks, are quickly established, and that all TCNs who are present at external borders without fulfilling entry conditions are swiftly referred towards the applicable procedure without leaving the location where the screening is performed.

a) Personal scope

The personal scope of the new screening procedure is set by Articles 3 and 5 of the proposal. In particular, the screening will concern:

- All TCNs crossing external borders outside of the border crossing points, or disembarked after a search and rescue operation, with regard to whom Member States are required to take biometric data in line with the Eurodac Regulation.¹⁴⁶
- All TCNs presenting themselves at border crossing points without fulfilling the entry conditions who apply there for international protection.¹⁴⁷
- All TCNs apprehended within the territory of Member States, where there are indications that they eluded border checks at the external border on entry.¹⁴⁸

The screening procedure will not concern:

- TCNs with regard to whom Member States are not expected to collect biometric data pursuant to the Eurodac Regulation¹⁴⁹ because they are to be immediately turned back or kept in custody, confinement or detention pending their removal, when removal is executed within 72 hours from apprehension.¹⁵⁰
- TCNs whose entry is authorised on the basis of the derogations to ordinary entry conditions referred to in Article 6(5) of the Schengen Borders Code.¹⁵¹

b) Location

All TCNs submitted to screening at the external borders “shall not be authorised to enter the territory of the Member State”¹⁵² and, as a consequence, the procedure should in these cases be conducted **“at or in proximity to the external border”**.¹⁵³ It is therefore left to Member States to determine the “appropriate locations for the screening” by taking into account “geography and existing

¹⁴⁵ Ibidem.

¹⁴⁶ Article 3(1)(a)(b), Screening proposal.

¹⁴⁷ Article 3(2), Screening proposal.

¹⁴⁸ Article 5, Screening proposal.

¹⁴⁹ Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of “Eurodac” (OJ L 180, 29.6.2013) [hereinafter: Eurodac Regulation].

¹⁵⁰ Article 3(1)(a), Screening proposal.

¹⁵¹ Article 3(3), Screening proposal. Will not be submitted to the screening holders of residence permits or long-term visa for the purposes of transit, visa-required third-country nationals in case a visa is issued at the border, and persons admitted by a Member State on the basis of an individual decision on humanitarian grounds, on grounds of national interest or because of international obligations, except persons seeking international protection who should be channelled to the screening.

¹⁵² Article 4(1), Screening proposal.

¹⁵³ Article 6(1), Screening proposal.

infrastructures", with the Commission suggesting that the tasks related to the screening may be carried out in "existing hotspot areas".¹⁵⁴ In the cases of TCNs apprehended within the territory, the screening shall be conducted "at any appropriate location within the territory of a Member State".¹⁵⁵

c) Activities included in the screening

According to Article 6(6) of the proposal, the screening should consist of:

- A preliminary **health and vulnerability check** aimed at identifying any needs for immediate care or isolation on public health grounds, any vulnerability or special reception or procedural needs.¹⁵⁶
- An **identity check** aimed at establishing the identity and nationality of the TCN by using identity and travel documents, biometric data and any other information provided by or obtained from the TCN concerned, in combination with national and European databases.¹⁵⁷
- **Registration of biometric data** (i.e., fingerprint data and facial image data) pursuant to the Eurodac Regulation, to the extent it has not occurred yet.¹⁵⁸
- A **security check** through a query of relevant national and European databases, in particular the Schengen Information System (SIS), to verify that the person does not constitute a threat to internal security.¹⁵⁹

d) Outcome of the screening

On completion of the screening procedure, the authorities responsible shall fill out the so called '**de-briefing form**',¹⁶⁰ containing personal information (name, date and place of birth and sex), initial indication of nationalities, countries of residence prior to arrival, languages spoken, reason for unauthorised arrival, entry, or illegal stay; with information on whether the person made an application for international protection, information obtained on routes travelled and any other information on assistance received from a person or organisation in crossing the border without authorisation.

After the completion of the de-briefing form, **TCNs shall be referred to the appropriate authorities**. In particular:

- All TCNs crossing external borders outside border crossing points, who have not requested international protection and with regard to whom the screening has not revealed that they fulfil entry conditions shall be referred to the authorities competent for return, pursuant the

¹⁵⁴ Recital No. 20, Screening proposal. Hotspot areas are defined by the point (23) of Article 2 of Regulation (EU) 2019/1896 as "an area created at the request of the host Member State in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders".

¹⁵⁵ Article 6(2), Screening proposal.

¹⁵⁶ Article 9, Screening proposal.

¹⁵⁷ Article 10, Screening proposal.

¹⁵⁸ Article 14(6), Screening proposal.

¹⁵⁹ Articles 11 and 12, Screening proposal.

¹⁶⁰ Article 13, Screening proposal.

procedures set in the Return Directive 2008/115/EC. They may be also refused entry in accordance with Article 14 of the Schengen Border Code (Regulation (EU) 2016/399).¹⁶¹

- All TCNs disembarked after a search and rescue operation who have not requested international protection shall be referred to the authorities competent for return pursuant the procedures set in the Return Directive 2008/115/EC.¹⁶²
- All TCNs apprehended within the territory of Member States who do not apply for international protection and with respect to whom the debriefing has not revealed that they fulfil the conditions for stay shall be referred to the authorities competent for return pursuant the procedures set in the Return Directive 2008/115/EC.¹⁶³
- All TCNs who apply for international protection shall be referred to the authorities responsible for asylum. In these cases, the de-briefing form shall indicate any elements which seem at first sight to be relevant to refer the third-country nationals concerned into the accelerated examination procedure or the border procedure.¹⁶⁴

The screening could also be followed by **relocation**, under the mechanism for solidarity established by the proposed Regulation on Asylum and Migration Management (see chapter 4).¹⁶⁵

e) Duration

As a general rule, the proposed duration of the screening process is **5 days** for TCNs apprehended in the external border areas, disembarked after search and rescue, or presenting themselves at border crossing points,¹⁶⁶ and **3 days** for TCNs apprehended within the territory.¹⁶⁷ There are only two exceptions to this general rule, both set by Article 6(3) of the proposal:

- In cases concerning TCNs apprehended at the external border who have already been kept in detention or custody for more than 72 hours pending their removal, the screening procedure should not exceed 2 days.
- In exceptional circumstances, where a disproportionate number of TCNs needs to be screened, the period of 5 days for completing the screening procedure may be extended by a maximum of an additional 5 days.

Where not all the checks have been completed within the deadlines, the screening shall nevertheless end with regard to that person, who shall be referred to a relevant procedure, be it asylum, refusal of entry, or return.¹⁶⁸ Even if not explicitly specified in the proposal, an interpretation in line with the objective to ensure the highest standard of protection to asylum seekers would be that when screening has not been completed, entry on the territory must nonetheless be guaranteed and referral made to the procedure offering the highest protection standards (i.e., the ordinary asylum procedure or return procedure).

¹⁶¹ Article 14(1), Screening proposal.

¹⁶² Article 14(1), Screening proposal.

¹⁶³ Article 14(4), Screening proposal.

¹⁶⁴ Article 14(2), Screening proposal.

¹⁶⁵ Article 14(3), Screening proposal.

¹⁶⁶ Article 6(3), Screening proposal.

¹⁶⁷ Article 6(5), Screening proposal.

¹⁶⁸ Article 14(7), Screening proposal.

f) Procedural guarantees

A number of procedural guarantees are set with the aim to ensure that every person would have an individual assessment and their fundamental rights are respected during screening, with particular consideration to the need to ensure the respect of the principle of *non-refoulement*.

In particular, Article 8 of the proposal establishes that the authorities responsible for screening, eventually with the support of national, international and non-governmental organisations and bodies, shall provide TCNs with **information** regarding the following in particular: the scope of the screening and their rights and obligations and all other information relating to the conditions of entry and stay in the EU; the possibility to apply for asylum or for relocation to another EU Member State and; the personal data collected and processed during the procedure.

Most importantly, Article 7 of the proposal sets out the obligation for each Member State to establish an **"independent" monitoring mechanism** for ensuring respect of fundamental rights during screening, with particular regard to the prevention of arbitrary detention, the need to ensure access to asylum, and due respect to the *non-refoulement* principle.

3.1.2. Analysis of key legal changes

Many elements included in the screening proposal correspond, by and large, to what border authorities are already requested to do under the existing legislative framework. Nevertheless, the Commission has justified the proposal with the need to "streamline" procedures "upon arrival"¹⁶⁹ and clarify the existing legal framework.¹⁷⁰

Identity and security checks are carried out pursuant to the **Schengen Borders Code**, which establishes common rules on how checks on TCNs crossing external borders at border crossing points shall be performed,¹⁷¹ and on the treatment of TCNs intercepted while attempting to cross the borders outside border crossing points.¹⁷² The Screening proposal merely provides **more detailed rules** on how to carry out identity and security checks in the particular circumstances of TCNs submitted to screening.

The rules for the collection of biometric data, of applicants for international protection and persons apprehended in connection with the unauthorised crossing of the external borders of the EU, are set by the **Eurodac Regulation**, which covers also TCNs or stateless persons found without authorisation in the territory of a Member State, whose fingerprint data can be taken to check whether they have applied for international protection in another Member State.¹⁷³

¹⁶⁹ European Commission, *Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]*, SWD(2020)207 final, Brussels, 23.9.2020, p. 6.

¹⁷⁰ Interview, Commission 2.

¹⁷¹ Article 8(3), Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 77, 23.3.2016) [hereinafter: Schengen Borders Code].

¹⁷² Article 13(1), Schengen Borders Code.

¹⁷³ Article 17(1), Eurodac Regulation. The 2016 proposal on the reform of Eurodac confirm existing rules on this point (COM (2016) 272 final, see also Council document 9848/18, 12 June 2018).

The Screening proposal confirms existing obligations concerning the fingerprinting of TCNs, but sets **specific deadlines** for Member States to comply with their obligations under the Eurodac Regulation (See chapter 5 of this study for further details).

While performing checks on TCNs on entry, border guards are already requested to verify that the TCNs concerned (his/her means of transport and the objects he or she is transporting) are not likely “to jeopardise the (...) public health of any of the Member States”.¹⁷⁴ In its guidance of April 2020, the Commission has further reinforced border management measures to protect health, establishing a set of guidelines on the measures to be taken in the case of people who, in crossing the external border of the EU, are identified as posing a risk to public health from Covid-19.¹⁷⁵

With regard to applicants for international protection, Article 13 of the Reception Conditions Directive¹⁷⁶ already provides that Member States “may” proceed to a medical screening of applicants “on public health grounds”. The guidance on the implementation of relevant EU provisions in the area of asylum and return procedures, and on resettlement, released in the wake of the Covid-19 pandemic has made an explicit reference to this provision, encouraging Member States to implement medical screening for applicants and mandatory Covid-19 testing for new arrivals.¹⁷⁷

Ultimately, the only novelty that the proposal will introduce with regard to medical checks is making such checks mandatory also in relation to all **TCNs apprehended during border surveillance or disembarked following a search and rescue operation**. However, Member States located along EU’s maritime borders already carry out systematic health checks on TCNs arriving by sea, as recommended by the operating procedures adopted in the context of the hotspot approach.¹⁷⁸

As suggested in the introductory section of this chapter, the proposal on the screening procedure can be interpreted as an **adaptation and generalisation of the border control practices implemented following the launching of the hotspot approach**. Unfortunately, the proposal does not address the main bottlenecks of the approach as identified by existing evaluations and scholarly research on its implementation,¹⁷⁹ but rather further reinforces these.

The experience of Greece, which the Commission praised in 2017 as a best practice case,¹⁸⁰ has for instance shown that keeping TCNs in hotspot facilities for the entire duration of the screening, and of subsequent asylum or return procedures, may easily lead to **overcrowding and the rapid**

¹⁷⁴ Article 8(3)(vi), Schengen Borders Code.

¹⁷⁵ European Commission, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, 2020/C 86 I/01.

¹⁷⁶ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (OJ L 180, 29.6.2013) [hereinafter: Reception Conditions Directive]. See also Article 13 of the interinstitutional agreement reached on proposal for a recast Reception Conditions Directive (Council of the European Union, Interinstitutional File: 2016/0222 (COD), Brussels, 18 June 2018).

¹⁷⁷ European Commission, Communication from the Commission Covid-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, C/2020/2516.

¹⁷⁸ European Commission, Best practices on the implementation of the hotspot approach, cit., § 6.

¹⁷⁹ European Council for Refugees and Exiles, The implementation of the hotspots in Italy and Greece. A Study, Amsterdam, 2017; EU Agency for Fundamental Rights, Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy, Vienna, 2019; E. Pascucci and E. Patchett, ‘Hotspots: Questioning the Future of Europe through Its Borders’, *Journal of Contemporary European Research*, 14(4), 2018, 324–329.

¹⁸⁰ European Commission, Commission Staff Working Document: Best practices on the implementation of the hotspot approach, cit., p. 4.

deterioration of reception standards. The strategy envisaged by the proposal to address the issue seems to rely exclusively on time limits, yet existing time limits to take fingerprints¹⁸¹ and register asylum applications¹⁸² did not prevent thousands of migrants and asylum seekers from getting stuck in hotspot facilities. If we read the proposal on the screening procedure in combination with the proposed provisions on the new border asylum and return procedures,¹⁸³ it is evident that in the absence of an effective solidarity and fair sharing of responsibility mechanism,¹⁸⁴ (see section 3.2.2) the risk is that in the areas of greatest migratory pressure, TCNs subjected to screening, and then referred to border procedures, will get stuck in border areas.¹⁸⁵

Another area of concern in the implementation of the hotspot approach relates to the **role of EU agencies**, especially as regards the inconsistency between their mandate and competence, and their de-facto roles on the ground.¹⁸⁶ In presenting the proposal on the new screening procedure, the Commission has emphasised the role that EU agencies – the EBCG and the future European Union Agency for Asylum in particular – will be able to play in “accompanying and supporting”¹⁸⁷ the competent authorities in their tasks related to screening. The interviews carried out in preparation for this study suggest that a more active role was initially envisaged for EU agencies, which could have been vested with the power of performing the screening independently, rather than merely of “accompanying and supporting” frontline Member States.¹⁸⁸

However, **the division of labour between EU agencies and national authorities drawn up by the proposal is vague**, with Article 6(7) merely stating that relevant authorities “may be assisted or supported in the performance of the screening by experts or liaison officers and teams deployed by the European Border and Coast Guard Agency and the [European Union Agency for Asylum] within the limits of their mandates”. According to the rules currently in force, EU agencies may offer “technical and operational reinforcement” to national authorities in three main areas: first, the screening of incoming migrants (identification, registration, debriefing, and fingerprinting); second, the provision of initial information of persons wishing to ask for international protection; and third, in the field of returns.¹⁸⁹ Assistance is offered by deploying “Migration management support teams”, only, however, “where a Member State faces disproportionate migratory challenges”.¹⁹⁰ In the Screening proposal, **the**

¹⁸¹ Article 14(1), Eurodac Regulation.

¹⁸² Article 6(1), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013) [hereinafter: Asylum Procedures Directive].

¹⁸³ See Chapter 4.

¹⁸⁴ See Section 3.2.2.

¹⁸⁵ Jakulevičienė, L. (2020) *Re-decoration of existing practices? Proposed screening procedures at the EU external borders*, eumigrationlawblog.eu (available at: <https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/>)

¹⁸⁶ Horii, S. (2018), “Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis”, *Refugee Survey Quarterly* 37(2):204-30; E. K. Saranti, D. Papachristopoulou and M.-N. Vakouli, “EASO’s Operation on the Greek Hotspots. An overlooked consequence of the EU-Turkey Deal”, Lesvos Greece Refugee Rights Initiative.

¹⁸⁷ Screening proposal, p. 3.

¹⁸⁸ Interview – EASO.

¹⁸⁹ Article 40(1) and (4), EBCG Regulation. See also Article 21 of the interinstitutional agreement reached on the proposal on the new European Union Agency for Asylum (Council of the European Union, Interinstitutional File: 2016/0131(COD), 17 June 2021), referring to the relevant provisions in the EBCG Regulation.

¹⁹⁰ Article 40(1), EBCG Regulation.

role of EU agencies does not seem to be limited to situations of disproportionate migratory pressure. Greater coordination with the current legal basis would thus be needed here.

The only real novelty brought by the screening proposal is ultimately the role that is assigned to the **EU Fundamental Rights Agency (FRA)** in supporting Member States in developing the independent monitoring mechanisms of fundamental rights in relation to the screening (on which see section 3.2.3 below).

3.2. Critical assessment

3.2.1. Legal coherence

The proposed screening procedure is presented by the Commission as contributing to the establishment of a new “comprehensive approach to migration and mixed flows”¹⁹¹ by creating “a seamless link between all stages of the migration process, from arrival to processing of asylum requests and, where applicable, return”.¹⁹² Commission documents often use a terminology suggesting that the main rationale behind the proposal is the need to facilitate access to protection for those in need. Thanks to the screening procedure, TCNs will be “swiftly”¹⁹³ referred towards the applicable procedure, “accelerating”¹⁹⁴ as a consequence the process of determining their status and facilitating the “quick identification”, “at the earliest stage possible”,¹⁹⁵ of people in need of international protection. This, it is suggested, will “increase transparency” and build trust in the system”,¹⁹⁶ ultimately ensuring “rapid legal certainty”¹⁹⁷ for the TCNs concerned.

Doubt can however be cast on whether this emphasis on the temporality of the procedure will, in itself, be a guarantee for administrative effectiveness and improved access to rights. According to the opinion of the European Council on Refugees and Exiles (ECRE), for instance, the very fact that all asylum seekers will need to pass through the screening before having access to the asylum procedure may lead to delayed access to the entitlements and protections offered to asylum seekers under EU law.¹⁹⁸ In particular, while TCNs applying for international protection (at the moment of apprehension, or in the course of border controls at border crossing points, or during screening) should be considered as applicants for international protection, it is suggested that **provisions relating to the registration of an application of the Asylum Procedures Regulation, as well as the “legal effects” of the Reception Conditions Directive, shall only apply after screening has ended.**¹⁹⁹

¹⁹¹ Screening proposal, p. 2.

¹⁹² Asylum procedure proposal, p. 4.

¹⁹³ Screening proposal, p. 2.

¹⁹⁴ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM(2020) 609 final, Brussels, 23.9.2020, p. 4.

¹⁹⁵ Screening proposal, p. 1.

¹⁹⁶ European Commission, *Communication on a New Pact on Migration and Asylum*, cit., p. 4.

¹⁹⁷ European Commission, *Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management*, cit., p. 9.

¹⁹⁸ ECRE (2020), *Comments on the Commission proposal for a screening regulation COM(2020)612*, Brussels, p. 9.

¹⁹⁹ Screening proposal, p. 5. Recital No. 16 of the proposal reads as follows: “Article 26 and 27 of the Asylum Procedures Regulation should apply only after the screening has ended. This should be without prejudice to the fact that the persons

Another reason for concern is the **blurring between the border enforcement and asylum protection rationale the proposal entails**. While the proposed screening procedure is presented as improving access to asylum procedures for those in need, the main rationale behind it is that of controlling onward movements. The Commission regrets that the Schengen Borders Code (SBC) does not provide sufficient instructions to border guards on how to handle TCNs seeking international protection at border crossing points and that, as a consequence, different practices are observed across Member States. According to the Commission's reasoning, the result is that TCNs admitted to the territory – despite not fulfilling conditions for entry, based on the claim of seeking international protection – are likely to abscond.²⁰⁰ Despite the **lack of evidence and reliable data on the scope, scale and dynamics of onward movements in the EU**,²⁰¹ the Commission opts here for introducing an **obligation for Member States to hold TCNs – and asylum seekers in particular – at the border**, by extending to air and land borders a practice already experimented with under the hotspot approach in relation to unauthorised entry by sea.²⁰²

Whilst one of the main rationales behind the proposal is that of preventing asylum seekers from absconding after having been authorised to enter the territory of a Member State, it is not clear why this objective cannot be pursued by taking **individualised decisions and assessing the risk of absconding for individual applicants**, rather than creating a mechanism whereby the vast majority of asylum seekers will be kept at the border, along with those not fulfilling conditions for entry. In this respect, the proposal may be considered as impinging on the **principle of proportionality**²⁰³ given that the Commission does not consider the practicability of potentially less onerous alternatives for preventing asylum seekers from absconding.²⁰⁴

The approach proposed by the Commission will in fact impose a **considerable administrative burden on frontline Member States** – which will be called upon to set up the facilities to hold TCNs submitted to screening –, but it will also have a profound impact on the fundamental freedoms of asylum seekers, who must be prevented from entering the territory of the Member State pending screening (and subsequent asylum and return border procedures). While in strict legal terms there is no obligation for Member States to admit asylum seekers on their territory, to the extent that *non-refoulement* and access to asylum are guaranteed,²⁰⁵ the practical consequences of such an approach cannot be overlooked. In

applying for international protection at the moment of apprehension, in the course of border control at the border crossing point or during the screening, should be considered applicants.”

²⁰⁰ Screening proposal, p. 3.

²⁰¹ See discussion in section 2.2.2 in Chapter 2 above.

²⁰² During the interviews conducted for the preparation of this study, it was often suggested that another source of inspiration for the proposal was the experience of the Netherlands, which is conducting asylum border procedures in airports without authorising the entry of the applicant (Interview Commission 2; Interview Commission 3)

²⁰³ Article 5(4) TEU and Article 52(1) Charter of the Fundamental Rights of the European Union. On the principle of proportionality see T. Tridimas, “The principle of Proportionality”, in *Oxford Principles of European Union Law. The European Union Legal Order*, Volume 1. Oxford: Oxford University Press, 2018, pp. 243-264.

²⁰⁴ Screening proposal, p. 9.

²⁰⁵ On the right to entry, see K. Hailbronner and D. Thym (2016), *EU Immigration and Asylum Law: A Commentary*. Oxford: Hart Publishing, p. 61 and 75. See also ECJ *Anafe v. Ministre de l'Intérieur* C-606/10.

particular, the experience of countries like Greece²⁰⁶ or Hungary,²⁰⁷ which have implemented a model based on the **systematic containment of asylum seekers in border areas**, suggests that such an approach is likely to seriously impact on personal liberty,²⁰⁸ while the deterioration of reception conditions may in some circumstances create situations amounting to a violation of the prohibition of torture, and inhuman and degrading treatment.²⁰⁹

3.2.2. Solidarity and fair sharing of responsibility

The screening procedure will mostly impact countries located along the eastern and southern external border of the EU, from which a considerable administrative and infrastructural effort will be required to implement the measures envisaged by the Commission. The proposal under discussion is therefore likely to impinge on the solidarity and fair sharing of responsibility principle, which should guide EU policies on migration and asylum.²¹⁰

In the Screening proposal, **the issue of solidarity and fair sharing of responsibility is essentially addressed from the point of view of the operational and financial support offered to frontline Member States**, which will be able to cover the expenses related to its implementation by drawing on the resources available under the new Multiannual Financial Framework 2021-2027 and avail themselves of the operational support provided by the relevant EU agencies. Overall, **the logic underlying the proposal is not dissimilar to that inspiring the hotspot approach**, in the sense that a responsible implementation of border control procedures is considered as the necessary prerequisite for the proper functioning of solidarity mechanisms, such as relocation and return sponsorship, which are now included as ordinary tools of the EU asylum and migration policy in the proposals for an Asylum and Migration Management Regulation (RAMM) and for a Crisis and *Force Majeure* Regulation.²¹¹

However, **the responsibilities that the implementation of the screening proposal will impose on frontline Member States can hardly be balanced by the solidarity mechanisms** envisaged by the Commission.

On the one hand, in the absence of a thorough impact assessment, **it is unclear whether the estimated financial resources available to support the implementation of the screening proposal would be sufficient to compensate for the administrative burden created by the new screening procedure**, in particular at border areas subject to greater migratory pressure. On the other hand, the 'flexible' solidarity mechanism envisaged by the Commission seems unsuitable to offering adequate support to frontline countries by largely leaving to Member States the choice on how to offer solidarity.

²⁰⁶ A. Papoutsis, J. Painter, E. Papada and A. Vradis, "The EC hotspot approach in Greece: creating liminal EU territory", *Journal of Ethnic and Migration Studies*, 2018, 1–13.

²⁰⁷ A. Kallius, D. Monterescu, and P. K. Rajaram, 'Immobilizing mobility: Border ethnography, illiberal democracy, and the politics of the 'refugee crisis' in Hungary', *American Ethnologist*, 43(1), 2016, 25–37.

²⁰⁸ See ECJ judgments on Hungarian "transit zones" *Commission v. Hungary* C-808/18, and *FMS v. Hungary* C-924/19 PPU and C-925/19 PPU.

²⁰⁹ See the ECtHR interim measure concerning the living conditions in Greek reception facilities adopted in the case *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, Application no. 14165/16.

²¹⁰ Article 80, Treaty on the Functioning of the European Union. On the principle of solidarity and fair sharing of responsibility, see, Hailbronner, K. and Thym, D. (2016), *EU Immigration and Asylum Law: A Commentary*, cit.: 1043-1045; D. Thym and E. Tsourdi, "Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions," *Maastricht Journal of European and Comparative Law* 24(5), 2017: 605-621.

²¹¹ See chapters 6 and 7.

This flexibility is maintained even in cases of disembarkation following search and rescue operations or in situations of migratory pressure (see chapter 6). The obligation to offer solidarity becomes more stringent in crisis situations, but – besides the political and procedural complexity of the crisis management mechanism envisaged by the Commission (on which, see chapter 7) – it must be remembered that TCNs submitted to screening would remain excluded from relocation pending screening.

3.2.3. Fundamental rights compliance

a) The legal fiction of non-entry

In the case of TCNs submitted to screening at external borders, persons concerned would **not** be considered as being authorised to enter the Member State territory.²¹² Given that TCNs undergoing screening are de-facto present on EU territory, **the proposal creates a legal fiction of “non-entry”**.

This provision seems to reflect the current provisions of the Schengen Borders Code establishing that, pending the verification of the conditions for entry, TCNs shall not be authorised to enter the territory. However, according to the Schengen Borders Code, TCNs may be admitted “on humanitarian grounds, on grounds of national interest or because of international obligations”.²¹³ The difference established by the Schengen Borders Code between TCNs showing protection needs and any other TCN wishing to enter EU territory is somewhat blurred by the current Asylum Procedures Directive. While applicants shall, according to the Directive, pending the determination of their request for international protection, be allowed to enter or remain in the Member State,²¹⁴ this right to enter and remain may also be recognised by holding the applicant “at the border or in transit zones”.²¹⁵

The issue in the Asylum Procedure Directive is approached from the perspective of protecting applicants from potential *refoulement*, and therefore the applicants held at the border or in transit zones are seen as “remaining” in the Member State.²¹⁶ In the Screening proposal, instead, the crucial question becomes the need to prevent TCNs from entering the territory, and this may explain the terminological shift according to which TCNs held at the border or in transit zones are now described as not-yet within EU territory. Whatever the reason for this terminological inconsistency, it is clear that according to a well-established doctrine, **States do not have the liberty to withdraw their territorial jurisdiction, so that even though an individual is de-facto present within the territory, s/he is not recognised as de-jure present**.²¹⁷ The legal fiction of non-entry cannot relieve Member States from their obligation under international human rights instruments or the Charter of Fundamental Rights of the European Union as concerns the treatment of TCNs within their jurisdiction.²¹⁸

b) Deprivation of liberty

²¹² Article 4(1), Screening proposal.

²¹³ Article 6(5)(c), Schengen Borders Code Regulation (EU) 2016/399.

²¹⁴ Article 9, Asylum Procedures Directive.

²¹⁵ Article 2(p), Asylum Procedures Directive.

²¹⁶ Article 2(p), Asylum Procedures Directive.

²¹⁷ Gammeltoft-Hansen, T., and Hathaway, J.C. (2015) “Non-Refoulement in a World of Cooperative Deterrence”, *Columbia Journal of Transnational Law* 53(2):235–84. The leading case in this regard is still ECtHR *Amuur v. France*, Application no. 19776/92, see also ECtHR *Ilias and Ahmed v. Hungary*, Application no. 47287/15.

²¹⁸ Jakulevičienė, L. (2020) *Re-decoration of existing practices?*, cit.

According to Article 6(1) of the proposal, screening should be performed “at locations situated at or in proximity to the external borders”, before the persons concerned are authorised to enter the territory. Member States are also explicitly required to “apply measures pursuant to national law” to prevent unauthorised entry during screening. Measures which, in individual cases, “may include detention, subject to the national law regulating that matter”.²¹⁹ During the interviews conducted for this study, it was often stated that the intention of the provisions was to leave to the discretion of Member States the decision on the most appropriate measure to adopt in order to prevent TCNs’ entry on their territory.²²⁰ **It remains obscure, however, as to how Member States may prevent entry without placing the persons concerned in detention.** The risk here is that the proposal will further encourage the controversial practice of holding TCNs, pending the determination of their right to entry, in the “transit” or “international” zones adopted by several Member States.²²¹

The position of persons refused entry and held in “transit” or “international” zones at the border has been the subject of some controversy, with **the ECtHR and CJEU case law reaching different conclusions as to whether the restriction on freedom of movement (confinement) in such zones amounts to a deprivation of liberty (detention)**, depending on the specific circumstances of the case.²²² Over the years, **Member States have clearly exploited this legal uncertainty**, holding TCNs, pending the determination of their right to entry, in locations such as islands or other geographically inaccessible areas where, even if not formally detained, they had their freedom of movement severely constrained (See Section 8.3.2 b of this study).²²³

As already mentioned, the Screening proposal arguably leaves Member States free to determine the appropriate locations to carry out pre-entry screening procedures “taking into account geography and existing infrastructures”. It is only suggested that the tasks related to screening may be carried out in already established hotspot areas.²²⁴ This reference here to the hotspot approach is particularly concerning, as the experience of the past years has clearly shown that **hotspot areas were in fact managed as places of confinement**, in which migrants’ freedoms were drastically curtailed even in the absence of formally adopted detention measures.²²⁵ Given that where a situation is qualified as detention “a number of safeguards kick in”²²⁶, it is of the utmost importance to specify the nature of the measures that may be taken to prevent entry, and detail the reception conditions that must be

²¹⁹ Recital no. 12, Screening proposal.

²²⁰ Interview – Commission 3; Interview – Member State 1; Interview – Commission 2.

²²¹ Gruša Matevžič, *Crossing a Red Line: How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry*, Budapest: Hungarian Helsinki Committee, 2019.

²²² Containment of applicants for asylum in the Rösztke transit area was for instance deemed to constitute detention by the ECJ (see ECJ cases *Commission v. Hungary* C-808/18 and *FMS v. Hungary* C-924/19 PPU and C-925/19 PPU), whereas such containment under almost comparable circumstances was not qualified as detention by the ECtHR (see ECtHR case *Ilias and Ahmed v. Hungary*, Application No. 47287/15).

²²³ Mountz, A. (2011), “The enforcement archipelago: Detention, haunting, and asylum on islands.” *Political Geography* 30(3): 118–128. Rules on restrictions of asylum seekers’ freedom of movement are now better specified in Article 7 of the provisional agreement reached on the proposal for a recast Reception Conditions Directive (Council of the European Union, Interinstitutional File: 2016/0222 (COD), Brussels, 18 June 2018).

²²⁴ Recital no. 20, Screening proposal.

²²⁵ EU Agency for Fundamental Rights (2019), *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy*. Vienna.

²²⁶ Cornelisse, G. (2020) “The Pact and Detention: An Empty Promise of ‘certainty, clarity and decent conditions’”, eumigrationlawblog.eu (available at: <http://eumigrationlawblog.eu/the-pact-and-detention-an-empty-promise-of-certainty-clarity-and-decent-conditions/>).

offered, in order to clarify if the holding of TCNs at the border pending screening will amount to a deprivation of liberty or not.

Whilst detention to prevent “an unauthorised entry into the country” is explicitly provided for by Article 5(1)(f) ECHR, EU law covers only the case of applicants for international protection, who may be detained “in the context of a procedure” on their “right to enter the territory”.²²⁷ However, by reading the proposal **it is not entirely clear if the grounds for detention and the standards on reception and detention conditions set by EU law will also cover TCNs held at the border pending the screening procedure.** The standards set by the Reception Conditions Directive should be guaranteed to any persons “who can be understood to seek refugee status or subsidiary protection status”,²²⁸ including when the application is made at “the border, in the territorial waters or in the transit zones of a Member State”,²²⁹ yet the Explanatory Memorandum to the Screening proposal suggests that the legal effects concerning the Reception Conditions Directive “should apply only after the screening has ended”.²³⁰

In a similar vein, according to the Return Directive, Member States should offer a treatment no less favourable than that envisaged by Articles 16 and 17 on detention conditions to TCNs subject to a refusal of entry, or apprehended or intercepted by the competent authorities in connection with the irregular crossing, who have not subsequently obtained an authorisation or a right to stay.²³¹ However, the Commission suggests in the Screening proposal that TCNs held at the border are not covered by the Return Directive until processing has ended and a decision on refusal of entry has been adopted.²³²

Ultimately, the proposal seems to **leave discretion to Member States in determining where and under what conditions TCNs placed under the screening procedure will be held**, without clarifying the nature of the measures that will be taken to submit TCNs to the screening procedure, and what guarantees should surround its adoption. Leaving so much unspecified around crucial protections of TCNs fundamental rights is hardly justifiable.²³³ The impression is that the Commission was not ready or willing to acknowledge that the screening procedure will necessarily entail detention. This ambiguity is likely to have serious consequences, as it may further encourage the practice of resorting to *de-facto* detention at the border, depriving TCNs of the crucial safeguards envisaged by EU migration and asylum law in case of detention.²³⁴

²²⁷ Article 8(2)(3), Reception Conditions Directive. See also Article 8(3)(d) of the provisional agreement reached on the proposal for a recast Reception Conditions Directive (Council of the European Union, Interinstitutional File: 2016/0222 (COD), Brussels, 18 June 2018).

²²⁸ Article 2(a)(b), Reception Conditions Directive. See also Article 2(1) of the provisional agreement reached on the proposal for a recast Reception Conditions Directive (Council of the European Union, Interinstitutional File: 2016/0222 (COD), Brussels, 18 June 2018).

²²⁹ Article 3(1), Reception Conditions Directive. See also Article 3(1) of the provisional agreement reached on the proposal for a recast Reception Conditions Directive (Council of the European Union, Interinstitutional File: 2016/0222 (COD), Brussels, 18 June 2018).

²³⁰ Screening proposal, p. 5; see also Recital No. 16.

²³¹ Article 4(4), Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008) [hereinafter: Return Directive].

²³² Screening proposal, p. 5; see also Recital No. 16.

²³³ See ECRE, *Comments on the Commission proposal for a screening regulation*, cit., 2020, p. 14.

²³⁴ According to existing standards, migrants may be placed in detention pending their removal or upon entry only if other sufficient, less coercive measures cannot be applied. Moreover, the need for detention should be assessed on an individualised basis, and detention decided by a written decision subject to judicial review. see C. Costello, “Human rights and

Less clear is where screening procedures should take place in cases of **TCNs apprehended within the territory of Member States**. Article 6(2) of the Screening Proposal simply says that in those cases “the screening shall be conducted at any appropriate location within the territory of a Member State.” This means that Member States will have room to implement this provision differently, possibly also using ordinary pre-removal detention facilities to that end. Yet the Italian case may be taken as an example of the implications that this provision can have, in particular when implemented by frontline member countries. Following the enactment of Decree No. 17/2017, the Italian police have been vested with the power of returning irregular migrants intercepted on Italy’s mainland to hotspot areas, thus giving a legal basis to the **practice of forcibly dispersing migrants gathering near main border crossing points** in an attempt to reach Switzerland, France, or Austria.²³⁵

In spite of the Commission suggesting that “submitting the same third-country national to repeated screenings should be avoided to the utmost extent possible”,²³⁶ the idea of submitting TCNs apprehended within the territory of Member States to pre-entry screening is likely to encourage dispersal practices and further detention. Moreover, this provision risks encouraging discriminatory practices, given that the only way to implement this provision would be for the police to target foreign-looking people.²³⁷

c) Protection of personal data

The screening proposal provides for the processing of biometric data and the consultation of existing databases in the context of the identity check and security check. It is therefore likely to impinge on the rights to respect for private life and for the protection of personal data as enshrined in Article 7 and 8 of the Charter of Fundamental Rights of the European Union.

With regard to identity check, one of the main concerns is related to the poor wording of Article 10(1)(b), where it is suggested that Member States can also use “data or information provided by or obtained from the third-country national concerned”. This may be read as authorising many of the dubious practices used by Member States to support **identity verification processes in the absence of documentary evidence** – such as exploiting the information contained in smart phones – which are likely to seriously interfere with TCNs’ rights to data protection and privacy.²³⁸

the elusive universal subject: immigration detention under international human rights and EU law”, *Indiana Journal of Global Legal Studies* 19(1), 2012, 257-303; L. Harta, ‘We Only Do What’s Necessary: Detention of Asylum Seekers in European Law.’ *Common Law Review*, 15, 2018, 46-49. On detention in the context of migration and asylum see at least the following ECtHR cases: *Chahal v. the United Kingdom*, Application No. 22414/93; *Saadi v. the United Kingdom*, Application No. 13229/03; *Khlaifia and Others v. Italy*, Application no. 16483/12 2008; and ECJ cases *Commission v. Hungary* C-808/18 and *FMS v. Hungary*, C-924/19 PPU and C-925/19 PPU.

²³⁵ Tazzioli, M. (2018), “Containment through mobility: migrants’ spatial disobediences and the reshaping of control through the hotspot system.”, *Journal of Ethnic and Migration Studies*, Vol. 44, No. 16, pp. 2764-2779.

²³⁶ Recital n. 19, Screening proposal.

²³⁷ According to the definition put forward by the European Commission against Racism and Intolerance, racial profiling should be read as “The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities” (European Commission against Racism and Intolerance (2007) “ECRI General Policy Recommendation no. 11 on Combatting Racism and Racial Discrimination in Policing”, para. I(1)). On the risk of racial profiling in immigration law enforcement, see B. Bowling, S. Westenra S., ‘Racism, Immigration, and Policing’. In *Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging*, 2018, DOI:10.1093/oso/9780198814887.003.0005

²³⁸ EDPS, *Opinion on the New Pact on Migration and Asylum*. Brussels, 2020, § 10.

The screening proposal also allows the use of existing databases for performing “security checks” on all TCNs crossing the external borders of the EU or apprehended within the territory of the Member State concerned, including asylum seekers. While this may result in expanding the use of information systems for security purposes beyond the limits foreseen in relation to law enforcement access to EU migration databases,²³⁹ it must also be underlined that the indiscriminate subjection of all TCNs submitted to screening to security checks, without a specific reason or justification, is likely to **reinforce a public perception that all TCNs, including asylum seekers, are to be considered potential threats.**²⁴⁰

d) Monitoring mechanism

The Screening proposal introduces a monitoring mechanism for ensuring respect of fundamental rights during screening, with particular regard to the prevention of arbitrary detention, the need to ensure access to asylum and due respect of the *non-refoulement* principle. While the proposal to establish a monitoring mechanism is certainly commendable, the framework proposed to ensure the well-functioning of the mechanism has been judged largely insufficient.²⁴¹

In particular, several shortcomings in the current proposal can be identified. First, the **independence of the monitoring mechanism** must be reinforced, possibly by making mandatory and not just optional the participation of the “relevant national, international and non-governmental organisations and bodies”.²⁴² Second, **clear consequences and follow-up procedures** must be established to respond to non-compliance of fundamental rights obligations reported by the monitoring body. This is particularly needed in light of the poor results achieved by the complaints mechanism established under Article 111 of the EBCG Regulation 2019/1986.²⁴³

In the same vein, it is not clear if the proposed monitoring mechanisms will cover the action of national authorities alone, or also that of **EU agencies involved in the screening procedure**. In light of the limitations of existing procedures for monitoring fundamental rights compliance during EU agencies' deployment,²⁴⁴ an extension of the scope of the monitoring mechanism would be needed. In particular, such an extension would compensate for the lack of transparency of the rules regarding the suspension and/or termination of the agencies' operational activities in cases where concern any failure to respect migrants' and asylum seekers' fundamental rights arise.²⁴⁵

²³⁹ Meijers Committee, *Comments on the Migration Pact – Asylum Screening Regulation*, November 2020, p. 6; ECRE, *Comments on the Commission proposal for a screening regulation*, cit., p. 25. On existing standards of necessity and proportionality justifying the use of large-scale database for security purposes, see ECtHR case *S. and Marper v. United Kingdom*, Applications nos. 30562/04 and 30566/04; and CJEU case *Digital Rights Ireland Ltd, C-293/12*.

²⁴⁰ See the thematic report on digital borders of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (UN General Assembly, A/75/590, 10 November 2020).

²⁴¹ See ECRE, Amnesty International, Danish Refugee Council, Human Rights Watch, International Rescue Committee, Oxfam, Refugee Rights Europe, Save the children, *Joint statement: Turning rhetoric into reality. New monitoring mechanism at European borders should ensure fundamental rights and accountability*, 10th November 2020.

²⁴² Article 7(2), last subparagraph, Screening proposal.

²⁴³ Carrera, S., and Stefan, M., *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective remedies for victims of human rights violations?*, Brussels: CEPS Paperback, 2018.

²⁴⁴ M. Fink, 'Frontex and Human Rights: Responsibility in 'multi-actor Situations' Under the ECHR and EU Public Liability Law', Oxford University Press, 2018; S. Horii, 'Accountability, dependency, and EU Agencies: the hotspot approach in the refugee crisis', *Refugee Survey Quarterly*, 37(2), 2018, 204-230.

²⁴⁵ According to the EBCG Regulation, it is for the Agency's Executive Director to decide on the suspension or termination of an operational activity when there are violations of fundamental rights or international protection obligations of a “serious

Finally, **the scope of the mechanism should be extended** to cover also border control activities performed outside the locations in which the screening procedure will take place, given that the vast majority of reported breaches of migrants' fundamental rights typically occur outside of official border crossings points, transit zones, hotspot areas, and reception facilities.

e) **Right to legal remedy**

A final concern is related to the outcome of the screening procedure. Whilst it is claimed that the procedure it is essentially aimed at information gathering and “does not entail any decision affecting the rights of the person concerned”,²⁴⁶ by the end of the screening TCNs should be referred to the appropriate authorities, “which – using the information collected during the screening in the debriefing form – should take the relevant decisions”.²⁴⁷ The information collected will, in particular, be used to determine the appropriate procedure for the examination of the application – be it the ordinary asylum procedure or a border or accelerated procedure – or it may result in their submission to the new return border procedure. This may therefore indirectly impact TCNs' access to rights, diverting them towards an asylum and return sub-system characterised by sub-standard procedural guarantees (see chapter 4).

Even if we accept the Commission's point of view that, not entailing any decision 'directly' affecting the rights of the person concerned, the filling of the de-briefing form is not covered by the right to an effective remedy under Article 47 of the EU Charter on Fundamental Rights. It represents a form “of processing of personal data”²⁴⁸ and as such it is covered by the General Data Protection Regulation (GDPR).²⁴⁹ It is therefore necessary that the **TCNs concerned have access to a procedure to raise concerns regarding the information collected in the de-briefing form – and the possibility to request correction and erasure of inaccurate data.**²⁵⁰

Given the tight time limits set for the completion of the screening procedure, it may be difficult to imagine that TCNs concerned may successfully challenge the information collected in the debriefing form without further delaying access to the asylum procedure. It should however, at least be ensured that TCNs have the possibility to rebut the representation of the facts included in the de-briefing form and that the screening authorities be obliged to give an account of the TCNs' counter-deductions, justifying in writing the referral decision taken as a consequence of the screening. In this way, the referral decision would also become justiciable and could eventually be challenged during the asylum procedure. Obviously, in order for such procedural guarantees to be effective, TCNs must have access

nature” (Article 46(4), EBCG Regulation). This decision is taken in “consultation” with the Agency's Fundamental rights officer and be based on “duly justified grounds” (Article 46(4), EBCG Regulation), still a significant discretion is left to the Executive Director in assessing the situation on the ground. Similar rules will also apply to the new European Union Agency for Asylum (see Article 18(5) of the interinstitutional agreement reached on the proposed Regulation on the European Union Agency for Asylum [Council of the European Union, Interinstitutional File: 2016/0131(COD), 17 June 2021]). See Chapter 8 of this study for further details.

²⁴⁶ Screening proposal, p. 12.

²⁴⁷ Screening proposal, p. 7.

²⁴⁸ Screening proposal, p. 12.

²⁴⁹ Article 2(1), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016) [hereinafter: General Data Protection Regulation].

²⁵⁰ Articles 16 and 17, General Data Protection Regulation. See in this regard EDPS (2020), *Opinion on the New Pact on Migration and Asylum*, cit., § 33.

to legal assistance during screening. Unfortunately, in the current version of the proposal, only an obligation to inform the TCNs concerned is included.

4. AMENDED PROPOSAL FOR AN ASYLUM PROCEDURE REGULATION

4.1. Legal mapping

4.1.1. Context and scope

From the Explanatory Memorandum, as well as the Communication on the New Pact and its other accompanying documents, it appears that the Amended Proposal for an Asylum Procedure Regulation (amended APR proposal) is to be understood against the background of the following intersecting factors:²⁵¹

- (1) the increasing share of complex cases due to *mixed arrivals* of persons with divergent recognition rates;
- (2) the persistently high number of applications for international protection in the EU, notwithstanding the decrease in the number of irregular arrivals. This trend, according to the Commission, points towards *multiple applications* by applicants not seeking protection in the first Member State of arrival, thus reflecting the phenomenon of *irregular secondary movements*.
- (3) As a consequence of the previous factors, on the burden on Member States has increased, not only in relation to the processing of asylum applications, but also in relation to the return of migrants who are not in need of protection, thereby contributing to failures of the *return system*.²⁵²

According to the Commission, an overriding aim of the New Pact is to close the gaps between external border controls and asylum and return procedures. This process should be swift and based on clear and fair rules for authorisation to enter and access to the appropriate procedure.²⁵³ The Commission therefore proposes to establish a 'seamless procedure' at the border, applicable to all non-EU citizens attempting to cross without authorisation. This would include a pre-entry screening, an asylum procedure and, where applicable, a swift return procedure, with the aim of integrating processes which are currently separate.²⁵⁴ In particular, the 'seamless procedure' is intended to create a connection between the asylum and return procedures that are carried out at the external border (referred to as the asylum border procedure and the return border procedure) in order to quickly assess asylum requests that are abusive or inadmissible.²⁵⁵

The key elements of the amended APR proposal as compared to the initial proposal for an Asylum Procedure Regulation (2016 APR proposal)²⁵⁶ are described and analysed in this chapter. The amended APR proposal is to be seen in connection with other elements of the CEAS reform package from 2016

²⁵¹ See Chapter 2, section 2.2.

²⁵² Amended APR proposal, COM(2020) 611, Explanatory Memorandum, pp. 1-5; Communication on a New Pact, COM(2020) 609, pp. 1 and 4-5; Commission SWD COM(2020) 207, pp. 49-50 and 72-74.

²⁵³ Communication on a New Pact, p. 4.

²⁵⁴ *Ibid.*

²⁵⁵ Recital 40 of the amended APR proposal; Commission SWD, p. 72. Notably, the Commission here also refers to requests lodged by applicants from 'low recognition rate countries', cf. *infra*, subsections 4.1.2(c), 4.2.1 and 4.2.3(b).

²⁵⁶ Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467.

and with the additional legislative proposals accompanying the Pact. The close link between the amended APR proposal and the proposal for a Screening Regulation is further highlighted in subsection 4.1.2.²⁵⁷

4.1.2. Analysis of key legal changes

a) New pre-entry phase

As mentioned above, the amended APR proposal aims to make targeted amendments to the 2016 APR proposal to put in place, together with the proposed Screening Regulation and the recast Return Directive, a **'seamless link' between all stages of the migration process** from arrival to processing of asylum requests and granting of international protection or, where applicable, the return of those not in need of protection.²⁵⁸

To that aim, the Commission proposes to create a **new pre-entry phase "consisting of a screening, a more developed accelerated procedure and a border procedure for asylum and return"**.²⁵⁹

The interconnectedness between provisions included in the proposed Screening Regulation, the amended APR proposal (together with the original 2016 APR proposal), and the 2018 proposal on a recast Return Directive, may result in the creation of border procedures essentially comprising or merging all these elements, depending on the legal and organisational modalities of Member States' implementation. *De facto* integration of the various procedural steps is in line with the intention of the Commission to create **a connection between the asylum and return procedures at the external border**.²⁶⁰

Regardless of the specific organisational setup at the national level, the pre-entry screening will serve as a procedural device for the allocation of newly arrived TCNs not fulfilling the entry conditions into one of the following three channels:²⁶¹

- Refusal of entry (on the basis of Article 14 SBC);
- Return procedure;
- **Asylum border procedure**
 - determining either the inadmissibility of the application or providing for an accelerated examination of its merits, followed by
 - **Return border procedure** (as an integral part of the integrated border procedure), if an application in the context of the asylum border procedure is rejected as inadmissible, unfounded, or manifestly unfounded, or
- The ordinary asylum procedure for examining applications for international protection.

²⁵⁷ Proposal for a Screening Regulation, COM(2020) 612. The proposal is analysed *supra*, Chapter 3.

²⁵⁸ Amended APR proposal, Explanatory Memorandum, p. 12.

²⁵⁹ Amended APR proposal, Explanatory Memorandum, p. 12. According to Article 41.2 of the amended APR proposal, when the border procedure is applied, decisions can be taken on the following: 1) the inadmissibility of an application in accordance with Article 36 of the 2016 APR proposal; 2) the merits of an application in an accelerated examination procedure in the cases referred to in Article 40.1. of the same proposal. This provision should be read in conjunction with Article 40.1 2016 APR proposal, which made the use of the accelerated examination procedure mandatory for the cases listed in that Article.

²⁶⁰ Commission SWD, pp. 42-44 and 72. See also interview – Commission 1, and interview – Member State 2.

²⁶¹ See Chapter 3, section 3.1.1., point d.

The second of the above-mentioned procedural channels (asylum-return border procedure) is described and analysed in the following subsections 4.1.2 (b)-(f).

b) Mandatory application of the asylum border procedure

Whereas the 2016 APR proposal would leave Member States the option to apply the border procedure to take decisions on the admissibility of asylum applications as well as the merits of applications subject to the accelerated examination procedure,²⁶² the amended APR proposal entails **mandatory application of the border procedure for three categories of cases subject to an accelerated examination**. Specifically, Member States will have the obligation to apply the asylum border procedure if:

- 1) the applicant has **misled the authorities** by presenting false information or documents, or by withholding relevant information or documents with respect to their identity or nationality that could have had a negative impact on the decision;
- 2) the applicant may, for serious reasons, be considered a **danger to the national security or public order** of the Member States;
- 3) the applicant is from a third country for which the **share of positive asylum decisions** in the total number of decisions is 20% or lower.²⁶³

In addition, the amended APR proposal **will extend the geographical scope of the asylum border procedure**, as compared to both the 2013 recast APD and the 2016 APR proposal. It is proposed to keep applicants subject to the asylum border procedure **at or in the proximity of the external border or transit zone**.²⁶⁴ Member States are supposed to set up the necessary facilities where they expect to receive the most applications falling within the scope of the border procedure, and will retain discretion in deciding at which specific locations such facilities should be set up at the external border.²⁶⁵

It is further proposed that Member States shall have the possibility to designate **other locations within the territory** for the accommodation of applicants, on a temporary basis and for the shortest time necessary, in situations where the capacity of the locations notified to the Commission is 'temporarily insufficient' to process the mandatory examinations in the border procedure. Thus, the amended APR proposal will lower the current threshold for moving the border procedure to other locations and, at the same time, leave to the discretion of Member States as to the choice of the location of such alternatives within the entire territory.²⁶⁶

²⁶² Article 41(1) of the 2016 APR proposal.

²⁶³ Article 41(3) of the amended APR proposal, cf. Article 40(1)(c), (f) and (i) of the 2016 APR proposal, respectively. The provision in Article 40(1)(i) was not included in the 2016 APR proposal but will be inserted according to the amended APR proposal, see *infra* subsection 4.1.2(c).

²⁶⁴ Article 41(13) of the amended APR proposal.

²⁶⁵ Amended APR proposal, recital 40c, and Explanatory Memorandum, p. 15.

²⁶⁶ Article 41(14) of the amended APR proposal, cf. Article 43(3) of the recast APD ("impossible in practice [...] normally at locations in proximity to the border or transit zone") and Article 41(4) of the 2016 APR proposal ("difficult in practice [...] at locations in proximity to the border or transit zone").

c) Scope of the accelerated examination procedure

Under the amended APR proposal, the proposed mandatory application of the asylum border procedure is linked to the inclusion of a **new ground for accelerating the examination of the merit of an application for international protection**.²⁶⁷ In addition to the eight grounds under which the accelerated examination procedure would be compulsory included in the 2016 APR proposal,²⁶⁸ the proposal under consideration establishes that Member States shall accelerate the examination of the merits of an application for international protection in cases where **the applicant is from a third country for which the proportion of decisions granting international protection applications is 20% or lower, according to the latest available yearly EU-wide average Eurostat data**.²⁶⁹

Exceptions to this rule shall be made if:

- 1) a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data;
- 2) 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.

As discussed in point (b) above, the new acceleration logic is among those grounds resulting in the mandatory allocation of a case to the asylum border procedure. As a consequence, this amendment is directly linked to an **expanded use of the asylum border procedure** proposed by the Commission in the amended APR proposal.²⁷⁰

d) Integrated procedure on asylum and return

As part of the strategy to secure swift return procedures, the amended APR proposal provides for an **integration of asylum and return decisions**. According to the Commission, targeted amendments to its 2016 APR proposal are necessary to “prevent migrants from delaying procedures for the sole purpose of preventing their removal from the Union and misusing the asylum system”.²⁷¹ To that end, the measures proposed are described below.

The newly included Article 35a provides that in all cases where an asylum application is rejected as inadmissible, unfounded, or manifestly unfounded with regard to both refugee status and subsidiary protection status, Member States will issue a return decision respecting the recast Return Directive. This return decision shall be issued either as part of the decision rejecting the application for protection or

²⁶⁷ Article 41(3), cf. Article 40(1)(i) of the amended APR proposal.

²⁶⁸ Article 40(1)(a)-(h) of the 2016 APR proposal.

²⁶⁹ Article 40(1) of the 2016 APR proposal, as amended by no. 14 of the amended APR proposal, adding Article 40(1)(i). A similar provision will be inserted as Article 40(5)(c) concerning unaccompanied minor applicants, see *infra*, subsection 4.2.3(c)). The country of origin is defined by reference to the applicant's nationality or, in the case of a stateless person, the country of former habitual residence.

²⁷⁰ cf. *supra*, subsection 4.1.2 (b).

²⁷¹ Amended APR proposal, p. 17.

in a separate act. In the latter case, it shall be issued at the same time and together with the decision rejecting protection.²⁷²

As an additional measure to ensure that the return procedure is not unnecessarily delayed and to reduce the risk that rejected asylum applicants abscond or prevent their removal, the amended APR proposal will establish a combined remedy for both asylum and return decisions. Thus, it is proposed to have an **appeal procedure for both asylum and return decisions** before the same court or tribunal within the same judicial proceedings and time limits.²⁷³ At the same time, it will be specified that all the legal effects of a return decision shall be automatically suspended for as long as the applicant has a right to remain or is allowed to remain in the territory.²⁷⁴

Further, a new **border procedure for carrying out return** is proposed in connection with the rules on the asylum border procedure discussed above. The border procedures for carrying out return, which replaces the procedure included in the 2018 proposal on a recast Return Directive, applies to TCNs whose applications have been rejected in the context of the asylum border procedure.²⁷⁵

e) Limitation of appeal in certain cases

The amended APR proposal will retain the option for Member States to consider an appeal against a decision considering an application for refugee status inadmissible, when the appellant has been granted **subsidiary protection status** offering the same rights and benefits as refugee status under EU and national law.²⁷⁶ While this proposal is in line with the 2013 Asylum Procedures Directive,²⁷⁷ the limitation of appeal in such cases was not included in the 2016 APR proposal.²⁷⁸

In addition, in order to improve the effectiveness of procedures at the external border and to ensure effective returns, the amended APR proposal will allow for **only one level of appeal** in relation to decisions taken in the context of the **border procedure**.²⁷⁹ Thus, Member States shall not offer applicants for protection the possibility to lodge a further appeal against a first appeal decision concerning a rejection decision taken in the asylum border procedure.

f) Limitations of suspensive effect

According to the amended APR proposal, applicants will retain the right to remain on the territory pending the outcome of an appeal, though it is proposed to extend the exceptions from this rule as compared to the current APD.²⁸⁰ In particular, there will be no automatic suspensive effect of appeal against decisions rejecting an application as unfounded or manifestly unfounded, if it falls within the

²⁷² Article 35a of the amended APR proposal.

²⁷³ Article 53(1) of the amended APR proposal, cf. recital 66c and Explanatory Memorandum, p. 17.

²⁷⁴ Article 54(1) of the amended APR proposal.

²⁷⁵ Article 41a of the amended APR proposal.

²⁷⁶ Article 53(2) of the amended APR proposal.

²⁷⁷ Article 46(2), second sub para. recast APD. For an interpretation of this provision, see CJEU, Case C-662/17, *E.G.*, judgment of 18 October 2018.

²⁷⁸ Cf. Article 53(2) of the 2016 APR proposal.

²⁷⁹ Article 53(9) and recitals 65 and 66b of the amended APR proposal.

²⁸⁰ Cf. Article 46(5)(a)-(d) of the recast APD.

accelerated examination procedure or the asylum border procedure²⁸¹ as well as decisions rejecting a **subsequent application as unfounded or manifestly unfounded**.²⁸²

There will also be no automatic suspensive effect of appeals against decisions to **withdraw protection**, either on grounds of exclusion from such status, or because the beneficiary is considered a danger to the security of a Member State, or if she/he has been convicted of a particularly serious crime.²⁸³

It is further proposed to limit the possibility to request **interim measures** in cases that are exempt from the automatic suspensive effect as described above. If the appeal does not automatically entitle the applicant to remain on the territory pending the outcome of the appeal case, it will be possible for the appeal court or tribunal to decide that the applicant is allowed to remain, either upon request or *ex officio*.²⁸⁴ In the former situation, the amended APR proposal will introduce a time limit of at least 5 days for the applicant's request.²⁸⁵ The applicant shall have the right to remain until the time limit has expired and, if having requested interim measures, pending the decision of the court or tribunal on that request.²⁸⁶

Importantly, the amended APR proposal will generally tighten the rules concerning **subsequent applications**. Member States may provide for an exception to the right to remain on the territory where a first subsequent application has been made merely in order to delay or frustrate the enforcement of a return decision that would result in the applicant's imminent removal, provided that it is immediately clear to the determining authority that no new elements have been presented to support the subsequent application.²⁸⁷

In case of an appeal against a subsequent application, Member States will be allowed to refuse an applicant the temporary right to remain – pending a court's or tribunal's decision on a request for interim measures – where the appeal has been made merely in order to delay or frustrate the enforcement of a return decision which would result in the applicant's imminent removal, under similar conditions as those referred in the previous paragraph.²⁸⁸

²⁸¹ Article 54(3)(a) of the amended APR proposal.

²⁸² Article 54(3)(d) of the amended APR proposal.

²⁸³ Article 54(3)(e) of the amended APR proposal.

²⁸⁴ Article 54(4) of the amended APR proposal.

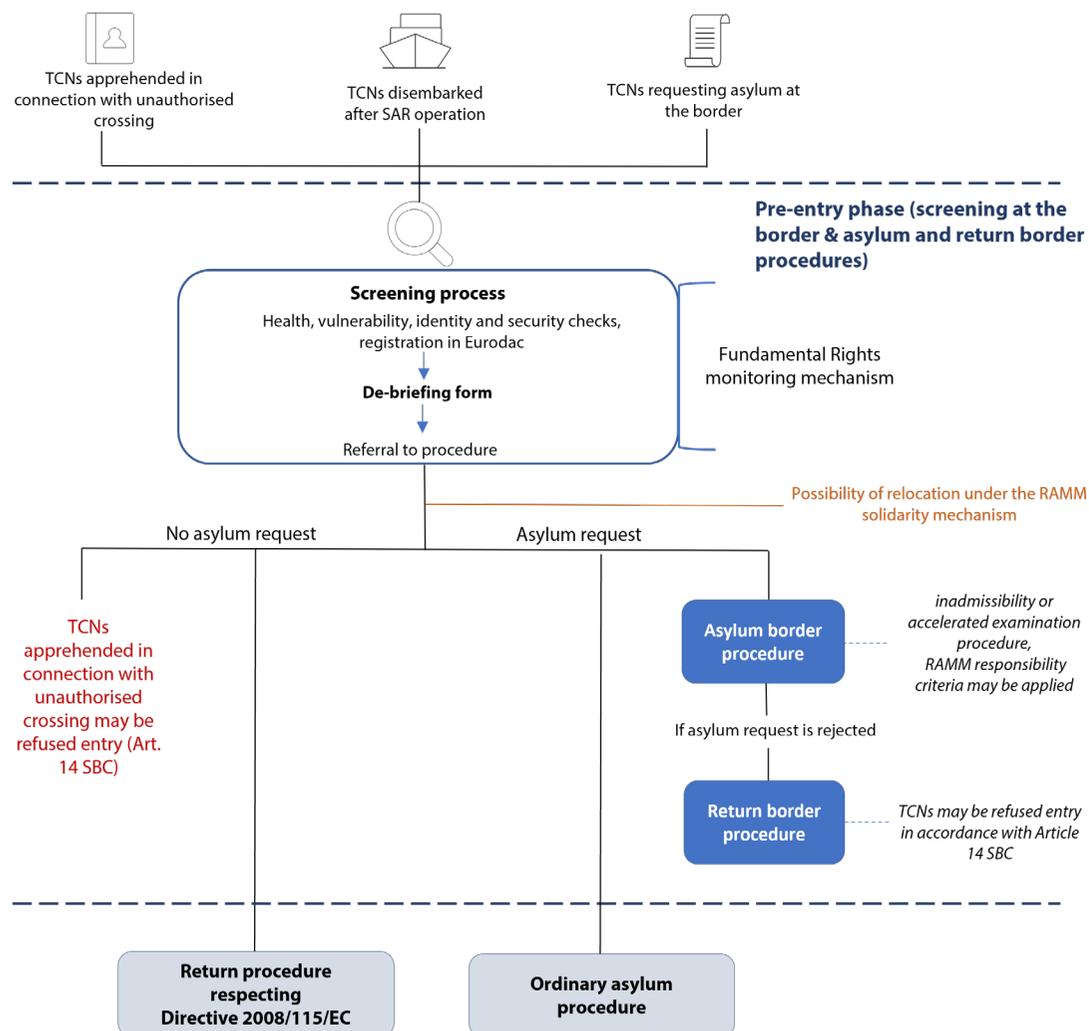
²⁸⁵ Article 54(5)(a) of the amended APR proposal.

²⁸⁶ Article 54(5)(d) of the amended APR proposal.

²⁸⁷ Article 43(c) of the amended APR proposal. However, this provision can be applied only if the subsequent application has been lodged within one year of the determining authority's decision on the first application.

²⁸⁸ Article 54(6) of the amended APR proposal, referring to Article 42(4) of the 2016 APR proposal. Cf. Explanatory Memorandum, pp. 17 and 19.

Figure 1: Pre-entry phase under the New Pact (screening at the border and asylum and return border procedure)



Length of procedures:

- Screening: **5 days**. In exceptional circumstances, where a disproportionate number of TCNs needs to be screened, the period of 5 days may be extended by a maximum of an **additional 5 days**
- Asylum Border procedure: **12 weeks**
- Return Border procedure: **12 weeks**



Detention/restrictions freedom of movement:

- No authorisation of entry into the territory during the screening at the external border and the asylum and return border procedures (fiction of 'non-entry').
- Applicants shall be kept at or in the proximity of the external border or transit zones.
- Member States may apply **detention** to prevent an applicant from entering the territory after an individual assessment.



Mandatory asylum border procedure:

- Member States are obliged to apply the asylum border procedure if the applicant:
 - poses a risk to national security and public order
 - Presents false information or withholds relevant information
 - Is from a third country with an EU-wide average recognition rate of 20% or lower
- Exceptions:
 - unaccompanied minors and minors under the age of 12 and their family members, unless they are considered a danger to national security
 - Member States may decide not to apply the border procedure to applicants from countries where readmission is likely to be unsuccessful (in accordance with the procedure laid down in Art. 25a of the Visa Code).

4.2. Critical assessment

4.2.1. Legal coherence

Not all the key elements of the amended APR proposal described above can be considered as reflecting fundamental changes of law and policy, as some of the proposed rules are of a more specific or technical nature. It is here assumed that the most significant changes are those pertaining to:

- a) New pre-entry phase;
- b) Mandatory application of the asylum border procedure in certain cases, in combination with the expanded scope of the accelerated examination procedure;
- c) Integration of asylum and return procedures.

a) New pre-entry phase

As regards the proposed creation of a new **pre-entry phase**, the asylum and return border procedures under the amended APR proposal need to be analysed in connection with the proposed Screening Regulation. According to the amended APR proposal, the asylum border procedure may be applied by Member States following the screening procedure, provided that the applicant has not yet been authorised to enter Member States' territory and does not fulfil the conditions for entry as set out in the Schengen Borders Code.²⁸⁹

As underlined in chapter 3 above, the authorities responsible for screening shall point to any elements that seem at first sight relevant to refer TCNs concerned into the accelerated examination procedure or the border procedure.²⁹⁰ Since Member States may apply the border procedure when taking decisions on the inadmissibility of an application as well as the merits of an application being examined in an accelerated procedure²⁹¹ the actual **design and implementation of the pre-entry screening appears decisive to the further effects of the amended APR proposal.**²⁹²

b) Mandatory application of the asylum border procedure

The significant change concerning the **mandatory application of the asylum border procedure** is particularly clear when considered in combination with the proposed establishment of an additional acceleration ground, in the case of applicants coming from countries with an average low recognition rate.²⁹³ While this intuitively appears to enhance the efficiency of the examination procedure, **the exceptions to the proposed new acceleration ground may in reality prove to be counter-productive to this same aim.**

Whereas the first exception, referring to a 'significant change' in the country concerned, can be applied on the basis of general country of origin information, the second exception from the use of accelerated examination depends on an assessment of the applicant's personal circumstances. Both the proposed exceptions may therefore seem to constitute a **legal contradiction** insofar as such assessments seem

²⁸⁹ Article 41(1) of the amended APR proposal, cf. Article 6 of SBC Regulation 2016/399.

²⁹⁰ Article 14(2) of the proposal for a Screening Regulation.

²⁹¹ Cf. Article 41(2) of the amended APR proposal.

²⁹² See analysis of the proposal for a Screening Regulation *supra*, chapter 3.

²⁹³ Article 40(1)(i) of the 2016 APR proposal, as inserted by the amended APR proposal. See *supra*, subsection 4.1.2(c).

difficult to reconcile with the rationale of the accelerated examination procedure. In addition, it can be questioned whether the setup of the asylum border procedure will provide sufficient safeguards and legal certainty for applicants. Assessing individual applicants' needs for protection as compared to the statistical average may be such a **complex and time-consuming exercise** as to make the effective application of this exception in the accelerated border procedure illusory.

The proposed new acceleration ground is presented in the Explanatory Memorandum as being based on "more objective and easy-to-use criteria" and it is suggested that the proposed percentage is justified by the "significant increase in the number of applications made by applicants coming from countries with a low recognition rate, lower than 20%" and "hence the need to put in place efficient procedures to deal with those applications, which are likely to be unfounded".²⁹⁴ Although the proposed percentage threshold for considering an application unfounded might be considered somewhat arbitrary, it reflects the framing of the border procedure as an important "migration management tool", a view arguably held by Member States in favour of the mandatory application of the border procedure. From this migration management perspective, the asylum border procedure is particularly useful where a large share of the asylum seekers is coming from countries with a low recognition rate.²⁹⁵

According to the Commission, the border procedure can increase the chances of successful returns directly from the external border within a short period of time after arrival, due to the swifter return procedure and the stronger links between asylum and return. This is assumed to be able to decrease the risk of applicants absconding or performing unauthorised movements within EU territory.²⁹⁶ However, some Member States remain sceptical regarding the obligation to apply the asylum border procedure, pointing to various **challenges in applying that procedure systematically**, including difficulties in "quickly assessing whether an applicant could qualify for examination" and the need in the meantime to keep the applicant at the border.²⁹⁷

Even considering that the purpose of the joint asylum and return border procedure is to quickly assess 'abusive asylum requests' or asylum requests made at the external border by applicants with a low chance of receiving protection,²⁹⁸ it remains doubtful whether this purpose **necessitates the insertion of the proposed additional acceleration ground based on the recognition rate**. This quantitative criterion may appear superfluous in light of the currently existing and the previously proposed grounds for acceleration of the examination procedure.²⁹⁹ Importantly, these grounds include reference to the concept of '**safe country of origin**' which will, according to the 2016 APR proposal, be subject to designation at EU level as well as national level.³⁰⁰ In addition to the problem of legal coherence, the

²⁹⁴ Amended APR proposal, Explanatory Memorandum, pp. 13-14.

²⁹⁵ *Ibid.*, pp. 4 and 9.

²⁹⁶ *Ibid.*, p. 9. See also Commission SWD, pp. 42-44 and 72.

²⁹⁷ Amended APR proposal, Explanatory Memorandum, p. 9.

²⁹⁸ *Ibid.*, p. 4.

²⁹⁹ Article 31(8)(a)-(j) recast APD and Article 40(1)(a)-(h) of the 2016 APR proposal, respectively.

³⁰⁰ Article 40(1)(e), cf. Articles 47, 48 and 50 of the 2016 APR proposal.

proposed new acceleration ground also raises serious questions pertaining to compliance with fundamental rights.³⁰¹

In order to have the full picture of the legislative instruments accompanying the New EU Pact, it may be relevant to note that the Commission's emphasis on a 'low recognition rate' and the alleged link to 'abusive asylum requests'³⁰² appears particularly problematic insofar as the expanded use of border procedures as foreseen in the amended APR proposal may become **dramatically amplified in crisis situations**. According to the proposed Crisis and *Force Majeure* Regulation, Member States will have the option to apply the border procedure to persons coming from third countries for which the EU-wide average recognition rate is above 20%, but lower than 75%.³⁰³ The problem of legal coherence is closely connected to an even more serious risk of violating fundamental rights insofar **as it cannot meaningfully be argued that applicants with a recognition rate up to 75% have a low chance of receiving protection, even less that their asylum requests are abusive**. The fact that the border procedure under the proposed rule will be optional does not appear to mitigate the lack of coherence or its related fundamental rights concern.

c) Integration of asylum and return procedures

Finally, the proposed obligation on Member States to issue a **return decision in combination with the rejection of an application for protection** does not seem, in and of itself, to raise problems in terms of legal coherence. Notably, it is stipulated that return decisions shall respect the Return Directive.³⁰⁴ As discussed in section 4.2.3 below, however, this proposal has been criticised from a fundamental rights perspective.³⁰⁵

It is further relevant to mention here that, presumably as a consequence of the proposed 'integration' or 'hybridisation' of asylum and return procedures, the amended APR proposal refers not only to Article 78(2)(d) TFEU, but also to Article 79(2)(c) TFEU as the legal basis of the instrument. This gives rise to certain coherency issues both in terms of regulatory principles in EU law and in the case of concrete questions of interpretation for which the legal basis may potentially be decisive in the identification of the objective of the relevant APR provision, and thus for its precise meaning and balancing towards other EU policy objectives (For more details see chapter 8, section 8.1).

4.2.2. Solidarity

Due to the mandatory inadmissibility rules that would have to be applied before the general criteria for determining responsibility for the examination of an application under the proposed Dublin Regulation, the 2016 APR proposal would indirectly impact responsibility sharing among Member States.³⁰⁶ The amended APR proposal will apparently not produce a similar impact. The provisions included in the proposal will not directly impact on the distribution of responsibility for the

³⁰¹ See *infra*, subsection 4.2.3(b).

³⁰² Amended APR proposal, Explanatory Memorandum, p. 4.

³⁰³ Article 4 of the Proposal for a Crisis and Force Majeure Regulation, COM(2020) 613. See *infra*, section 7.

³⁰⁴ Article 35a of the amended APR proposal.

³⁰⁵ ECRE, *Comments on the Amended Proposal for an Asylum Procedures Regulation. Border asylum procedures and border return procedures*, December 2020, p. 3 and pp. 35-36. See *infra*, section 4.2.3.

³⁰⁶ Cf. Article 36 of the 2016 APR proposal, taken together with Article 3(3)-/5) of the proposal for Dublin IV Regulation, COM(2016) 270.

examination of applications for protection among Member States, and no similar indirect effect seems to result from links between the proposed successor to the Dublin Regulation – the RAMM proposal – and the 2016 APR proposal or the amended APR proposal.³⁰⁷

Nonetheless, certain provisions and procedural devices included in the amended APR proposal seem likely to have a significantly stronger impact on certain Member States than on others. This is particularly the case for the proposed **provisions on mandatory application of the asylum border procedure that will become directly connected to the return border procedure**.³⁰⁸ Given that such procedures will be applied exclusively at the external borders of the EU, due to the intrinsic connection between the asylum border procedure and the pre-entry screening at external borders,³⁰⁹ **they will necessarily affect ‘frontline’ Member States, especially those with long external borders.**

In addition to the **administrative burdens** of examining applications for protection in border procedures, such Member States will also have to set up and run the necessary **facilities for the reception of asylum seekers**. Reception conditions in such facilities are likely to amount to **de jure or de facto detention**.³¹⁰ Due to the narrow link between rejection of applications and return decisions in the context of border procedures, these same ‘frontline’ Member States may also have to carry out a significant number of **returns** of unsuccessful applicants.

This may altogether be considered as an inevitable consequence of the obligation incumbent on ‘frontline’ Member States to manage the external borders and control the entry of TCNs into EU territory. On the other hand, the amended APR proposal does not address this as a specific responsibility sharing issue in light of Article 80 TFEU, neither in terms of financial implications nor by linking it to relocation or other solidarity mechanisms under the New EU Pact (see further discussion in chapter 8). At the same time, this issue highlights an inherent tension in the amended APR proposal between time limits in border procedures and the duration of detention or other restrictions of asylum seekers’ movement, which raise specific issues from a fundamental rights perspective as discussed in the following section.

4.2.3. Fundamental rights compliance

a) Pre-entry phase: detention and access to protection

As described above in section 4.1.2 and discussed in section 4.2.1, the legislative instruments accompanying the New EU Pact will create a new pre-entry phase, consisting of the screening of TCNs at the border as well as the asylum and return border procedure. While the former instrument is analysed in chapter 3 of this study, it is relevant here to cast light on two fundamental rights’ issues in connection with the amended APR proposal.

³⁰⁷ RAMM Proposal, COM(2020) 610. See *infra*, chapter 6.

³⁰⁸ Articles 41(3) and 41a of the amended APR proposal. See also Article 35a on the combined issue of return decisions and decisions rejecting the application for protection.

³⁰⁹ Cf. Article 41(1) of the amended APR proposal, referring to the screening procedure in accordance with the proposed Screening Regulation.

³¹⁰ Cf. EASO, *Border Procedures for Asylum Applications in EU+ Countries*, 2020, p. 11; EPRS Study, *Asylum procedures at the border. European Implementation Assessment*, November 2020, pp. 15-17, 42 and 74-84. See also *infra*, subsection 4.2.3(a).

First, since the asylum border procedure is to be applied by Member States following the pre-entry screening – provided that the applicant has not yet been authorised to enter Member States' territory and does not fulfil the entry conditions set out in the Schengen Borders Code –,³¹¹ **applicants will typically be subjected to significant restrictions of movement for the duration of the asylum border procedure.** Such restrictions will normally amount to *de jure* or *de facto* detention, often with an uncertain legal basis in EU law and national law.³¹² In light of recent critical scrutiny of this widespread practice by the European courts³¹³ as well as the European Parliament,³¹⁴ it would seem highly relevant to clarify the relevant legal basis and limit its application in the context of the asylum border procedure. This even more so, given the apparent acceptance by some policymakers of the fact that the legislation proposed under the New EU pact may result in increased detention practices.³¹⁵

Another fundamental rights issue associated with the proposed emphasis on border procedures is that of securing **access to EU territory and to the procedure guaranteeing substantive examination of applicants' need for protection.** This is due to the close linkage and potential *de facto* integration of the pre-entry screening and the asylum and return border procedure. There is ample evidence that fundamental rights are already being undermined and often violated by the denial of access to the asylum procedure at external borders of the EU Member States resulting from summary return to third countries, collective expulsions and lack of procedural protection.³¹⁶ The limited legal clarity and procedural safeguards surrounding the pre-entry screening³¹⁷ would seem to exacerbate the risk of violating not only the CEAS legislative instruments, but also the EUCFR and the ECHR.

b) The asylum border procedure: mandatory application and accelerated examination

In addition to the general considerations above pertaining to the asylum border procedure that will become a core element of the proposed pre-entry phase, the proposed obligation for Member States to apply the asylum border procedure in certain cases of accelerated examination may give rise to specific concerns from a fundamental rights perspective. As described above, under the amended APR proposal, application of the asylum border procedure will be **mandatory in cases falling within the**

³¹¹ Article 41(1) of the amended APR proposal, cf. Article 6 of SBC Regulation 2016/399. Only if the procedure exceeds a period of 12 weeks will the applicant be authorised to enter the territory, with certain exceptions, cf. Article 41(11) and (12) of the amended APR proposal.

³¹² Cf. 2016 APR proposal, Explanatory Memorandum, pp. 15-16; EPRS Study, *Asylum procedures at the border. European Implementation Assessment*, November 2020, pp.15-17 and 76-91; UNHCR, *EU Pact on Migration and Asylum. Practical considerations for fair and fast border procedures and solidarity in the European Union*, 2020, p. 2.

³¹³ See, in particular, CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others*, judgment of 14 May 2020; CJEU, Case C-808/18, *Commission v. Hungary*, judgment of 17 December 2020; ECtHR, *R.R. and Others v. Hungary*, judgment of 2 March 2021.

³¹⁴ European Parliament resolution of 10 February 2021 on Implementation of Article 43 of the Asylum Procedures Directive (P9_TA(2021)0042), paras. 9-14.

³¹⁵ Interview – Commission 1; interview – Commission 2; interview – Member State 1; see for a different position, interview – Commission 3.

³¹⁶ Cf. CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others*, judgment of 14 May 2020; CJEU, Case C-808/18, *Commission v. Hungary*, judgment of 17 December 2020; ECtHR, *Sharifi and Others v. Italy and Greece*, judgment of 21 October 2014; ECtHR, *Ilias and Ahmed v. Hungary*, Grand Chamber judgment of 21 November 2019; ECtHR, *M.K. and Others v. Poland*, judgment of 23 July 2020; ECtHR, *Shahzad v. Hungary*, judgment of 8 July 2021; ECtHR, *D.A. and Others v. Poland*, judgment of 8 July 2021.

³¹⁷ Cf. Jens Vedsted-Hansen, "Admissibility, Border Procedures and Safe Country Notions", in S. Carrera and A. Geddes (eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees*, EUI 2021, pp. 170-77.

new acceleration ground based on the recognition rate for applicants from the relevant country of origin.³¹⁸

An exception to this mandatory ground for accelerating the examination, and hence from the border procedure, shall apply if the applicant belongs to a category of persons for whom the recognition rate of 20% or lower cannot be considered as representative for their protection needs. Since this exception refers to the applicant's personal circumstances, it appears **difficult to reconcile the exception with the application of an accelerated border procedure**. The reference in the preamble of the proposal to such specific circumstances potentially being "due to a specific persecution ground"³¹⁹ may suggest that the proposed exception would allow for the exemption of applicants from the mandatory accelerated border procedure **on a group basis or at least a *prima facie* basis**, such as on the basis of the nationality of the applicant.

However, **individual protection needs may differ from those reflected in the recognition rate for reasons other than a 'specific persecution ground'**. Neither this criterion, nor any other reason indicating that a person may need protection due to circumstances that are atypical for the statistical average, are mentioned in the proposed wording of the exception from the acceleration ground. The Explanatory Memorandum is also silent as to the meaning and scope of this exception criterion. In addition, it is unclear whether exception from the proposed new acceleration ground will be applicable to situations falling outside the definition of refugee status in the Refugee Convention and the Qualification Directive (or the proposed Qualification Regulation). In other words, **it appears entirely uncertain whether and under which criteria applicants who may be eligible for subsidiary protection status would be exempted from the proposed acceleration ground based on the average recognition rate**.

In addition to this substantive uncertainty, serious doubts can be raised as to whether the asylum border procedure can provide adequate safeguards in this regard. The assessment of individual applicants' protection needs as compared to the statistical average may be a complex and time-consuming exercise that may result in this **exception becoming illusory if applied in the accelerated asylum border procedure**. Deciding the protection needs of an individual applicant will often require more time and administrative resources than allowed for within the normal duration of the asylum border procedure, being limited to 12 weeks including any possible appeal procedure.³²⁰ This seems well reflected in the view held by Member States that are sceptical towards a mandatory asylum border procedure, according to which there will be "difficulties in quickly assessing whether an applicant could qualify for examination".³²¹

As mentioned above, the proposal for an additional acceleration ground may appear superfluous given the currently existing as well as the previously proposed grounds for accelerating the examination procedure.³²² In any event, the proposed acceleration ground based on the recognition rate for

³¹⁸ Article 41(3), cf. Article 40(1)(i) of the amended APR proposal. See *supra*, subsections 4.1.2(c) and 4.2.1(b).

³¹⁹ Recital 39a APR, as inserted by the amended APR proposal.

³²⁰ Article 40(11) of the amended APR proposal.

³²¹ Amended APR proposal, Explanatory Memorandum, p. 9.

³²² Cf. Article 31(8)(a)-(j) recast APD and Article 40(1)(a)-(h) of the 2016 APR proposal.

applicants from the relevant country of origin seems to involve a **significant risk of damage to the quality of asylum decisions**. It is generally recognised that the special circumstances prevailing in border procedures are structurally linked to the weakening of procedural safeguards, potentially leading to the reduction of the quality of decisions taken on applications for protection.³²³ The proposal to combine mandatory application of asylum border procedures with accelerated examination based on a purely statistical ground appears to exacerbate structural weaknesses.

In sum, **the introduction of an exemption to the application of the new acceleration ground** based on an unclear notion of the existence of 'specific persecution grounds', while leaving the assessment of actual protection needs in individual applicants' circumstances undefined, **does not seem to be an effective way of modifying the risk of erroneous decisions in this context**. The combination of the proposed new acceleration ground and the mandatory application of the asylum border procedure in such cases therefore seems to imply the serious risk of violating the fundamental rights protected by Articles 18, 19 and 47 EUCFR.

c) Protection of children's rights

In line with the current standards on asylum procedures and on detention of applicants for international protection,³²⁴ the 2016 APR proposal provides for safeguards for minor applicants in general and for unaccompanied minors in particular.³²⁵ This includes, in the case of the latter, modifications of the general scope of application of the accelerated examination procedure – which will be optional for unaccompanied minor applicants – and the border procedure.³²⁶

As to the **asylum border procedure**, the amended APR proposal includes a special safeguard for unaccompanied minor applicants as well as for minors below the age of 12 and their family members. For these categories of applicants, the border procedure may only be applied in cases where the applicant – or, in the case of families, any member of the family – may for serious reasons be considered to be a danger to the national security or public order, or the applicant, or any member of the family, has been forcibly expelled for serious reasons of public security or public order.³²⁷ Given the likelihood that detention *de facto* or *de jure* will take place in connection with the border procedure, this safeguard will similarly reduce the possibility of minor applicants being held in detention for the duration of the asylum border procedure.³²⁸ **This constitutes an important limitation of the risk of violating children's right not to be exposed to deprivation of liberty and, in case of actual detention, to inhuman detention conditions**. Such practices have frequently been held by the European Court of Human Rights not to be in conformity with fundamental rights, both the right to liberty (Article 5 ECHR),

³²³ See in particular, EPRS Study, *Asylum procedures at the border. European Implementation Assessment*, November 2020, pp. 98-107.

³²⁴ Recital 33 and Articles 7, 15 and 25 of the recast APD; recital 22 and Article 11, cf. Articles 23 and 24 of the recast Reception Conditions Directive.

³²⁵ Recitals 20, 28, 29, 39 and 40 and Articles 21, 22, 24, 30-32 and 40-41 of the 2016 APR proposal.

³²⁶ Articles 40(5) and 41(5) of the 2016 APR proposal, respectively.

³²⁷ Article 41(5) of the amended APR Proposal, cf. Explanatory Memorandum, pp. 11 and 14-15, and Article 40(5)(b) of the 2016 APR proposal.

³²⁸ See also recital 40(h) of the amended APR proposal, referring to the recast Return Directive as regards the return border procedure.

the prohibition of inhuman and degrading treatment (Article 3 ECHR) and in some instances also the right to respect for family life (Article 8 ECHR).³²⁹

Notwithstanding the limited application of the asylum border procedure, it should be noted that the proposed **new ground for accelerating the examination procedure**, based on the average recognition rate for applicants from the relevant country of origin, will apply also to unaccompanied minor applicants for protection.³³⁰ The fact that the rule on accelerated examination will be optional for such applicants does not seem to make it less problematic from a fundamental rights perspective. Thus, the substantive uncertainty as to the scope of the exception from this acceleration ground, pointed out in subsection 4.2.3(b), is equally relevant to this category of applicants. As regards the procedural safeguards, these applicants will, only in the situations detailed above, be subjected to the particular limitations within the asylum border procedure. Nonetheless, **the very fact of being an unaccompanied minor applicant may, in itself, create serious, if not insurmountable, difficulties to provide the information necessary to demonstrate that one of the exceptions from the acceleration ground applies in the individual case.**

d) Protection against *refoulement*: return decisions and limitations of suspensive effect

The proposed requirement for Member States to issue a return decision, in combination with the rejection of an application for protection, seems compatible with fundamental rights insofar as the examination of the application and the decision on applicants' protection needs is conducted in full accordance with the substantive and procedural standards of the CEAS instruments and the EUCFR provisions relating to asylum, especially Articles 4, 18, 19 and 47 EUCFR.

However, the amended APR proposal has been criticised for disregarding the fact that returning an applicant in need of protection may violate the principle of *non-refoulement* in light of Articles 2 or 3 ECHR and Articles 2 or 4 EUCFR, even if the return decision is based on a correct assessment of the applicant's protection status under EU law.³³¹ This criticism seems to have a sound basis, given the exclusion clauses and substantive limitations in the Qualification Directive. Although it may be formally accommodated by the stipulation that return decisions shall respect the Return Directive,³³² it would be relevant to emphasise *non-refoulement* obligations in the context of the proposed link between asylum and return decisions.

Finally, while the proposed **limitations on the suspensive effect of appeals** in certain cases do not formally deviate from the requirement of effective remedies under Article 47 EUCFR and Article 13 ECHR, they nonetheless **raise concern as to whether this requirement will be effectively respected.**

³²⁹ See, as significant examples concerning unaccompanied minors, ECtHR, *Mubilanzila Mayeka and Kanika Mitunga v. Belgium*, judgment of 12 October 2006; ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, judgment of 22 November 2016; ECtHR, *Moustahi v. France*, judgment of 25 June 2020; concerning accompanied migrant minors, ECtHR, *Muskhadzhiyeva and Others v. Belgium*, judgment of 19 January 2010; ECtHR, *Popov v. France*, judgment of 19 January 2012; ECtHR, *A.B., A.M. and Others v. France*, judgments of 12 July 2016; ECtHR, *M.D. and A.D. v. France*, judgment of 22 July 2021.

³³⁰ Article 40(5)(c) of the amended APR proposal. See *supra*, subsections 4.1.2(c), 4.2.1(b) and 4.2.3(b).

³³¹ ECRE, *Comments on the Amended Proposal for an Asylum Procedures Regulation. Border asylum procedures and border return procedures*, December 2020, p. 3 and pp. 35-36.

³³² Article 35a of the amended APR proposal, apparently including reference to Article 5 of the Return Directive on *non-refoulement* and other fundamental rights.

In cases where the appeal has no automatic suspensive effect, it shall be for the appeal court or tribunal to decide, either upon request or *ex officio*, whether the applicant shall be allowed to remain pending the outcome of the appeal.³³³ Nonetheless, it might enhance effectiveness of this safeguard if a **general non-refoulement caveat was inserted in the relevant APR provisions** (i.e., Article 54(4) and (5)), in line with the reference to the principle of *non-refoulement*, in the context of limiting the suspensive effect in cases of subsequent applications.³³⁴

³³³ Article 54(4) of the amended APR proposal.

³³⁴ Article 54(6) of the amended APR proposal.

5. AMENDED PROPOSAL FOR A EURODAC REGULATION

5.1. Legal mapping

5.1.1. Context and scope

Eurodac is the first Automated Fingerprint Identification System (AFIS) established at the EU level. It has been operational since 2003, based on Article 15 of the Dublin Convention, to assist in the determination of the Member State responsible for examining an application for international protection.³³⁵ During negotiations on the establishment of Eurodac, but also in the context of later amendments, the objectives and content of Eurodac have always been subject to debate.

A first amendment to the original purpose of Eurodac was provided with its extension to cover 'irregular migrants' on the basis of the Protocol to the Eurodac Convention, later included in the Eurodac Regulation.³³⁶ This amendment, incorporated in 2000 in EU law,³³⁷ allowed Member States to record, transmit, and match the fingerprints of those regarded as 'irregular' border-crossers and those found on European territory 'illegally'. This addition was presented by some negotiators as a necessary step to "curb the entry into the EU of illegal refugees" and to deal with the "influx of migrants from Iraq and the neighbouring region".³³⁸ Regulation 603/2013, adopted in 2013, extended the use of Eurodac further, allowing access to the database for law enforcement purposes.³³⁹

In 2016, the European Commission submitted a proposal including a new extension to the scope and use of Eurodac.³⁴⁰ On June 19, 2018, the European Parliament and Council reached a **partial provisional agreement** on that proposal.³⁴¹ The most important amendments, as agreed upon in the provisional agreement, concern the extension on the use of Eurodac data for resettlement purposes, a separate provision on the protection of minors, and changes to provisions related to access to Eurodac for law enforcement purposes as well on transfer of personal data to third countries.³⁴² The 2020

³³⁵ Basis in Convention of 15 June 1990, *OJ C* 25, 1997

³³⁶ Council doc 13673/98 (Presse 427 -G), Council 3-4 December 1998.

³³⁷ Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, *OJ L* 316/1, 15.12.2000.

³³⁸ Points 17 and 46 from the Action Plan of the General Affairs Council, 26 January 1998, Press Release 5271/98.

³³⁹ Regulation (EU) No 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) *OJ L* 180, 29.6.2013. This Regulation entered into force of on 20 July 2015.

³⁴⁰ COM (2016) 272 final, 4.5.2016.

³⁴¹ See for the press release: <https://www.europarl.europa.eu/news/en/press-room/20180618IPR06025/asylum-deal-to-update-eu-fingerprinting-database>. The adoption of this amended proposal was put on hold due to difficulties reaching agreement on other legislative proposals and more in particular on the proposed Dublin IV Regulation. The description in the next sections is based on the table of 21 June 2018 describing the partial provisional agreement of 19 June 2018 and which was published on 22 June 2021 at the Public Register of the European Parliament. See further the Council document 9848/18, 12 June 2018.

³⁴² Other amendments included in the provisional agreement concern the recording of scanned colour copies of identity and travel documents in Eurodac, a provision to ensure that if a person acquires the citizenship of the Member State of origin

proposal builds on the 2016 proposal as amended by the provisional agreement, also adding new elements connecting Eurodac within other proposals of the **New Pact on Migration and Asylum**, including the proposal on a Screening Regulation and the proposal on the Regulation on Asylum and Migration Management (RAMM).³⁴³

Aside from the proposed 2020 amendments, it is important to address the connection between Eurodac and EU regulations on the **interoperability of an EU large-scale database** adopted in May 2019.³⁴⁴ This interoperability framework makes Eurodac part of an integrated information network between existing and future large-scale EU information systems in the AFSJ, which will allow national authorities to check whether information on an individual person is recorded in any of the EU databases that are part of the network (VIS, SIS II, Eurodac, the Entry/Exit System, ETIAS, and ECRIS-TCN).³⁴⁵

5.1.2. Analysis of key legal changes

a) Extending the objectives of Eurodac

The current purpose of Eurodac aims “to assist in determining which Member State is to be responsible pursuant to Regulation 604/2013 for examining an application for international protection lodged in a Member State by a third-country national or a stateless person”. This goal includes determining the implementation of obligations concerning ‘take charge’ and ‘take back’ requests and the transfer of asylum applicants. Fingerprint data and other personal data processed in Eurodac may only be used for the purposes set out in the Eurodac Regulation and Article 34(1) of the Dublin Regulation 604/2013.

The explanatory memorandum of the 2020 proposal is clear on the overall major reform of the Eurodac objectives. According to the Commission, this proposal “aims at transforming Eurodac into a common European database to support EU policies on asylum, resettlement and irregular migration”. Specifically, according to the text of the 2016 proposal, widening the scope of searches to all categories of data, including biometric data, would allow to follow “a pattern of irregular and secondary movements” throughout the EU and establish the identity of persons in the absence of identity documents.³⁴⁶ During the negotiations leading to the 2018 provisional agreement, EU co-legislators agreed on a new objective, namely to use Eurodac for assisting in the application of the rules of the resettlement framework.³⁴⁷

The 2020 proposal adds the following four objectives:

- prevent Assisted Voluntary Return and Reintegration (AVRR) ‘shopping’;

his/her data will be erased “without delay” (instead of “as soon as possible this Member State becomes aware[...]”, and the inclusion of rules concerning the operational management of DubliNet.

³⁴³ COM (2020) 614, 23.09.2020. explanatory memorandum p. 2. On p. 11 the Commission refers to the provisional agreement.

³⁴⁴ Regulation 2019/817 and Regulation 2019/818, OJ EU L 135, 22.05.2019.

³⁴⁵ Access to the network is based on different search mechanisms, including a European Search Portal (ESP) which serves as a ‘message broker’ enabling users to search multiple information systems simultaneously, using both biographical and biometric data.

³⁴⁶ Explanatory memorandum to 2016 proposal, COM (2016) 272, p. 13.

³⁴⁷ This is based on Article 1 (1) (b) and 1 (2) and explanation on p. 41 of the 2020 proposal (Commission) following the partial provisional agreement of 19 June 2018, see for the press release: <https://www.europarl.europa.eu/news/en/press-room/20180618IPR06025/asylum-deal-to-update-eu-fingerprinting-database>.

- assist in the correct identification of TCNs pursuant to Article 20 of the Interoperability Regulation;
- support to the European Travel Information and Authorisation System (ETIAS) objectives;
- support to the Visa Information System (VIS) objectives.

Furthermore, to address the issue of onward movements, the 2020 proposal allows the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) to draw up statistics using data from Eurodac in order to count applicants, other than applications for international protection. This amendment aims at preventing double counting and would allow for more reliable data on the scale of secondary movements.³⁴⁸

b) Addition of new categories of persons and lowering of age

Eurodac currently only stores data on persons of 14 years or older who apply for international protection, or TCNs apprehended in the context of irregular crossing of land, sea, and air borders. TCNs who are illegally staying within the territory of Member States are currently *not* stored in Eurodac. Their fingerprints are collected and subsequently transmitted to Eurodac only to check whether a person falling within this category previously applied for asylum in one of the Member States.

The Eurodac proposal adds two new categories of persons to be stored in Eurodac. The first category, already included in Article 1(1)(b) of the 2016 Commission proposal and confirmed in the partial provisional agreement of 19 June 2018, concerns illegally staying TCNs or stateless persons. The second category is added by the 2020 proposal and concerns TCNs disembarked following search and rescue (SAR) operations who apply for international protection from the pool of irregular border crossers. According to the Commission, this new category is necessitated by the lack of official border checks for SAR arrivals and the difficulty in precisely defining points of entry. Furthermore, in the Commission's view, the proposed amendment will "lead to a more accurate picture of the composition of migratory flows in the EU" implying use for statistical purposes.³⁴⁹

For all the Eurodac categories, the 2020 proposal maintains the provision already included in the 2016 proposal of the Commission, and confirmed in the partial provisional agreement of 19 June 2018, to lower the age of persons to be stored in the database from 14 years to 6 years.³⁵⁰ The implication of this lowering of age, including the possibility of coercion of children for the purposes of collecting biometrics, will be addressed in the fundamental rights assessment (section 5.2.3).

c) New categories of personal data

Currently, Eurodac does not include directly identifying data, such as name or specific personal information, but only the following data: fingerprints, Member State of origin, place, and date of asylum application; sex, reference number used by the Member State of origin; date on which the fingerprints were taken and date on which data was transmitted to Eurodac Central Unit; operator user ID. Only where applicable, Member States can record the following additional data: the date of arrival of a

³⁴⁸ See also D. Thym, "Secondary Movements: Overcoming the Lack of Trust among the Member States?", EU Immigration and Asylum Law and Policy Blog, 29 October 2020, <https://eumigrationlawblog.eu/secondary-movements-overcoming-the-lack-of-trust-among-the-member-states/>.

³⁴⁹ COM(2020) 614, Explanatory memorandum, p. 12.

³⁵⁰ Following the 2016 proposal and the 2018 agreement.

person after a successful transfer; the date when a person left or was removed from the territory of a Member State; and the date when the competent authority decides to examine an asylum application.

Based on the 2016 proposal, and maintained in the 2018 provisional agreement, the following categories of personal data will be added to the current data in the Central System and the Common Identity Repository (CIR), as provided for in the Interoperability regulations.

- surname and forename (including previously used names);
- facial image;
- age;
- date and place of birth;
- nationality;
- where available, type and number, and scanned colour copies of travel and identity documents.

The **2020 proposal adds further categories of personal data**, related to the objectives of the New Pact on migration and asylum:

- the indication whether an asylum application is rejected, to “reinforce the link with return procedures”;
- the fact that a person could pose an internal security threat following the screening procedure;
- where there are indications that a visa was issued to the applicant, the Member State which issued or extended the visa or on behalf of which the visa has been issued, and the visa application number;³⁵¹
- where applicable, the fact that the application for international protection has been rejected in case the applicant has no right to remain and has not been allowed to remain in a Member State pursuant to the (proposed) Asylum Procedure Regulation;
- The fact that voluntary return and reintegration assistance (AVRR) has been granted.³⁵²

d) Data retention periods and advanced erasure, blocking and marking of data

The current Eurodac Regulation provides that **data on asylum applicants** is stored for 10 years from the date fingerprints are taken.³⁵³ Upon expiry of this period, this data is automatically deleted from Eurodac. If the applicant acquires the citizenship of any Member State, the data should be erased as soon the ‘Member State of origin’, that is the Member State that transferred the data of the applicant to Eurodac, “becomes aware that the person concerned has acquired such citizenship”.

Data on **asylum applicants who are granted international protection** in one of the Member States is not erased from Eurodac, but is ‘marked’ in accordance with Article 18 of the Regulation. Accordingly, this data remain accessible for law enforcement purposes for a period of 3 years from the date when

³⁵¹ The latter category would be necessary to assist Member States which are bound by the Dublin Regulation, but not by the VIS Regulation.

³⁵² In order to prevent ‘AVRR shopping’, according to the proposal.

³⁵³ Article 12 Regulation 603/2013.

international protection was granted, after which it is 'blocked'. From that moment Eurodac 'hits' may not be transmitted further.

Data on **TCNs or stateless persons recorded in connection with irregular border crossing** can be recorded for 18 months from the date fingerprints were taken. Upon expiry of this period, this data is automatically deleted. Furthermore, data on this category of persons must be deleted as soon as possible once the 'Member State of origin' becomes aware that the person concerned has been issued a residence permit, left the Member State territory, or acquired the citizenship of any Member State.³⁵⁴

The provisional agreement of 2018 and the 2020 proposal **no longer include a provision on the blocking of data on asylum applicants granted international protection**. The 2016 proposal provided for the accessibility of data on international protection beneficiaries for law enforcement purposes for a limited period of 3 years from the date when the data subject was granted international protection. The 2018 provisional agreement foresaw that 'marked data' on beneficiaries of international protection stored in Eurodac Central System will remain available for law enforcement purposes until such data are automatically erased from the Central System and the CIR (after ten years or earlier if the person acquires EU citizenship). This means that until final erasure, personal data on persons granted international protection would remain available for law enforcement purposes.

As already proposed by the Commission in 2016, the **data retention time limit for irregular border crossing migrants is extended from 18 months to 5 years**. This 5 year-period will also apply to new categories of disembarked persons following SAR (as included in the 2020 proposal) and of illegally staying migrants (as included in the 2016 proposal and agreed upon in the provisional agreement of 2018).

Despite a proposal from the European Parliament to reduce the retention period of data on applicants for international protection, no agreement could be reached during the negotiations of the 2018 provisional agreement, so that the '10 years period' appears to remain open to discussion.³⁵⁵ Furthermore, no agreement could be reached on the proposal of the European Parliament to ensure the advanced erasure of data of persons who have been granted a long-term resident status in accordance with Directive 2003/108.³⁵⁶

The obligation of advanced data erasure is maintained for persons who acquire EU citizenship, but no longer applies for irregular border crossing TCNs or stateless persons granted a residence document or who left the EU territory. Their data will be marked until the end of the 5 year-retention period but will remain available for law enforcement purposes until such data is automatically erased from the Central System. In accordance with the 2020 Commission proposal, the same provisions apply to persons disembarked during a SAR operation who have been granted a residence permit.³⁵⁷ This means that data in the Central System and the CIR on persons disembarked following a SAR operation

³⁵⁴ Article 16 (1) and (2) Regulation 603/2013.

³⁵⁵ See the aforementioned partial provisional agreement of 19 June 2018. One week earlier, 12 June 2018, the maintaining of the ten years period was described by the Council as "a major concession" from the side of the Parliament, indicating that an agreement had been reached, see Council doc. 9848/18 p. 3.

³⁵⁶ In the Council doc. 9848/18 of 12 June 2018, p. 3, it is mentioned that in return for maintaining the 10 years period, the European Parliament insisted that data of persons who have been granted a long-term resident status would be deleted from the Central System. However, according to the text of the partial provisional agreement of 21 June 2018, there is no agreement with regard to this issue as well.

³⁵⁷ See Article 14 b(3a) in connection with 14 (a) (2) and 19 (4) and (5) of the 2020 proposal.

and granted a residence permit will be 'marked' and remain available for law enforcement purposes as well.

e) Extension of access for law enforcement purposes

The existing Eurodac Regulation allows access for law enforcement purposes only by designated authorities as listed by Member States and notified to the Commission, based on Article 43. The comparison of biometric or alphanumeric data with Eurodac data is necessary for the purpose of the prevention, detection, or investigation of terrorist offences or of other serious criminal offences. As an additional requirement, there must be "an overriding public security concern which makes the searching of the database proportionate". Before designated authorities of the Member State and Europol may have access to Eurodac data, they should first consult other available fingerprint databases, including the VIS. Furthermore, access must be necessary in a specific case: therefore, systematic comparisons are explicitly prohibited, unless reasonable grounds are established, evidencing reasonable grounds that the comparison will substantially contribute to the prevention, detection, or investigation of any of the criminal offences in question.

The 2020 proposal maintains, as agreed upon in the 2018 provisional agreement, **the "expansion of scope and simplification of law enforcement access to Eurodac"**.³⁵⁸ First, the obligation to consult the VIS first has been removed. The text of the proposed Article 21, as agreed in the partial provisional agreement of 19 June 2018, provides that designated authorities "may also conduct a search in the Visa Information System". Designated authorities may submit their "reasoned electronic request for comparison of biometric or alphanumeric data with the data in the Eurodac Central System", as provided in Article 21 (1), "at the same time they submit a request for comparison with the data stored into the Visa Information System". Second, the amended Article 21, following the provisional agreement of June 2018, and maintained in the 2020 proposal, states that searches "shall be carried out with biometric or alphanumeric data" which is broader than the current provision in Article 20 (2) of the 2013 Eurodac Regulation that "requests for comparison with Eurodac data shall be limited to searching with fingerprint data".

In addition, whereas the 2016 proposal provided that comparison with Eurodac data is only allowed if this is necessary in "specific cases", the Council proposed to allow such comparison "in specific cases or to specific persons", which would have constituted a major extension for Europol access. The current proposal, as agreed upon in the partial provisional agreement of 19 June 2018, allows comparison with Eurodac data, if necessary, in "a specific case including specific persons". While it is uncertain how this provision will be applied in practice, it makes clear that no access related to "specific persons" is allowed if there is no connection to any specific case of investigation.

f) Role of the European Border Coast Guard agency and the EU Agency for Asylum

The 2020 proposal maintains the role of the European Border and Coast Guard (EBCG) and the EU Agency for Asylum (EUAA), as included already in the 2016 proposal and the 2018 agreement, with regard to the **collection and transmission of fingerprints and facial images**. Members of EBCG may

³⁵⁸ This expansion is justified in the new proposed recital 22a in the provisional agreement, version Council doc. 6016/18, stating: "A broader and simpler access of law enforcement authorities of the Member States to Eurodac may, while guaranteeing the full respect of the fundamental rights, enable Member States to use all existing tools to ensure that people live in an area of freedom, security and justice."

take and transmit biometric data upon request of a Member State and on behalf of that Member State. In the case of EASO, whereas the 2016 proposal limited this power to “Member States asylum experts on behalf of EASO”, the 2020 proposal, following the partial provisional agreement of June 2018, provides that experts of Asylum support teams of the EUAA, “including members of Agency’s own staff” may collect and transmit biometrics. This means that staff members of both agencies will have the power to collect and transmit personal data and biometrics from asylum applicants and other TCNs.

g) Transfer of personal data to third countries

The existing 2013 Eurodac Regulation prohibits Member States, Europol, and eu-LISA to share information obtained from Eurodac with third countries, international organisations, or private entities. Furthermore, Article 35 (2) of the same Regulation provides that personal data which originated in a Member State and is exchanged between Member States following a ‘hit’ obtained for law enforcement purposes, may not be transferred to third countries if there is a serious risk that as result of such transfer the data subject may be subject to torture, inhuman or degrading treatment or punishment, or any other violation of his/her fundamental rights.

The 2016 Eurodac proposal included in Article 38 the possibility to **share data with third states for the purpose of return**, in line with the condition included in Article 37 (3) that “no information regarding the fact that the individual concerned applied for asylum in one of the Member States shall be disclosed to third states”. Furthermore, transfer of data could only take place under the following conditions: a) it should be necessary in order to prove the identity of the TCN for the purpose of return; b) the third state should agree to use the data only for “the purposes for which they were provided and to what is lawful and necessary to secure the purposes laid down in Article 1(1)(b) and delete the data where it is no longer justified to keep it”; c) the Member State which entered the data should give its consent; d) the individual should be informed that his/her personal information may be shared with a third state.

The June 2018 provisional agreement maintains the general prohibition of transfer of Eurodac data to third states, adding however the possibility of data transfer in view of return as already proposed in the 2016 proposal.³⁵⁹ At the same time, compared to this 2016 proposal, the **conditions for data transfer to third states in view of return have been amended**.

First, the general prohibition of disclosing information on the fact that an asylum application was made in a Member State, as included in the 2016 proposal, is deleted. This is replaced by **a less clear provision stating that “transfers of personal data to third countries** pursuant to this Article shall not prejudice the rights of persons related to Article 10(1), 12a(1) and 12d(1) of this Regulation, in particular as regards *non-refoulement*, and the prohibition to disclose or obtain information in accordance with [Article 30 of Directive 2013/32/EU]”. This latter provision prohibits in general disclosure of information regarding individual applications for international protection or the fact that an application has been made “to the alleged actor(s) of persecution or serious harm”. This provision, if maintained in the proposed Asylum Procedure Regulation, would be **less strict than the current overall prohibition to share information with third states**, thus entailing a greater risk of violation of the rights of asylum seekers and the prohibition of *non-refoulement*.

Second, Article 38 (1b)(a) of the partial provisional agreement no longer includes the condition of the 2016 proposal that transfer should be necessary in order to prove the identity of the TCN; instead, it

³⁵⁹ See also preamble 51 as amended in the partial provisional agreement June 2018.

provides that data is transferred or made available “solely for the purpose of identification of, and issuance of an identification or travel document to, an illegally staying third-country national in view of return”. Third, the aforementioned limitation of the use by third states has been completely omitted. Fourth, whereas the 2016 proposal provided that the Member State of origin should have given its consent to the transfer, the provisional agreement uses a more ‘open’ formulation, stating in general that data may be transferred or made available to a third state “with the agreement of the Member State of origin”. Finally, the condition that the TCN should have been informed that his/her personal data may be shared with the authorities of a third country, as already included in the 2016 proposal, has been maintained in the provisional agreement.

In the provisional agreement of June 2018, a new subparagraph has been added to the proposed Article 38, which is unrelated to the specific content of Eurodac but refers to **the general monitoring tasks of the independent supervisory authorities** with regard to the transfer of personal data to third states in general, in accordance with Regulation 2016/679.³⁶⁰ Furthermore, the 2018 provisional agreement added data protection requirements which were maintained in the 2020 proposal. First, transfer must be carried out in accordance with the relevant provisions within EU law, in particular on data protection and in line with chapter V of the GDPR Regulation (EU, 2016/679), and, where applicable, readmission agreements, and the national law of the Member State transferring the data. Implementation of the GDPR standards and necessity and proportionality must be monitored by an independent supervisory authority and the data transfer may not prejudice individual rights, in particular the principle of *non-refoulement*.

5.2. Critical assessment

5.2.1. Legal coherence

When assessing the legal coherence of the current proposal to amend Eurodac, three major points need to be underlined:

- the lack of an impact assessment on the extended use and content of Eurodac;
- the questionability of the reliability and accuracy of information to be held in Eurodac (and thus questionability of its use and added value for different purposes);
- the lack of transparency of legislation for both users and data subjects as a result of the different legal instruments at stake.

a) Lack of impact assessment on the extended use and content of Eurodac

As underlined in section 5.1.1., the European Commission has presented the 2020 Eurodac proposal as part of the general framework of the New Pact on Migration and Asylum.³⁶¹ Whereas Eurodac had originally been developed for the sole purpose of the implementation of the Dublin Regulation, the current proposal, taken together with earlier amendments of the Eurodac Regulation, envisages **Eurodac to be used as a multipurpose tool** (see section 5.1.2, point a).

³⁶⁰ Text of 1(c) reads: “Implementation of Regulation (EU) 2016/679, including with regard to the transfer of personal data to third countries pursuant to this Article, and in particular the use, proportionality and necessity of transfers based on Article 49(1)(d) of that Regulation, shall be subject to monitoring by the national independent supervisory authority set up pursuant to Chapter VI of Regulation (EU) 2016/679.”

³⁶¹ See explanatory memorandum of the proposal, COM (2020) 614, p. 1.

Various chapters of this study have underlined the lack of an impact assessment accompanying the proposals of the New Pact, which would take into account and assess the potential added value of alternative policy options. In the specific case of Eurodac, whereas the European Data Protection Supervisor (EDPS) recommended **a full data protection and privacy impact assessment** of the 2016 proposal and an assessment of the need to collect and use facial images of the persons to be recorded in Eurodac, **none of these assessments have taken place.**³⁶²

It should be further noted that the extension of law enforcement access to Eurodac as provided for in the current Eurodac Regulation also lacked any substantiation on the basis of an impact assessment. Equally, **impact or necessity assessments are lacking with regard to the proposed new amendments**, notably as regarding the use of Eurodac in relation to the Screening proposal, the maintaining and introduction of time limits for storage of 10 and 5 years, and the lowering of age from 14 to 6 years.³⁶³

As it will be underlined in section 5.2.3., from a fundamental rights perspective, independent evidence justifying the lawfulness of the provisions included in the Eurodac proposal constitutes an absolute requirement. This evidence should demonstrate the necessity and proportionality of the proposed extension of content, scope and use of Eurodac, taking into account the linkages between Eurodac and other databases in the context of interoperability. Taking into account the wide and indiscriminate central storage of personal and biometric data on unsuspected persons, including refugees and children, to which these amendments would apply, the Commission should have addressed the fundamental rights impacts that those amendments imply more extensively.³⁶⁴

b) Reliability and accuracy of information to be held in Eurodac

That value is added by the use of Eurodac for the purpose of migration and asylum management (including statistical use), requires that the data it contains is reliable.³⁶⁵ Different organisations have expressed their **concerns on the quality and accuracy of information stored in Eurodac.**³⁶⁶ As established in a 2021 report from the European Migration Network, Member States collect different types of data during asylum procedures, which may result in different practices with regard to the storage of data on asylum seekers into Eurodac.³⁶⁷ As the current proposals add new categories of personal information to be included in Eurodac, this may increase the risk of not only differentiated practices, but also of less accurate or reliable data. The inclusion of information allowing for multiple interpretations, such as whether a person poses an internal security risk, or, whether he or she, following the rejection of his/her application for international protection, has the right to remain in a Member State, will increase this risk. Finally, where such use enables the linking of different personal

³⁶² EDPS (2012), Opinion amended proposal for a Eurodac Regulation (Recast version), 5 September 2012, p. 3.

³⁶³ FRA The impact of the proposal for a revised Eurodac Regulation on Fundamental Rights, Opinion 6/2016, 22 December 2016, p. 23.

³⁶⁴ See ECtHR *M.K. v France*, 18 April 2013, no. 19522/09 and *S. and Marper v United Kingdom*, appl.no. 30562/04 and 30566/04, 4 December 2008, para. 124-125 where the ECtHR pointed to the blanket and indiscriminate nature of domestic authorities' data retention powers.

³⁶⁵ ECRE/Vavoula (2020) p. 27.

³⁶⁶ Fundamental Rights Agency, Opinion 1/2018, p. 30; European Court of Auditors, EU information systems supporting border control - a strong tool but more focus is need on timely and complete data (2019).

³⁶⁷ European Migration Network (EMN), *Data Management in the Asylum Procedure*, 2021.

data to a single person, further questions on the fundamental rights and data protection impact arise.³⁶⁸

c) Lack of transparency of legislation for both users and data subjects

As pointed out by the EDPS, the Eurodac proposals **blur the distinction between different policy areas of asylum, migration, police cooperation, internal security, and criminal justice.**³⁶⁹ This approach follows a trend which is embedded in the interoperability framework, which, as explained by the Commission, once fully operational will “[...] connect all European systems for borders, migration, security, and justice, and will ensure that all these systems ‘talk’ to each other [...].” The envisaged framework, however, has resulted in a complex and opaque legislative patchwork, that, with amendments upon amendments, has made it increasingly difficult to ensure the identification of the correct legal basis for the different instruments involved. In addition, the EU legislator has in this way, integrated different legal instruments, each adopted for very different purposes, without having provided an evaluation of the effectiveness of each individual measure first.

5.2.2. Solidarity

According to the explanatory memorandum of the 2020 proposal, Eurodac “puts in place a clear and consistent link between specific individuals and the procedures they are subjected to in order to better assist with the control of irregular migration and the detection of unauthorised movements”. The Commission further specifies that the proposal will support the implementation of the new solidarity mechanism included in the RAMM.³⁷⁰ It is however questionable whether the development of Eurodac as a multipurpose tool, based on the 2020 proposal and previous amendments, will necessarily contribute to a higher level of solidarity in the EU.

First, the effectiveness of Eurodac for solidarity amongst Member States is connected to the effective implementation of the “Dublin system” and related developments as provided for in the RAMM proposal. Whereas the consequences of the RAMM for the application of principle of solidarity and fair sharing of responsibility is dealt with more extensively in the dedicated chapters of this study, this section discusses the role of Eurodac as a tool to support the effective implementation of the Dublin system.

The Dublin system has turned into a bureaucratic mechanism resulting in lengthy and costly procedures, leading only in relatively few cases to actual Dublin transfers, without contributing to the protection of asylum seekers or swift decision-making in asylum procedures.³⁷¹ It has been underlined how Eurodac has been primarily used by Member States as a tool shift responsibility to other Member States under the Dublin Regulation (e.g., based on the first country of entry criterion). In this way, **Eurodac has indirectly contributed to foster the unbalances in the sharing of responsibility among Member States inherent in the design of the Dublin system.**³⁷² In that context, some

³⁶⁸ EDPS Opinion 2020/9, 30 November 2020, p. 8.

³⁶⁹ EDPS Opinion 2020/9, 30 November 2020, p. 7.

³⁷⁰ COM (2020) 614, p. 2.

³⁷¹ EPRS Dublin Regulation on international protection applications, European Implementation Assessment, February 2020; Study on the Implementation of the Common European Asylum System on behalf of the LIBE Committee, EP, May 2016, p. 46.

³⁷² For example, Minos Mouzourakis, “We Need to Talk about Dublin. Responsibility under the Dublin System as a Blockage to Asylum Burden-sharing in the European Union,” University of Oxford, Refugee Studies Centre, Working Paper Series No. 105,

Member States have **failed to consistently collect and transmit asylum seekers' fingerprints at the external borders**, a fact that has prevented the effective use of Eurodac for the implementation of the Dublin Regulation.³⁷³

Finally, existing evidence illustrates how Eurodac seems to be increasingly applied by Member States for 'domestic' purposes related to law enforcement. Specifically, statistics provided by the EU Agency eu-LISA relative to 2018 and 2019 reveal a relatively high number of 'local hits' on the basis of searches by national law enforcement authorities.³⁷⁴ The proposed amendments to the Eurodac Regulation discussed above, confirms a **strong focus in using Eurodac in the areas of return and law enforcement, rather than on fostering equitable sharing of responsibilities for asylum seekers between Member States.**

5.2.3. Fundamental rights compliance

As clarified by the EDPS in 2020, the proposed changes to Eurodac – the linking of all data sets belonging to one person in one sequence, combined with the inclusion of new categories of personal data and an extended list of authorities provided access to that data – is liable to produce a substantial impact on individuals' fundamental rights.³⁷⁵

The current proposal, in conjunction with the interoperability scheme, changes the scope and impact of Eurodac extensively: not only 'qualitatively' – concerning the purposes for which Eurodac will be used – but also 'quantitatively' – in relation to the number of persons and personal data it will contain.³⁷⁶ In 2019, Eurodac already included more than 5.5 million data sets, a number which more than doubled between 2012 and 2019 and which will further increase based on the proposed amendments, due to the proposed addition of new categories of persons.³⁷⁷ The EDPS has pointed out that **the consequences of any data breach could seriously harm a potentially very large number of individuals**, adding that "if such information ever falls into the wrong hands, the database could become a dangerous tool against fundamental rights".³⁷⁸

Addressing the fundamental rights impact of the Eurodac reform, this section puts specific focus on the right to data protection, but also addresses other rights, including the right to human dignity and integrity, the best interest and rights of children, individual access and/or erasure rights and the right to effective judicial protection, as well as the right to non-discrimination.

2014 and F. Maiani, "The reform of the Dublin system and the dystopia of 'sharing people'", *Maastricht Journal of European and Comparative Law* 2017, no. 5, pp. 622-645.

³⁷³ EPRS Policy Brief on the Recast Eurodac Regulation, March 2019, p. 3.

³⁷⁴ Eu-LISA, *Eurodac statistics 2018*, February 2019, p. 16 and *Eurodac – 2019 Annual report*, eu-LISA, July 2020. Local hits are produced when two datasets generating a hit are from the same country.

³⁷⁵ EDPS Opinion 2020/9, 30 November 2020, p. 8.

³⁷⁶ Niovi Vavoula, "Transforming Eurodac from 2016 to the New Pact. From the Dublin System's Sidekick to a Database in Support of EU Policies on Asylum, Resettlement and Irregular Migration," ECRE Working Paper 13, 2020, p. 15, (further referred to as 'ECRE/Vavoula, 2020').

³⁷⁷ In 2019 Eurodac was used by 32 States (including the UK) and contained 5,69 million datasets, of which 97% concerned applicants for asylum. In 2019, 916,536 transactions took place, including 592,691 from asylum seekers (Category 1), 111,761 in relation to irregular border-crossers (Category 2) and 211,635 transactions on searches for irregular stays in MS (Category 3). Eurodac – 2019 Annual report, eu-LISA, July 2020. <https://www.eulisa.europa.eu/Publications/Reports/Eurodac%20-%202019%20Annual%20Report.pdf>. In 2012, Eurodac included 2,3 million datasets, *Annual report on Eurodac statistics 2012* Brussels, 28.6.2013 COM(2013) 485 final.

³⁷⁸ EDPS Opinion 4/2018 on the proposed regulations on interoperability, 16 April 2018, p. 3 and 11.

a) The right to data protection and privacy

Necessity and proportionality – lack of impact and necessity assessment

The right to privacy and data protection foreseen in Articles 7 and 8 EUCFR applies to everyone within the jurisdiction of the Member States and the EU. Limitations to these rights must observe the general conditions provided in Article 52 (1) EUCFR. Accordingly, **any limitation to the right to data protection must be provided for by law and respect the essence of those rights and freedoms, subject to the principle of proportionality.** Limitations must be necessary and genuinely meet the objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.³⁷⁹

In accordance with the principles laid down in the General Data Protection Regulation (GDPR) and the Law Enforcement Directive (LED)³⁸⁰ and as further interpreted by the CJEU, it is the obligation of the EU legislator to assess the necessity and proportionality of a legislative measure and to define a clear and limited purpose of the use of the personal information.³⁸¹ Criteria to assess the compatibility of measures with Article 7 and 8 EUCFR includes at least the following: a) an assessment of the scope of data processing and whether the proposed goals justify the storage of data of an entire group of persons; b) the availability of specific limits with regard to authorities having access to data and their subsequent use; c) prior review by court or independent body to assess which access for law enforcement purposes is strictly necessary; d) and available time limits, restricting the storage of data to what is strictly necessary.³⁸²

In previous opinions and reports on the extension of Eurodac for law enforcement and return purposes, different organisations, including EDPS and FRA, submitted that the **necessity of these amendments was insufficiently demonstrated.**³⁸³

Over the previous years, a number of databases have been established by the EU legislator for the purpose of controlling irregular migration and unauthorised movements of TCNs within the EU, some of them only recently for this purpose.

For example, the **ETIAS Regulation** refers to the goal of “enabling consideration whether the presence [...] of third-country nationals in the territory of the Member States would pose [...] a security, illegal immigration, or high epidemic risk” (ETIAS Article 1(1)). The **SIS Regulation** establishes that SIS should be used for “carrying out checks on third-country nationals who are illegally entering or staying on the territory of the Member States” (Article 44 (1) (d) SIS II Regulation 2018/1862) and also for the “return of illegally staying third-country nationals” (Regulation 2018/1860 SIS II). Furthermore, the **Entry Exit**

³⁷⁹ As provided in Article 53 EUCFR, the level protection of the EUCFR will not go below the standards of the ECHR.

³⁸⁰ Regulation 2016/679 of 27 April 2016, OJ 4.5.2016, L 119 repealing Directive 95/46 and the Directive 2016/680, OJ 4.5.2016 L 119/89 repealing Decision 2008/977/JHA.

³⁸¹ EDPS *Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A toolkit*, 11 April 2017. And case-law CJEU *Digital Rights Ireland*, 8 April 2014 C-293/12 C-362/14, *Schrems v. Data Protection Commissioner*, 6 October 2015, para. 93-93, 98 and C-203/15, C-698/15, 21 December 2016 (*Tele2 Sverige AB Watson*) dealing with the E-Privacy directive.

³⁸² The CJEU in *Digital Rights Ireland* explicitly referred to the necessity to limit not only the users of data to those authorities for which access is considered necessary, but also the subsequent use of the data involved. *Digital Rights Ireland*, 8 April 2014 C-293/12, para. 56-66.

³⁸³ EDPS (2012), Opinion amended proposal for a Eurodac Regulation (Recast version), 5 September 2012, paras. 26-27; FRA *Opinion 6/2016*, Vienna 22 December 2016, p. 7, 40-42; ECRE Comments on the Commission proposal to recast the Eurodac Regulation, July 2016, pp. 6 ff.

System, entered into force in 2017, will serve for “strengthening the fight against irregular migration by creating a record of all cross-border movements by third-country national” and “to improve the management of external borders, to prevent irregular immigration and to facilitate the management of migration flows” (recital 6, 15 of the EES Regulation 2017/2226). Finally, the **Visa Information System (VIS)** has been developed to “assist in the identification of any person who may not, or may no longer, fulfil the conditions for entry to, stay or residence on the territory of the Member States’ and to ‘prevent visa shopping” (recital 5, VIS Regulation 767/2008).

The fact that the databases mentioned above do not contain information on irregular border crossing **does not seem to justify the proposed extended use of Eurodac without a prior assessment of the effectiveness of these other databases for “controlling irregular migration”**.

In its Opinion to the 2020 Eurodac proposal, the EDPS found that an in-depth fundamental rights and data protection impact assessment of the proposal should be carried out.³⁸⁴ Referring to his earlier Opinion addressing the proposals of the 2016 CEAS reform,³⁸⁵ the EDPS held that legislative proposals should clearly allocate the respective responsibilities of the different actors involved for processing personal data. In the current Eurodac proposals, only few of the earlier EDPS recommendations have been taken on board.³⁸⁶

Lack of purpose limitation

As a general principle of data protection law, **the purpose of databases must be well-defined and limited to specific goals**. This also means that the number of persons authorised to access and subsequently to use the data retained must be “limited to what is strictly necessary in the light of the objective pursued”.³⁸⁷ Articles 7 and 8 EUCFR precludes legislation that provides a “general and indiscriminate retention of traffic and location data of subscribers” and which does not restrict access of competent national authorities solely to the specific objective of the instrument at stake.³⁸⁸

According to the CJEU, the question whether EU legislation on data processing entails a violation of Article 7 and 8 EUCFR, will depend on whether this processing involves the central storage of biometrics, and its possible impact for individuals.³⁸⁹ In *Schwarz v Bochum*, for example, the CJEU observed that a mismatch “between the fingerprints of the holder of a passport and the data in that document does not mean that the person concerned will automatically be refused entry to the European Union, as pointed out in the second subparagraph of Article 4(3) of Regulation No 2252/2004. A mismatch of that kind will simply draw the competent authorities’ attention to the

³⁸⁴ EDPS Opinion 2020/9, 30 November 2020.

³⁸⁵ EDPS Opinion 7/2016 on the first reform package on CEAS.

³⁸⁶ As an example, the EDPS recommended that the introduction of a unique identifier in the Dublin database may not, in any case, be used for other purposes than those described in the Dublin Regulation. The 2020 Eurodac proposal, in connection with the interoperability regulations, allows multiple access to Eurodac for different purposes.

³⁸⁷ CJEU C-293/12, (*Digital Rights Ireland*), para. 62. See also C-362/14, 6 October 2014 (*Schrems I*), 6 October 2015, para. 93.

³⁸⁸ CJEU C-203/15, C-698/15, 21 December 2016 (*Tele2 Sverige AB Watson*), para. 114-225.

³⁸⁹ *Schwarz v. Bochum* found that the Regulation 2252/2004 on the storage of biometrics in the EU passport was not in violation of 7 and 8 CFR, because the regulation did not involve a central registration and the data could only be used for verification of the authenticity of the passport and the identification of its owner. The data therefore could not be used for law enforcement or any other purposes than preventing irregular migration of individuals to the EU territory. CJEU 17 October 2013, C-291/12 (*Schwarz v. Bochum*), see para. 48, 55-56, 59 and 60-61.

person concerned and will result in *a more detailed check of that person in order definitively to establish his identity*" (emphasis added).³⁹⁰

The same conclusion cannot be drawn with regard to the envisaged use of Eurodac, where the use of TCNs personal information is not limited to additional checks to establish a person's identity. Whereas "additional identity checks" to prevent mistakes or misuse of identity is indeed one of its aims, **the use of Eurodac in connection with other EU databases will have a much wider impact**: the rights of TCNs to enter or to remain in the EU territory may depend on records stored into these databases and the outcome of risk assessments carried out based on that information. The proposed recording in Eurodac of the fact that a person could pose an internal security threat following a screening procedure may have severe impact for the individual. Furthermore, data contained in Eurodac may lead to security checks and further actions by law enforcement authorities.

Purpose limitation must be considered as well when adopting rules allowing for the **technical interlinking of databases in the context of interoperability**. As the EDPS emphasised in his 2020 Opinion, "in line with the principles of purpose limitation and data minimisation, it is important to ensure that the authorities of Member States and the Union bodies should continue to be able to see only the data that is relevant for the performance of their specific tasks, even if the data sets are linked in a sequence".³⁹¹ This could include a provision ensuring that, once a record is deleted, the existence of a link in Eurodac to other databases is also deleted and should not be visible to national authorities.³⁹²

Related to the previous point, it must be stressed that the **proposal grants access to Eurodac to multiple users involved in a variety of different tasks**. These tasks include processing asylum applications, visa and immigration procedures, expulsions, resettlement and humanitarian assistance, and law enforcement. The proposed changes would result in an increased number of authorities with access to Eurodac, also in the context of widely divergent national practices. A list produced by the Commission on the authorities with access to Eurodac for law enforcement purposes in accordance with Article 5 (2) Eurodac Regulation reveals important differences.³⁹³

The scope of use and users of Eurodac will be further expanded by the interoperability scheme for two main reasons. First, the possibility to conduct checks on persons without their knowledge will increase due to the fact that, based on current EU legislation, biometrics will become the main tool to facilitate the interoperability of different databases and check whether a person has been registered in one of those databases.³⁹⁴ Secondly, and as pointed out by the EDPS in 2018, the interoperability regulations are "more than the sum of its parts, as its components ultimately contribute together to establish a central database of third-country nationals", including their biometric data, and increase

³⁹⁰ C-291/12, *Schwarz v. Bochum*, para. 44. Regulation No 2252/2004 referred to in the paragraph refers to Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, *OJL 385*, 29.12.2004.

³⁹¹ EDPS 2020, p. 8.

³⁹² EDPS 2020 p. 8; ECRE/Vavoula (2020), p. 29.

³⁹³ 'EU EURODAC List of authorities 191016 Art 5.2 Eurodac Regulation', submitted by the European Commission after a FOIA request, shows for example that some Member States report only 2 or 4 'designated authorities' (Austria, Greece), while Member States between 50 and even more than 200 authorities having access to Eurodac (Belgium, France, Italy).

³⁹⁴ This is because using biometrics allows authorities to use or check data on individuals, with or without knowledge of the data subject. See E.J. Kindt, *Privacy and Data Protection Issues of Biometric Applications: A Comparative Analysis*, Dordrecht: Springer Science+Business Media, Law, Governance and Technology Series 12, 2013, p. 359.

exponentially the number of authorities having access to Eurodac.³⁹⁵ The resulting integration of Eurodac into a general “**opaque ecosystem of biometric data processing, profiling and automated decision-making**” would increase the future impact on an individual’s right to data protection, in particular in relation to the principle of purpose limitation.³⁹⁶

Lack of transparency

According to CJEU case-law, in order to satisfy the requirement of proportionality, legislation must lay down **clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards**, so that persons whose personal data is affected have sufficient guarantees that data will be effectively protected against the risk of abuse.³⁹⁷ The need for such safeguards is all the greater where personal data is subjected to automated processing, particularly where there is a significant risk of unlawful access to that data. Those considerations apply especially where the protection of sensitive data is at stake.

It is questionable whether the proposed rules on Eurodac meet the above-mentioned criteria related to the principle of transparency. The multiplicity of existing data processing instruments next to, and partially in connection to Eurodac (each with its own set of data protection rules), in conjunction with the complex relationship between the GDPR, the LED, and the new regulations on interoperability, **does not yield a transparent legal framework**.³⁹⁸ This complexity of rules makes it difficult for data subjects to understand not only which law applies, but also **which state or organisation should be addressed regarding their rights to access to, correction of, or deletion of data, and, finally, their right to effective judicial protection**.³⁹⁹

Accuracy and security of personal data

Article 5 of the GDPR provides that **personal data shall be processed lawfully, fairly and in a transparent manner, and that it must be collected for specified, explicit, and legitimate purposes**. Furthermore, personal data must be relevant, and kept accurate and up to date. As pointed out by the EDPS, accuracy of information is crucial as it will largely determine the situation and procedural rights of the data subject.⁴⁰⁰

The proposed reform of Eurodac entails **several elements putting the accuracy of information at risk**. Not only as a result of the large number of authorities involved in the storage and use of Eurodac, but also due to the **inclusion of personal information that is susceptible to mistakes or inaccuracies**, such as names and surnames, birthdates and places of birth, and the ‘security flag’ following a screening procedure.

³⁹⁵ EDPS Opinion 4/2018 on the proposed regulations on interoperability, 16 April 2018, p. 11.

³⁹⁶ Bianca-Iona Marcu, “Eurodac: Biometrics, Facial Recognition, and the Fundamental Rights of Minors,” European Law Blog, 29 April 2021, <https://europeanlawblog.eu/2021/04/29/eurodac-biometrics-facial-recognition-and-the-fundamental-rights-of-minors/#more-7650> accessed 29.04.2021.

³⁹⁷ C-511/18, C-512/18 and C-520/18, 6 October 2020, *La Quadrature du Net and Others*, para. 132 and 166.

³⁹⁸ This blurring of legal rules and responsibilities with regard to the use (including law enforcement use) of the EU’s large-scale databases and the effects of interoperability has been addressed by not only EDPS and FRA, but also many commentators: see for example Special issue on interoperability *European Public Law* 26, no. 1, 2020, pp. 71-92.

³⁹⁹ See also EDPS addressing this problem within the context of the interoperability legislation, Opinion 4/2018, p. 4 and 10.

⁴⁰⁰ EDPS (2020), p. 11.

A similar concern can be expressed regarding the **security of data and risks of data leaks and unauthorised access**.⁴⁰¹

Independent supervision and prior review of access to data

Supervision is a key guarantee to ensure data protection and other fundamental rights involved, including regarding access to Eurodac data and data transfers to third countries. Article 8(3) EUCFR explicitly provides that compliance with the obligations deriving from the fundamental right to data protection, shall be **subjected to control by an independent authority**. The obligation of states to ensure the existence and effective functioning of independent supervision authorities of data processing is also provided and further specified in Articles 51 ff of GDPR and Articles 41 ff LED.

In light of the proposed extension of the content and use of Eurodac, as well as the complexity of the related legal framework, EU and national supervisory authorities will have an important and difficult task in fulfilling their independent and supervisory role. The EU legislator should therefore ensure, when adopting this new measure of data processing, that the necessary measures at EU and national level have been taken to ensure that data protection authorities are equipped with sufficient means and staff.

Furthermore, the linkage of different EU large-scale databases in the framework of the interoperability regulations will not only have an impact on the rights of data protection but also on the governance and supervision of the systems.⁴⁰² This requires a coordinated approach by the relevant supervisory authorities. To address this issue, the EDPS recommended that the Eurodac proposal should explicitly introduce a **single model of coordinated supervision**, by referring to Article 62 Regulation 2018/1725, ensuring cooperation between national data protection authorities and the EDPS.⁴⁰³

In *Tele2 Sverige Watson*, the CJEU dealt with the issue of **prior review of access to data by courts or independent authorities**.⁴⁰⁴ The CJEU held that access to the information at stake **must be subject to prior review** by a court or an independent administrative authority and in general the data concerned should be retained within the EU. In a recent judgement, the CJEU defined the requirements for that prior review, including that the court or body entrusted with that review must have all the powers and provide all the guarantees necessary in order to reconcile the various interests and rights at issue.⁴⁰⁵

According to the CJEU, in the context of a criminal investigation, a court or body must be able to strike a fair balance between, on the one hand, the interests relating to the needs of the investigation in the context of combating crime and, on the other, the fundamental rights to privacy and protection of personal data of the persons whose data is concerned by the access. Where that review is not carried out by a court but by an independent administrative body, that body must have a status enabling it to act **objectively and impartially when carrying out its duties** and must, for that purpose, be free from

⁴⁰¹ EDPS (2020), p. 9.

⁴⁰² EDPS Opinion 4/18 on the proposals for two Regulations establishing a framework for interoperability between EU large-scale databases, 16 April 2018, p. 10.

⁴⁰³ EDPS (2020), p. 8-9; Regulation 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, OJ L 295, 21.11.2018.

⁴⁰⁴ C-203/15, C-698/15, 21 December 2016 (*Tele2 Sverige AB Watson*), para. 120, 122-123. See also Opinion 1/15 on the EU-Canada PNR Agreement.

⁴⁰⁵ C-746/18 2 March 2021 (*H.K. v Prokuratuur*) para. 52-53.

any external influence. The EU legislative framework should ensure **prior review by independent supervisory authorities of access to data**, in accordance with the criteria of the CJEU.

b) The right to human dignity and integrity

Aside from the already existing obligation in the current Eurodac Regulation for Member States to take fingerprints from asylum seekers and irregular migrants crossing external borders, the new proposal as agreed upon in the provisional agreement of 19 June 2018 extends this obligation to take fingerprints, and now also facial images, to other categories of persons as described above, including children from ages 6 years and above.⁴⁰⁶

With regard to the protection of human dignity and physical and mental integrity (Article 1 and 3 EUCFR), the Eurodac proposal raises concerns surrounding the possible **use of force or coercion against asylum seekers and migrants who refuse or do not cooperate in providing their biometric data**.⁴⁰⁷ In earlier comments, both the FRA and the EDPS recommended avoiding the use of coercion with regard to asylum seekers who may often be in a vulnerable position.⁴⁰⁸

Recital 30(a) of the 2016 Eurodac proposal, as agreed upon in the provisional agreement of June 2018, provides that “only in duly justified circumstances and as a last resort, having exhausted other possibilities, a proportionate degree of coercion could be used to ensure the compliance of third-country nationals or stateless persons who are deemed to be vulnerable persons, and minors, with the obligation to provide biometric data”. In Article 2 it is provided that “Administrative measures for the purpose of ensuring compliance with the obligation to provide biometric data in accordance with paragraph 1 of this Article shall be laid down in national law. These measures shall be effective, proportionate and dissuasive and may include the possibility to use means of coercion as a last resort”.

While EU co-legislators agreed in the June 2018 provisional agreement to maintain the obligation for Member States to respect “at all times the dignity and physical integrity of the person during the fingerprinting procedure and when capturing his/her facial image”, it is problematic that **coercion remains an option for Member States**, and moreover the task of providing more detailed rules on the use of coercion against individuals (including vulnerable people and minors) is left to the discretionary power of the national legislator. This will result in different national rules and practices with regard to what is considered as “effective, proportionate and dissuasive” and a “last resort measure”.

To ensure protection of human dignity and integrity of individuals, EU co-legislators must **explicitly prohibit the use of coercion when collecting biometric data from all categories of TCNs falling within the scope of the Eurodac Regulation**. It should be explicitly provided that only administrative measures are allowed for the purpose of ensuring compliance with the obligation to provide biometric data, while further rules for the harmonisation of such measures in the Member States must be developed.

Another issue concerns the **information to be provided to TCNs within the context of collecting biometrics**. The 2018 provisional agreement provides that “Member States should inform all persons required by this Regulation to give biometric data of their obligation to do so. Member States should also explain to those persons that it is in their interests to fully and immediately cooperate with the

⁴⁰⁶ This obligation to implement the rules on taking migrants' fingerprints at the borders was stressed by the European Commission in the European Agenda on Migration COM(2015) 240, p. 13.

⁴⁰⁷ FRA 6/2016, p. 14 ff.; ECRE/Vavoula (2020), pp. 15-16;

⁴⁰⁸ FRA *Fundamental Rights Implications of the obligation to provide fingerprints for Eurodac*, Focus Paper 5/2015, p. 2.

procedure by providing their biometric data". This obligation is not further incorporated in the provisions of the Eurodac Regulation itself. Article 2 of the provisional agreement only refers to the provision in Article 30 which concerns the general obligation of authorities to inform the data subject of the purpose for which his/her data will be processed and, if applicable, the obligation to have his/her biometric data taken. This provision, however, does not include any obligation to inform the data subject of the fact "that it is in their interests to fully and immediately cooperate with the procedure by providing their biometric data" as provided in the aforementioned recital, nor about the consequences of any refusal to provide biometrics.

c) The rights and best interests of the child

The Eurodac proposal provides for the lowering of the age of obligation for TCN's to provide their biometric data from 14 to 6 years, including fingerprints and facial images. Furthermore, the current proposal based on the provisional agreement of June 2018 provides that use of coercion against minors and vulnerable persons remain possible. Both aspects should be considered as problematic in light of EU's and EU Member States' obligations to protect the rights and best interests of the child.

In its Opinion of 2016, the EDPS already pointed out that the necessity and proportionality of collecting biometrics from minors younger than 14 years was insufficiently evidenced.⁴⁰⁹ Although reliable data is lacking, asylum seekers below the age of 12 years will seldom arrive in the EU unaccompanied by a parent or guardian. As recognised by the CJEU, if unaccompanied minors apply for asylum, Member States have an obligation to ensure prompt access to the asylum procedure and avoid unnecessary prolongation of the procedures on the basis of the Dublin Regulation.⁴¹⁰ This implies that **recording children's biometrics as from the age of 6 years cannot be justified by the purpose of implementing the Dublin criteria.**

A justification for the need to centrally store the biometrics of minors in Eurodac, as submitted by the EU legislator, is the claim this would assist in tracing missing children. In the provisional agreement of 19 June 2018, the co-legislators agreed to include, in view of strengthening the protection of all children falling within the scope of the Eurodac Regulation, the consideration that taking biometric data for storage in the Central System would, aside from helping to identify children and to trace any family or other links with another Member State (as already provided in the 2016 proposal), assist Member States in "tracing children, including for law enforcement purposes, by complementing existing instruments, in particular SIS".⁴¹¹

However, evidence is lacking on why the current storage of alerts on missing persons, including children, in the SIS II is not a sufficiently effective tool. Specifically, whereas alerts of missing persons in the SIS are widespread, a uniform mechanism of cross-border cooperation is lacking and insufficient cooperation between the various organisations at the national level, including police, asylum, and child protection authorities, has been reported.⁴¹²

Existing gaps in tracing and protecting children will not be solved by the general and indiscriminate storage of personal information of every minor of 6 years and older in Eurodac, without first improving

⁴⁰⁹ EDPS 2016, pp. 9, 14 and 19.

⁴¹⁰ CJEU C-648/11, *MA, BT, and DA v SSHD*, 6 June 2013.

⁴¹¹ See table of 21 June 2018 describing the partial provisional agreement of 19 June 2018 and which was published on 22 June 2021 at the Public Register of the European Parliament.

⁴¹² European Migration Network Inform *How do EU Member States Treat Cases of Missing Children?* 2020.

the effective follow up of SIS alerts on missing persons in practice and strengthen the effective cooperation amongst the relevant authorities.

The **option to use coercion against minors** even if “proportionate” and “respecting dignity and physical integrity of the minor” for the purpose of ensuring compliance to provide biometrics, **runs counter the specific protection of rights of children as outlined in Article 24 EUCFR and the UN Convention on the Rights of the Child (CRC)**.⁴¹³ In 2015, the FRA recommended against the use of coercion with regard to children altogether, and that no fingerprints be taken from children if there is doubt concerning whether or not they have reached the age of 14 years (under the current Regulation).⁴¹⁴

Despite these recommendations, the proposed Eurodac Regulation not only extends the obligation for national authorities to “take promptly the biometric data of every third-country nationals or stateless persons” to persons of at least six years old, but also allows Member States “to use a proportionate degree of coercion at last resort to ensure the compliance of minors with the obligation to provide biometric data.”⁴¹⁵ **The use of any coercion against minors, including detention, for the collection of biometrics however must be absolutely prohibited.** Furthermore, in light of the principle of the best interest of the child, if there is doubt with regard to the age of persons, the EU and national authorities should treat them as minors unless proven otherwise.

The 2016 proposal and provisional agreement added some specific safeguards to protect the interests of the child. Besides the provision in the 2016 proposal that the collection of data must be carried out in a child-friendly and child-sensitive manner, a separate Article 2a with special provisions relating to minors was added and agreed upon by the EU co-legislators in the provisional agreement.⁴¹⁶ Furthermore, the current Eurodac proposal includes that, when adult family members or appointed guardians are absent, independent and trained officials will accompany the child, to safeguard his/her best interest and well-being.

Unfortunately, **guidelines are lacking regarding how the criteria of ‘child-friendly’ and ‘child-sensitive’ shall be met, or how to ensure the independency and relevant training of the ‘accompanying persons’** to protect the rights and well-being of the child. This may result in diverging standards at national level. EU co-legislators should therefore, in close cooperation with experts and FRA, develop precise and binding rules ensuring that a ‘child-friendly’ and ‘child-sensitive’ approach is adopted by national authorities when dealing with children, and guarantee the independency and relevant training of ‘accompanying persons’.

⁴¹³ Joint Statement of UNHCR, UNICEF, OHCHR, and IOM and civil society organisations on Coercion of children to obtain fingerprints and facial images is never acceptable’ (UNICEF, 2 March 2018), <https://www.unicef.org/eca/press-releases/joint-statement-coercion-children-obtain-fingerprints-and-facial-images-never>. See also ECRE Comments on the European Commission Staff Working Document on Implementation of Eurodac as regards the obligation to take fingerprints, June 2015, p. 10.

⁴¹⁴ FRA, 5/2015, p. 2.

⁴¹⁵ Provisional agreement of 19 June 2018, see version 21 June 2018, published at the Public Register of the European Parliament. See also Council doc. 9848/18, pp. 2 and 5.

⁴¹⁶ Article 2a provisional agreement, Council doc. 9848/18, p. 5.

d) The right to asylum – *non refoulement*

Addressing the scope and content of Eurodac, commentators, including the FRA, emphasised the importance of not jeopardising the protection and safety of asylum seekers and refugees, as protected in Articles 4, 18 and 19 (2) EUCFR, by sharing their personal information with third countries.⁴¹⁷ The 2016 proposal abandoned however the current prohibition in Regulation 603/2013 to share personal information with third countries for return purposes.⁴¹⁸ This amendment has been maintained in the provisional agreement and the current 2020 proposal.⁴¹⁹

As we have seen above, the Eurodac proposal, as agreed upon in the provisional agreement, allows the sharing of Eurodac data with the country of origin for return purposes, without limitation or specification of categories of data to be shared or addressing the specific status of children. In parallel, the June 2018 provisional agreement included a set of guarantees to ensure that transfer of personal data to third countries will not create a risk of *refoulement*.

It is questionable however, what these safeguards will mean in practice. First, in spite of the provisions on the prohibition of disclosure of information regarding application for international protection, third states may easily deduce from the context of data transfer and the extended categories of data to be shared, the fact that the individual previously applied for asylum in one of the Member States. Second, it depends on the individual national practices how, and which, information will be shared with third states. Third, it is unclear how the envisaged monitoring by national independent supervisory authorities will take place in practice, also considering the current lack of means and staff of national data protection authorities.⁴²⁰

More broadly, the widened use of Eurodac and the interlinking of data records entail that **secondary movement of persons seeking international protection in the EU are treated in the same way as irregular migrants**. As discussed in section 5.1.2, point d, provisions ensuring the protection of personal data of asylum seekers included in the current Eurodac Regulation are abandoned in the proposal under consideration. As both the ECtHR and the CJEU have already concluded in 2011, however, not every Member State can be considered as 'safe', and a refugee may have valid reasons for travelling from a country that does not provide adequate standards of protection.⁴²¹ This means that **controlling or preventing secondary movement, as such, is insufficient as justification for the extended sharing of personal information of applicants for international protection if this entails an extended risk of *refoulement***.

e) Individual right to access, correction, and deletion – effective judicial protection

The data subject's rights of access, rectification, completion, erasure, and restriction of data processing, to be exercised in accordance with chapter III of the GDPR Regulation, is now provided in the proposed

⁴¹⁷ FRA (2016), p. 32; Meijers Committee CM1609, 2016.

⁴¹⁸ COM (2016) 272, Article 38.

⁴¹⁹ See table of 21 June 2018 describing the partial provisional agreement of 19 June 2018 and which was published on 22 June 2021 at the Public Register of the European Parliament.

⁴²⁰ Ibid.; see amended recital 51.

⁴²¹ ECtHR *MSS v. Greece and Belgium*, resp. CJEU in *NS v SSHD*. See also Meijers Committee Note on the reforms of the Dublin Regulation, the Eurodac proposal and the proposal for an EU Asylum Agency (CM1609, 2016).

Article 31 of the Eurodac Regulation as agreed upon in the provisional agreement of June 2018.⁴²² Recital 49a, added in the 2018 provisional agreement, reads:

“Data subjects should have the right of access to, rectification and erasure of personal data concerning them and of restriction of the processing thereof. Taking into account the purposes for which the data are processed, data subjects should have the right to completion of incomplete personal data, including by means of providing a supplementary statement. Those rights should be exercised pursuant to Regulation 2016/679 and in accordance with the procedures set out in this Regulation, Directive 2016/680 and Regulation 2016/794 as regards the processing of personal data for law enforcement purposes pursuant to this Regulation. In relation to the processing of personal data in Eurodac by national authorities, each Member State, for reasons of legal certainty and transparency, should designate the authority which is to be considered as controller in accordance with Regulation (EU) 2016/679 and Directive (EU) 2016/680 and which should have central responsibility for the processing of data by that Member State. Each Member State should communicate the details of that authority to the Commission.”

This proposed text affirms the importance of ensuring individual right of access, rectification, and completion and deletion of data, also from a viewpoint of ‘legal certainty and transparency’. Furthermore, the provisional agreement added the right of completion of data, which implies that data subjects should have the “right to completion of incomplete personal data, including by means of providing a “supplementary statement”. These references to legal certainty and transparency and the possibility to provide supplementary information, however, are not included in the specific provisions of the proposed Regulation itself.

The complexity of the Eurodac legal framework (in combination with further use of personal information via the interoperability scheme) may hamper the effective use of individual data protection rights and access to effective judicial remedies as established in Article 47 EUCFR.⁴²³ The involvement of different Member States’ authorities and actors in the collection and use of personal data in Eurodac will make it difficult if not impossible for data subjects to address the competent and responsible authorities. One example is the ‘flagging’ (or ‘marking’) of persons who are identified as a security risk during the screening procedure. The current proposal **does not provide any legal remedy against such a ‘security flag’, nor any obligation for authorities to inform the TCN concerned**. In this context, it is crucial that the proposed Eurodac Regulation include an obligation for authorities to **inform concerned individuals when, following screening, a ‘flagging’ or ‘marking’ has been made in Eurodac indicating that the individual poses an internal security threat**. It should also provide access to an **effective judicial remedy** to refute the entry of such information in Eurodac. Furthermore, the burden of proof that ‘flagging’ or ‘marking’ as posing a security risk was required, should be on the issuing agency, so as to avoid a situation in which asylum seekers are requested to rebut the presumption of posing a security threat as, being reported into Eurodac.

The current proposal (Article 32) obliges Member States to provide for national supervisory authorities, a guarantee which is not comparable to access to effective judicial protection as ensured by Article 47 EUCFR.

⁴²² See table of 21 June 2018 describing the partial provisional agreement of 19 June 2018 and which was published on 22 June 2021 at the Public Register of the European Parliament and see amended recital 51.

⁴²³ *Schrems* para. 95.,

The previous analysis calls for the addition of a specific right to effective judicial protection for data subjects in the Eurodac Regulation with regard to the entry, rectification, completion, and deletion of personal data. This provision could be similar to the provision included in Article 68 of the SIS Regulation for any person to bring an action before any competent authority, including a court, under the law of any Member State to access, rectify, erase, obtain information or obtain compensation in connection with an alert relating to him/her. This ensures individuals will have immediate access to effective judicial remedies and are not obliged to define first which is the responsible authority, state, or agency.

f) Non-Discrimination

In the past, a number of observers have raised concerns regarding the use and possible discriminatory effects of EU large-scale databases, also within the framework of interoperability, not only at the external borders of, but also within, the Schengen territory.⁴²⁴

In her report on the use of digital border technologies, **the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, expressed concerns about the discriminatory and exclusionary effects of these digital technologies** without necessary human rights safeguards.⁴²⁵ She pointed out that the use of these measures risk **advancing existing racially discriminatory and xenophobic ideologies**, in part due to the wide-spread perception that migrants and refugees are to be considered *per se* a threat to security. The 2020 proposal provides that within seven years from its adoption, and every four years thereafter, the Commission will evaluate whether access for law enforcement has led to the indirect discrimination of persons covered by the Regulation.⁴²⁶ While seven years is a lengthy period to await a first evaluation, it should be recalled that the role of the EU legislator is to **prevent discrimination and refrain from adopting discriminatory measures, rather than measuring *ex post* the possible discriminatory effects of those measures.**

⁴²⁴ Comments of the Meijers Committee, 19 February 2018, CM1802, on the proposal of the Regulation establishing a framework of interoperability between EU information systems 12 December 2017, COM (2017) 794 and the letter to the chair of the LIBE Committee of 22 January 2019, CM1902, on the final compromise text on the Regulation on ECRIS-TCN (published on commissie-meijers.nl).

⁴²⁵ Report A/75/590, 10 November 2020 of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, <https://www.ohchr.org/EN/newyork/Documents/A-75-590-AUV.docx>

⁴²⁶ Amended Article 42 (4) Commission proposal of 23 September 2020. This provision is almost the same from the partial provisional agreement of June 2018, which mentioned '2023' for the first overall evaluation and then every four years thereafter.

6. PROPOSAL FOR AN ASYLUM AND MIGRATION MANAGEMENT REGULATION

6.1. Legal mapping

6.1.1. Assigning responsibility in the CEAS: opening Pandora's box of trust and solidarity

The need for establishing common criteria on the allocation of responsibility for asylum applications was put squarely on the table of Western European states in the early 1990s, most notably as a result of mounting backlogs and the back-and-forth exchanges between states disputing responsibility for asylum applications.⁴²⁷ The foundations of a system allocating asylum-related responsibilities within the EU context were laid out in the **1990 Dublin Convention**.⁴²⁸ Pursuant to its preamble, the Convention's aim was to facilitate the creation of a European area without internal frontiers by guaranteeing that asylum seekers would have their applications examined by one of the participating Member States. In this way, the Convention was expected to diminish the so-called "refugees in orbit" phenomenon⁴²⁹ and relieve national administrations from the increased costs of registering multiple applications.

The **hierarchy of criteria** for assigning responsibility under the Convention has formed the basis of its successors, the rationale being that responsibility should lie with the State that, through action or omission, has played a role in the applicant's entry or residence in EU territory. With the adoption of the Amsterdam Treaty,⁴³⁰ the Convention was replaced by a **Community instrument**, namely Regulation 343/2003⁴³¹ – the 'Dublin II Regulation' – which was revised a decade later by Regulation 604/2013 currently in place ('Dublin III Regulation').⁴³²

Despite a general consensus over the importance of having in place a set of agreed rules allocating responsibility for examining an asylum application, a range of **practical and substantive concerns** have been voiced over the years against the Dublin system. These include the continuation of secondary movements due to divergence in Member States' asylum policies, the unduly heavy burdens placed on countries at the external borders of the EU, the heavy costs on national administrations, the

⁴²⁷ R Byrne, G Noll, and J Vedsted-Hansen (eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (Kluwer Law International 2002) p. 19.

⁴²⁸ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (adopted 15 June 1990, entered into force 1 September 1997) OJ C 254, 19/08/97.

⁴²⁹ Commission of the European Communities, Commission Staff Working Paper, *Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States*, SEC (2000) 522 (21 Mar. 2000), par 13(2).

⁴³⁰ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997].

⁴³¹ Council of the European Union, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 18 February 2003, OJ L 50 (hereinafter Dublin II Regulation).

⁴³² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ 2013 L 180/31 (hereinafter Dublin III Regulation). The legal basis for the adoption of the Regulation is to be found in Article 78 (2) (e), establishing "criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection".

considerably small number of transfers executed, and, lastly, the coercive nature of Dublin transfers leading to human suffering and human rights violations condemned by European courts.⁴³³

Discussions on **solidarity mechanisms** which would tackle the asymmetries resulting from the implementation of the Dublin rules, although prominent between Member States since the CEAS's beginnings, have not provided fertile ground for anything more than vague commitments.⁴³⁴

Solidarity has found its way into the very first legal instrument of the CEAS, i.e., the Temporary Protection Directive,⁴³⁵ while EU institutions have been implementing solidarity measures through the establishment of European funds ('sharing money') and European agencies such as EASO and Frontex mandated, essentially, to ensure Member States' compliance with their CEAS responsibilities ('sharing norms')⁴³⁶ through operational support. Yet all these mechanisms were not meant to challenge the main tenets of the Dublin Convention and subsequent regulations, nor its internal market logic, but were rather seen as complementing the system in an **ad-hoc manner**.

In fact, despite the widely reported lack of an in-built mechanism to address situations of migratory pressure and possible solidarity contributions to countries in need,⁴³⁷ The aim of the Dublin II and Dublin III Regulations remained limited to laying down the criteria for the determination of the Member State responsible for examining an application for international protection (Article 1).

As suggested earlier in this study, increased refugee arrivals to Europe during 2015 have exposed a 'crisis' of policy and solidarity in the EU, proving that the existing system was ill-adapted to respond to such movements in a coherent, fair, and humane manner. In the following years, the EU continued to be confronted with humanitarian challenges, such as the dire conditions on the Greek islands, as well as challenges to the **principle of free movement** within the Schengen area,⁴³⁸ making a reform of the Dublin system imperative.

⁴³³ As Mitsilegas has put it, the Dublin system establishes a form of interstate cooperation based on automaticity and trust which assumes that the treatment of asylum seekers in all Member States complies with the requirements of the EUCFR, the CSR, and the ECHR. See Valsamis Mitsilegas, "Solidarity and Trust in the Common European Asylum System", *Comparative Migration Studies* 2(2), 2014. It is this assumption that was challenged by European courts in e.g. ECtHR, *M.S.S. v. Belgium and Greece* (no 30696/09) 21 January 2011 and CJEU, *Joined Cases N.S. (C-411/10) v Secretary of State for the Home Department and M.E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, (GC) 21 December 2011.

⁴³⁴ For a detailed historical account see E. Karageorgiou, *Rethinking Solidarity in European Asylum Law: A Critical Reading of the Key Concept in Contemporary Refugee Policy* (PhD Thesis defended at the Faculty of Law, Lund University, 2018).

⁴³⁵ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof OJ L 212 (TPD).

⁴³⁶ This has been crucial for the functioning of the CEAS as mutual trust presupposes that the EU Member States show solidarity with each other -in the form of sharing norms- holding a high level of protection of fundamental rights and the principle of non-refoulement (Rec. (3) to the Dublin III). On the conceptualisation of burden sharing as sharing norms, people and money, see G Noll, *Negotiating Asylum The EU acquis, Extraterritorial Protection and the Common Market of Deflection* (Nijhoff Publishers 2000).

⁴³⁷ See Commission Green Paper, 2007, "Dublin system may de facto result in additional burdens on MSs that find themselves under particular migratory pressures because of their geographical location". Commission Green Paper on the future of the Common European Asylum System, COM(2007) 301 final, 6.6.2007, 10.

⁴³⁸ See e.g., E. Karageorgiou, "The Impact of the New EU Pact on Europe's External Borders: The Case of Greece" in S. Carrera, and A. Geddes (eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, European University Institute, 2021.

During negotiations on the 2016 CEAS reforms, the proposal to revise the Dublin III Regulation,⁴³⁹ in particular the introduction of a mandatory sharing scheme, gave rise to high degree of controversy.⁴⁴⁰ Countries⁴⁴¹ opposing the proposal for a so-called **corrective allocation mechanism** – to be triggered once a state was reported to receive applications exceeding 150% of its capacity level –⁴⁴² argued that the proposed mechanism does not comply with the **principle of subsidiarity** as it “encroaches too far on the competences reserved for the Member States in the areas of security policy and social rights”.⁴⁴³ In addition, these countries considered the proposal for a mandatory solidarity system as incompatible with the **principle of proportionality and necessity**, going beyond what is absolutely necessary to achieve its objectives.⁴⁴⁴

A number of concerns have been also raised by the **European Parliament**, which put forward a counter-proposal as the basis for interinstitutional negotiations, essentially **abolishing the 150% threshold as well as the first-entry criterion**.⁴⁴⁵ Instead, the proposal introduced the possibility for an asylum seeker to demonstrate his/her “**meaningful ties**” to a particular Member State, and in the absence of such ties, provided a **permanent allocation mechanism**, allowing asylum seekers to choose from four least-burdened Member States at the time of application. Although the model suggested by the Parliament was well received by commentators and civil society,⁴⁴⁶ it did not manage to offer a way out of the deadlock caused by disagreement in the Council. As a result, negotiations had been stalled, primarily, due to **lack of consensus** on how solidarity should materialise.

6.1.2. Analysis of key legal changes

Against this background, in September 2020 the Commission adopted the new Pact on Migration and Asylum with a view to creating “faster, seamless migration processes and stronger governance” by means of a “comprehensive approach” that acknowledges collective responsibilities and tackles the most fundamental concerns expressed in negotiations since 2016 – in particular in relation to solidarity.⁴⁴⁷ This approach pledges to take “many legitimate interests” and varying asylum demands

⁴³⁹ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council of 4 May 2016 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)’ COM (2016) 270 final (herein after 2016 Proposal).

⁴⁴⁰ See e.g. Interparliamentary Committee Meeting organised by the Committee on Civil Liberties, Justice and Home Affairs on the Third Reform of the Common European Asylum System – Up for the Challenge – Summaries of Reasoned Opinions and Contributions of National Parliaments, 20 Feb 2017.

⁴⁴¹ These include Czech Republic, Romania, Hungary, Slovakia, and Poland.

⁴⁴² 2016 Proposal, Chapter VII, Article 34-43.

⁴⁴³ Interparliamentary Committee Meeting 20 Feb 2017, pp. 4-6.

⁴⁴⁴ *Ibid.*, p. 4.

⁴⁴⁵ EP Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)), 6.11.2017, Rapporteur: Cecilia Wikström (herein after Wikström Report).

⁴⁴⁶ See, among others, F. Maiani and C. Hruschka, “The Report of the European Parliament on the reform of the Dublin system: certainly bold, but Pragmatic?”, 20 December 2017, available at <https://eumigrationlawblog.eu/the-report-of-the-european-parliament-on-the-reform-of-the-dublin-system-certainly-bold-but-pragmatic/>

⁴⁴⁷ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final pp. 2-3.

into consideration, thus striking "a new balance between responsibility and solidarity".⁴⁴⁸ Accordingly, the RAMM proposal underlines the limitations of the current Dublin system and in particular the lack of a "structured solidarity mechanism".⁴⁴⁹ It thus aspires to build a system of **collective yet varying contributions** by Member States depending on geographies, capacities, and policy choices.

The Commission has withdrawn its 2016 proposal recasting the Dublin III Regulation yet maintained the changes on which agreement by states has been reached, while echoing some of the suggestions included in the 2017 European Parliament report discussed above. **The key changes introduced by the RAMM proposal** include:

- Extended definition of family to include siblings of the applicant and families created in transit (Article 2(g));
- Definition of "migratory pressure" (Article 2(w));
- Requirement to observe the principle of solidarity and provisions on how it should be implemented (Article 5);
- Requirement to conduct a "security check" before the application of the responsibility criteria (Article 8.4 - 8.5) (Article 3§3bii 2016 Proposal);
- Discretion in examining admissibility based on 'safe third country' considerations, Article 8(5) (instead of mandatory examination, Article 3 §3-5 2016 Proposal);
- Obligations of applicants and penalties for non-compliance (Article 9-10), (Article 4-5 2016 Proposal);
- Responsibility for first entry ceases after 3 years, Article 21 (instead of being permanent, Article 15 2016 Proposal);
- Additional responsibility criteria: a) responsibility for a Member State in which an applicant obtained a diploma (Article 20) and b) entry after disembarkation following a SAR operation (Article 21§2);
- A system of 'flexible solidarity contributions', e.g., relocation, return sponsorship, immediate operational support, long-term capacity building (Article 45-56), instead of an automated system of mandatory relocation triggered by an excess of the 150% threshold (Article 34-43 2016 Proposal);
- Limited possibilities for cessation and shift of responsibility, along the lines of the 2016 proposal;
- Restricted procedural safeguards, e.g., limited scope of effective remedy and lack of automatic suspensive effect (Article 27), along the lines of the 2016 proposal (Article 28);
- Possibility for refugees and subsidiary protection beneficiaries to obtain EU long-term resident status after 3 years (Article 71).

Below, we discuss in more detail the most important amendments in the new Pact relating to solidarity, responsibility, and procedures, including those already introduced by the 2016 proposal.

⁴⁴⁸ Press statement by President von der Leyen on the New Pact on Migration and Asylum, 23 September 2020.

⁴⁴⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM/2020/610 final, p. 11.

a) Solidarity embedded in the system

It is noteworthy that the RAMM is a comprehensive instrument with widened objectives: it sets out a common framework for the management of asylum and migration in the Union (Article 1(a)); and establishes a permanent mechanism for solidarity (Article 1(b)). Thus, solidarity is no longer an issue to be addressed when necessary, but rather a built-in component of the system. This is reflected in the principles permeating the new system: the **principle of integrated policy making** (Article 4), according to which coherence between the internal and external dimension of EU asylum and migration policy should be maintained; and, the **principle of solidarity** (Article 5) which, read in conjunction with Recital 3, entails, first and foremost, a sharing of norms between the Member States, namely full compliance with the *acquis* on asylum, migration management and return, as well as practical support to other Member States through solidarity contributions. This could be seen as a reaffirmation of the notion that “solidarity goes hand in hand with responsibility” as exemplified time and again by the Council⁴⁵⁰ and reiterated by the Commission.⁴⁵¹

In particular, the Commission introduces a **system of flexible solidarity contributions** ranging from relocation of asylum seekers from Member States of first arrival, to returns of irregular migrants.⁴⁵² The system distinguishes between two different situations in which solidarity contributions would be triggered: a) **disembarkation following SAR operations**,⁴⁵³ and b) migratory pressure or risk of pressure.⁴⁵⁴ Demand for solidarity in crisis situations is regulated by a separate Regulation,⁴⁵⁵ discussed in chapter 7.

Solidarity contributions under the RAMM may take the form of relocation of asylum applicants and beneficiaries of international protection, return sponsorship of irregularly staying TCNs, capacity building measures in the field of asylum, reception, and return, as well as measures responding to migratory trends in cooperation with third countries (Article 45.1). The Commission is granted the authority to decide, whenever necessary, what kind of re-adjustments (corrections) will have to be made so that the solidarity contributions pledged by Member States would be fit for purpose. In these cases, solidarity becomes compulsory by virtue of the exceptionality of the circumstances.⁴⁵⁶

The existing **early warning mechanism** included in Article 33 of the Dublin III Regulation – never activated to date – could hardly address the systemic flaws of the CEAS exposed by the 2015-2016 ‘crisis’ and the ensuing demands for increased solidarity towards Member States most affected. Its focus has been on planning and regular reporting with no concrete provisions on solidarity measures (formal recommendations and collaboration between Member States, the Commission and EASO). On the other hand, the 2016 Dublin proposal which sought to replace this mechanism with an automated

⁴⁵⁰ See e.g. Council of the European Union, Council conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows, 3151st Justice and Home Affairs Council meeting Brussels (8 March 2012).

⁴⁵¹ European Commission, Press Release, *A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity*, Brussels, 23 September 2020.

⁴⁵² Proposal for a Regulation on Asylum and Migration Management, Part IV Solidarity, Articles 45-60.

⁴⁵³ *ibid*, Articles 47-49.

⁴⁵⁴ *ibid*, Articles 50-53.

⁴⁵⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, COM(2020) 613 final.

⁴⁵⁶ E Karageorgiou, “The New Pact on Migration and Asylum: why Pragmatism Cannot Engender Solidarity”, 2020(2), *Nordic Journal of European Law*, pp III-VIII.

solidarity mechanism based exclusively on relocations, has been considered as overly ambitious and, thus, unrealistic.⁴⁵⁷ As detailed above, that mechanism revolved around an automated system that would be triggered when asylum applications in a Member State exceed 150% of its reference number, determined by a distribution key based on population (50%) and GDP (50%) (Article 34-35).

An exemption was also provided for, in which case a so-called 'solidarity contribution' of EUR 250,000 per applicant – who would have otherwise been allocated to that Member State – would have been made (Article 37). **This provision has raised much criticism, for legitimating the possibility of wealthier Member States buying themselves out of European solidarity and thus perpetuating unevenness, as well as for 'commodifying' asylum seekers.**⁴⁵⁸

The current system opens up a number of different options that are supposed to incentivise Member States opposing the mandatory relocation of asylum seekers into their territory, to share expertise and administrative responsibilities linked to the execution of return and capacity building instead. This argument is, at first sight, in line with the Wikström EP report's approach, which had also placed the emphasis on incentives and pragmatism.⁴⁵⁹ The main difference is that **the Wikström report held, at least theoretically, a potential to transform Dublin from a 'blame-based' to a 'solidarity-based' system due to the envisaged abolition of the 'first-entry' criterion.**

b) Responsibility and procedures

The RAMM maintains the provisions in the 2016 proposal extending the definition of family members to include siblings and families formed in transit (Article 2(g)). This is a step in the right direction, bringing the law closer to migration experiences on the ground and to ECtHR standards.⁴⁶⁰ However, the new definition does not cover families formed after the applicant has entered the EU, nor adult children.⁴⁶¹ Equally, a wide margin of discretion continues to be left for Member States to treat unmarried partners and same-sex couples based on national law, which can potentially contradict the expansive interpretation of 'family' regardless of legal relations by the ECtHR.⁴⁶² It is also hard to understand why siblings – although included in the family definition – have been excluded from dependency rules (Article 24). This puts applicants unable to reunite with a sibling or siblings legally present in the EU in an inferior position.

The responsibility for irregular entry – the ground creating most of the controversy around the system's fairness – remains intact. In a milder formulation compared to the 2016 proposal,

⁴⁵⁷ Interview Commission Officer, Unit ASYLUM (HOME C3), DG Home Affairs, European Commission, 9 February 2021. It should be noted that this automated system was supported by the EP, a more advanced version of which has been presented in the Wikström report, where applicants were to choose the country of relocation from four Member States who have received the lowest number of applications in relation to their share.

⁴⁵⁸ See ECRE, 'Comments on the [Dublin IV Regulation Proposal]' (October 2016) 37; See also Steve Peers, "The Orbanisation of EU asylum law: the latest EU asylum proposals", EU Law Analysis, 6 May 2016, available at http://eulawa_nalysis.blogspot.com/search?q=orbanisation

⁴⁵⁹ See EP Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)), 6.11.2017, Rapporteur: Cecilia Wikström.

⁴⁶⁰ On family relationships formed in transit see ECtHR, *Hode and Abdi v. UK*, Application No 22341/09, 6 November 2012.

⁴⁶¹ See for example the definition enshrined in Article 2(c) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/88.

⁴⁶² ECtHR, *Lebbink v. the Netherlands*, Application No 45582/99, Judgment of 1 June 2004.

responsibility for irregular entry does not however become permanent but rather ceases after three years. This, coupled with extending responsibility relating to the issuing of visas/residence documents (Article 19§4), results in, essentially, a stronger 'Dublin' system in all but name, retaining a strong incentive for EU frontline states not to rely on a complex and ultra-bureaucratic solidarity system.

Along the same lines, as already provided for in Article 26 of the 2016 Dublin proposal, 'take back' requests are transformed into mere 'notifications' (Article 31-32 RAMM); additionally, the shift of responsibility when the time limit for sending a 'take back' notification has not been respected by the notifying Member State has been removed (Article 23§3 Dublin III). Limiting the scope of existing clauses on the shifting of responsibility is presented by the Commission as a way to "discourage circumventing the rules and obstruction of procedure" (Recital 54) and to make the procedures more effective. Yet, in practice, removing those rules would hardly contribute to the stated objective: the national authorities of the notifying Member State are left with no incentive for sending the notification without delay, as failure to do so is no longer followed by a shift of responsibility to that State.

Another key element of the RAMM is that of making **applicants' own conduct irrelevant in relation to how and when responsibility is determined**. For example, the RAMM, following the 2016 proposal, deletes the criterion according to which continuous stay in a Member State before lodging the application shifts responsibility to that Member State (Article 13§2 Dublin III). Along the same lines, leaving the territories of the Member States for at least three months (Article 19§2 Dublin III) is no longer a ground for cessation of responsibility. While these amendments may appear to simplify the procedures, in line with the Pact's streamlining agenda, the assumption behind them is that the deleted clauses are an incentive for asylum seekers to abscond (Recital 54). Combined with the fact that the person to be relocated under the solidarity mechanism has no say as to his/her country of destination⁴⁶³ (except in the case of beneficiaries for international protection, Article 57§3), the proposed rules are indicative of a **conceptualisation of the asylum seeker as 'defector', and of the attempt to exclude refugee agency from what is considered as an administrative arrangement between States**.⁴⁶⁴

In line with a similar logic of deterrence (Recital 53), the RAMM maintains the provisions in the 2016 proposal which introduced an obligation for asylum seekers to apply for protection in the Member State of first entry and the ensuing consequences of non-compliance (Article 9, 10).⁴⁶⁵

As regards available **remedial mechanisms** to challenge transfers, the RAMM introduces more relaxed time limits (Article 33) compared to the 2016 proposal. Nevertheless, limitations of the available grounds based on which a transfer could be challenged – already introduced in the 2016 proposal – are maintained, while **no automatic suspensive effect** is recognised. Equally, the guarantee for transferred applicants to have their applications continued and completed in the receiving Member States is removed (Article 18§2), in line with the 2016 proposal.

⁴⁶³ In Article 11 RAMM which provides for the right to information, a new element (a) is added to precisely underline the absence of 'choice' by the applicant in relation to the State responsible under the criteria or through relocation.

⁴⁶⁴ On the simplification of the characterisation of the Dublin system as a purely inter-state arrangement, see the AG's opinion to the *Ghezelbash* case (CJEU, C-63/15 *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, 7 June 2016) para 70.

⁴⁶⁵ The application of examining the application under the accelerated procedures, envisaged in the 2016 reforms (Article 4(1)) has been deleted from the RAMM but introduced in the 2020 proposal for an Asylum Procedures Regulation (Article 40).

Figure 2: Procedure for triggering the RAMM solidarity mechanism in cases of migration pressure and SAR disembarkations

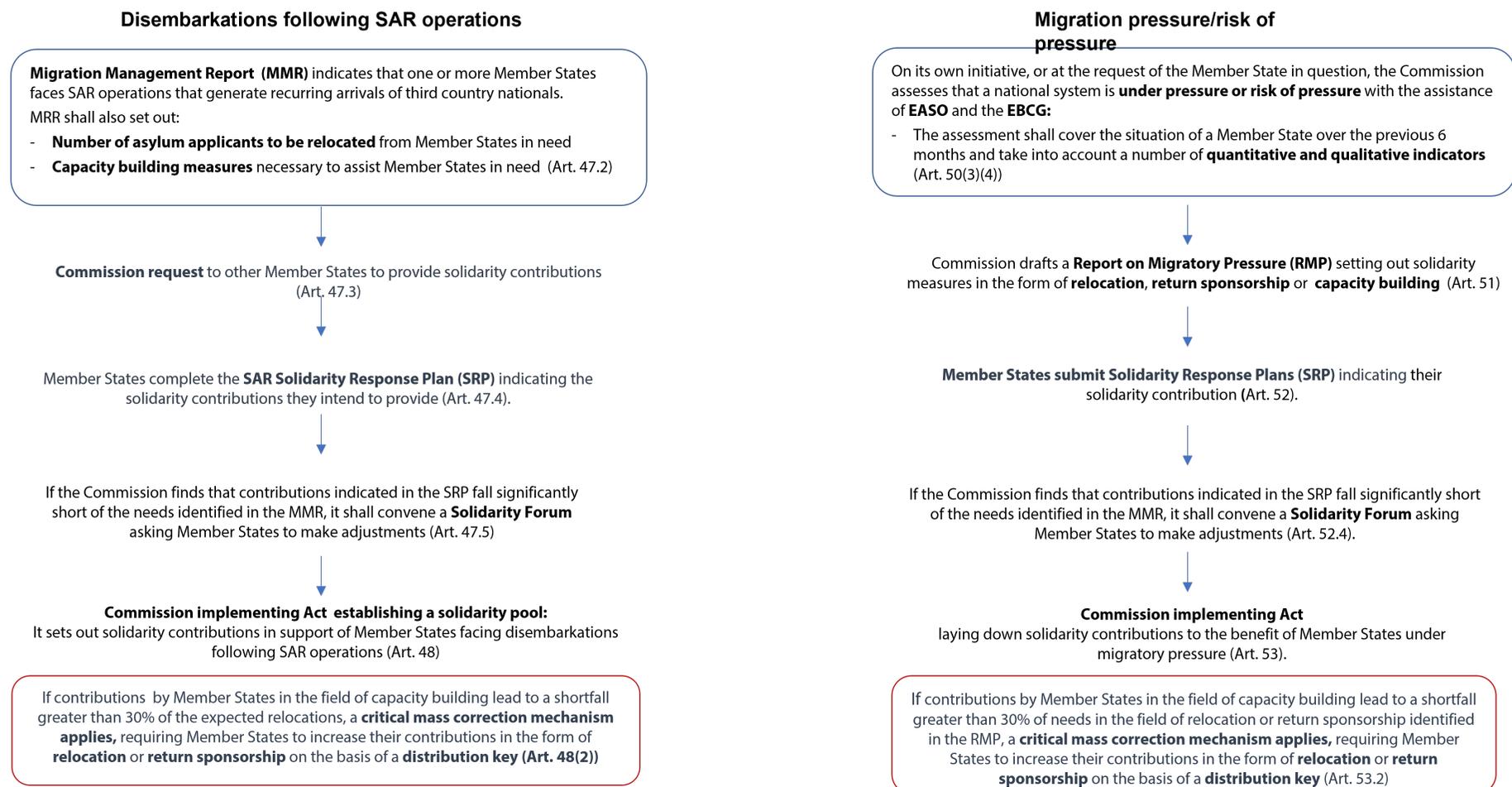


Figure 3. Key features and procedural aspects of the RAMM solidarity mechanism

1. Persons eligible/excluded from relocation

Eligible

- Asylum applicants **not** subject to border procedures (Art.45(1)(a))
- Beneficiaries of international protection who have been granted protection **less than three years before** (Art. 45(1)(c))

Excluded

- Persons who are considered a danger to national security or public order (Art. 57(7))
- Persons for whom the benefiting Member State is responsible based on allocation criteria (minors, family ties, visas, diplomas and dependency)

2. Return Sponsorship

- A Member State may commit to support the benefiting member state to return illegally staying third country nationals from its territory.
- If the person is not transferred **within 8 months** from the adoption of the implementing act, the Member State providing return sponsorship shall transfer the third country national onto its own territory (Art. 55).

3. Critical mass correction mechanism

- The option for Member States to support the benefiting Member State through capacity building measures shall not lead to a shortfall of more than 30% of the total needs in the field of relocation and return sponsorship identified by the Commission.
- In that specific circumstance, the Commission may require that those Member States indicating capacity building measures are required to cover 50% of their share based on a **distribution key** (based on 50% GDP and 50% population) through relocation or return sponsorship or a combination of both (Art. 53(2))

4. Procedural requirements in the context of relocation

- The benefiting member state shall identify the persons who could be relocated, taking into account if there are any **meaningful links** with the Member State of relocation (Art. 57).
- Transfer of person within **4 weeks** of the confirmation of the Member State of relocation or of the final decision on an appeal (Art. 57). If not carried out within the time limit, there is no cessation of responsibility like in the normal procedure (Art. 35(2), Art. 57(10)).
- Member State of relocation should assume responsibility to examine the application if the relocated person is an applicant for whom the benefiting Member State had been determined responsible for grounds of **irregular entry, visa waiver, entry at airport, or discretionary clauses** (Art. 58(3)). In all other cases, the member state of relocation, shall apply the responsibility criteria and, if necessary, transfer again.

6.2. Critical assessment

6.2.1. Legal coherence

The first key question to be answered is whether the RAMM is consistent with the overarching aims and fundamental principles underpinning the CEAS and laid down in the Treaties (Article 78 TFEU) and other key strategic and programmatic documents (e.g., 1999 Tampere Conclusions). It is worth recalling that based on Article 78 TFEU, read in conjunction with relevant provisions of the chapter on the AFSJ, **the main objective of the development of harmonised rules on asylum is the enhancement of protection.** Such protection must ensure **a fair treatment of refugees, in line with the fundamental rights protected in the ECHR and other relevant international treaties, including the 1951 Refugee Convention.**⁴⁶⁶ However, as suggested in the literature,⁴⁶⁷ asylum policy in Europe has been shaped by a **tension** between the need to control TCNs entry into, and presence in the EU and the imperative to remain engaged with the global refugee regime in line with international standards. As a result, **asylum forms part of a broader EU migration governance vision which has been informed, primarily, by considerations of security as well as efficacy based on an internal market logic.**

This vision is reflected in the RAMM, whereby the interconnectedness between the CEAS and migration policy (Rec 4), as well as a robust external dimension (Rec 6) are seen as intrinsic elements of European asylum policy.⁴⁶⁸ The adoption of such a comprehensive instrument which “establishes a seamless link between all stages of the migration procedure” constitutes a crucial component of what the Commission calls “a new approach to migration management”.⁴⁶⁹ In the architecture of the New Pact, the previous system is complemented by a pre-entry screening which, along with the proposed Asylum Procedures and Eurodac Regulation, seeks to prepare the ground for Member States’ authorities to decide on the allocation of responsibility based on the information gathered up to that point.

The envisaged link between asylum, border management, and return established in RAMM raises an issue of legal and policy incoherence.⁴⁷⁰ The CEAS instruments have the same legal basis, namely

⁴⁶⁶ See European Council, Tampere European Council 15 and 16 October 1999 Presidency Conclusions, 16/10/1999 Nr: 200/1/99. The Presidency Conclusions stated that the European Council “reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum” and that the establishment of a Common European Asylum System would be “based on the full and inclusive application of the Geneva Convention”.

⁴⁶⁷ See, e.g., Violeta Moreno-Lax, “Life After Lisbon: EU Asylum Policy as a Factor of Migration Control” in Acosta Arcaz and Murphy (eds.), *EU Security and Justice Law After Lisbon and Stockholm* (Hart Publishing, 2014); Samantha Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts*, Springer 2014.

⁴⁶⁸ See TFEU Article 78 §2g and Council Conclusions to date. In the successor of the Stockholm Programme, the so-called “strategic guidelines” of 2014, it is stated that all migration policies in the Union must be more integrated because the internal and external policy dimensions are interlinked to the extent that “success or failure in one field depend on performance in other fields as well as on synergies with related policy areas”. See European Council Conclusions of 26/27 June 2014 (EUCO 79/14), paras 2, 5, 8.

⁴⁶⁹ Proposal for a Regulation on Asylum and Migration Management COM(2020) 610 final, 2-3.

⁴⁷⁰ ‘Policy incoherence’ is defined in the literature as “a situation where different EU rules or a combination of EU and national rules, operate at cross purposes, undermining the ability of each to achieve the goals intended or where the rules and structures brought about by the degree of integration achieved to date produce otherwise avoidable negative outcomes for the Union and its Member States.” R McCrea, ‘Forward or Back: The Future of European Integration and the Impossibility of the Status Quo’ (2017) 23(1-2) *European Law Journal* 66.

Article 78(2) TFEU⁴⁷¹ while the legal basis of the Schengen Borders Code is Article 77 TFEU and that of the Return Directive is Article 79 TFEU. As stated by the CJEU in the *Jafari* case “the absence of a common legal basis [between the Dublin III Regulation, the Schengen Borders Code and the Return Directive] indicates that the context and the objectives of the three acts is not entirely the same.”⁴⁷² Although there may be overlaps between provisions – raised by the factual circumstances relevant to an asylum application (for example in case of an asylum application followed by irregular entry), the distinction between the different policy areas and the objectives sought thereof should, according to the Court, be maintained.⁴⁷³ Following this line of reasoning, **the artificial merging of legally distinct areas (asylum and protection/human rights with return and security/enforcement) in one instrument, i.e., RAMM, leads to incoherence**, undermining the distinct purposes sought by the merged areas and, essentially, posing a constitutional challenge for the EU.

In addition, **scepticism about the extent to which the RAMM is in line with the Charter and international human rights standards remains**. As discussed below in section 6.2.2., the introduction of a complex system that leaves many issues to be resolved at the implementation stage, can hardly be seen as meeting the requirements laid out in the UN Global Compact on Refugees which requires “efficient, effective and practicable arrangements” in order to ensure the full realisation of international solidarity and cooperation.⁴⁷⁴

As regards the overall compliance with EU principles, the RAMM provisions raise questions relating to mutual trust, legal certainty, and proportionality. As suggested above, through the new Pact the Commission has placed an emphasis in fostering trust in EU policies “by closing the existing **implementation gap**”.⁴⁷⁵ EU cooperation is, indeed, grounded on the principle of mutual trust, namely the assumption that all EU countries observe fundamental rights and their international law obligations *vis-à-vis* refugees, and it is precisely on this principle that the foundations of the Dublin system are similarly grounded.⁴⁷⁶ However, the assumption that the implementation gap is expected to close, and compliance with EU norms is to be achieved by introducing new legal structures that comprise a more complex administrative apparatus is at best wishful thinking given the realities on the ground.

Arguably, it is lack of trust towards particular Member States that has informed the proposal for flexible solidarity as well as the focus on the external dimension and cooperation with third countries. It is doubtful, however, if the proposed system could contribute to closing the implementation gap, insofar as refugees are ‘vanishing’⁴⁷⁷ in the system and the practicalities and politics of returns are taken for granted. At the same time, through the envisaged model of ‘asymmetric’ interstate solidarity, the Commission seeks to reach a compromise that would remedy the politically untenable ‘one-size-fits-

⁴⁷¹ More specifically, the Qualification Directive, Article 78(2)(a) and (b) TFEU; the Procedures Directive, Article 78(2)(d) TFEU; the Reception Directive, Article 78(2)(f) TFEU, and the Dublin III Regulation, Article 78(2)(e) TFEU).

⁴⁷² CJEU, AG Opinion to *C-646/16 Jafari v Bundesamt für Fremdenwesen und Asyl*, 26 July 2017 and *C-410/16 A.S. v Republika Slovenija*, 26 July 2017, para 138.

⁴⁷³ CJEU, *C-646/16 Jafari v Bundesamt für Fremdenwesen und Asyl*, 26 July 2017, paras 69-72.

⁴⁷⁴ Global compact on refugees (A/73/12) (Part II) para 16.

⁴⁷⁵ Communication on a New Pact on Migration and Asylum, COM/2020/609 final p. 2.

⁴⁷⁶ See Evelien Brouwer, “Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof”, *Utrecht Law Review*, 9(1), 2013, 136.

⁴⁷⁷ To use Durieux’s term. Jean-Francois Durieux, “The Vanishing Refugee: how EU asylum law blurs the specificity of refugee protection”, in H. Lambert, J. McAdam and M. Fullerton (eds.), *The Global Reach of European Refugee Law*, CUP, 2014, pp. 225-257. For a similar account, see Mouzourakis M, “More laws, less law: The European Union’s New Pact on Migration and Asylum and the fragmentation of ‘asylum seeker’ status”, *Eur. Law J.* 2021;1-10.

all' approach to solidarity but would, at the same time, nurture more divergence leading to **differentiated integration**.⁴⁷⁸

In addition, the Commission claims to be pursuing a "pragmatic and realistic approach" through the proposed solidarity mechanism taking "many legitimate interests" into consideration. Indeed, the various options for solidarity contributions offered in the RAMM reflects the variety of visions and political agendas of the Member States, leading to an unavoidable compromise at the expense of precision.⁴⁷⁹ Much of the key work, namely, determining what should count as a meaningful solidarity contribution in financial and other terms, and what kind of trade-offs will be legally acceptable and how they will be 'measured', is postponed to a future time, showing the abstraction at the point of application.⁴⁸⁰ Politically, this may allow for 'convergence despite disagreement', while legally speaking, **it contradicts predictability and legal certainty**.

Finally, as far as the **principle of proportionality** is concerned, it is unclear how the introduction of flexible solidarity contributions, including return sponsorship and capacity building, would enable sufficient responses to situations of disproportionate pressure on Member States' asylum systems. The link between return or financial and other contributions to third countries, on the one hand, and immediate relief of pressure in the 'benefitting' Member State, on the other, is not evident.

Arguably, the arrangement of return of rejected asylum seekers and irregular migrants to their countries of origin while they remain in the 'benefitting' Member State does not minimise that Member State's engagement in the process, both administratively and financially. In this context, the provisions relating to solidarity contributions beyond relocation seem to exceed what is necessary to achieve the objective of addressing solidarity demands in an effective way. Even in the case of relocation, **it is doubtful if permanent mandatory relocation in situations of pressure would meet the requirements for proportionality set by the CJEU** in its ruling on the 2016 emergency relocation mechanism. In that case, the Court used the provisional character of the measure (2 years) and the exceptionality of the 2015 situation to conclude that mandatory relocation was appropriate and necessary.⁴⁸¹

6.2.2. The RAMM in the light of the principle of solidarity in Article 80 TFEU

The RAMM proposal inserts the principle of solidarity within the substantive provisions of the Regulation, while in parallel stipulating a list of actions through which solidarity obligations are to be implemented by Member States (Article 5). Pursuant to this provision, Member States' compliance with their international and EU law obligations regarding asylum and border management, as well as the

⁴⁷⁸ N. EL-Enany, "The Perils of Differentiated Integration in the Field of Asylum", in B. De Witte, A. Ott, E. Vos (eds.), *Between Flexibility and Disintegration. The Trajectory of Differentiation in EU Law*, Edward Elgar, 2017.

⁴⁷⁹ Karageorgiou, LU PhD thesis 2018.

⁴⁸⁰ It is worth recalling that the never activated Temporary Protection Directive has been criticised for the absence of predefined commitments for solidarity. It was feared that relying on the Council to agree on a situation of 'mass influx' existing would prolong the process. This makes one wonder how implicating the Commission in defining particular deliverables in the context of the currently proposed reforms is different from the role the Council was tasked with in the context of the TPD and would not entail a similar risk. The same applies for the existing early warning mechanism which was rejected as establishing a lengthy and complex procedure with no clear indicators for measuring pressure. See 2016 Proposal p. 11. Equally, the fact that the new solidarity mechanism has to be triggered by either the Member State in question or the Commission, and this will be followed by a procedure of back-and-forth exchange on pledges, creates further uncertainty.

⁴⁸¹ CJEU, C-643/15 and C-647/15 *Slovakia and Hungary v Council*, 6 September 2017, paras 241-243, 251-253.

EU's financial and operational support via relevant funds, are considered crucial for giving effect to the principle of solidarity and, ultimately, for ensuring the "effective functioning" of the Union's asylum and migration policy. Although the insertion of a solidarity provision in the RAMM is positive, the question is the extent to which this is sufficient for the Regulation to be in line with the principle enshrined in Article 80 TFEU.

Indeed, the RAMM retains the default connection between external borders management and responsibility for examining an asylum application, introducing compensatory solidarity measures to tackle unevenness. This connection is enhanced by significantly limiting existing possibilities for cessation and shift of responsibility between Member States, and thus "reinforcing the responsibility of a given Member State",⁴⁸² for instance in the case where responsibility for first entry is extended to three years. **Preserving the first entry rule, to which a cumbersome administrative bureaucracy at the external borders is added, can hardly be seen as fair towards frontline countries, and thus in line with Article 80 TFEU.**⁴⁸³

In addition, the proposal broadens the scope of the EU principle of solidarity as enshrined in Article 80 TFEU, going beyond its financial implications by institutionalising relocation, return sponsorship and other – vaguely defined – capacity building measures. Although, in principle, an expansive understanding of solidarity is welcomed, in this case **'flexibility' means that Member States may be relieved from mandatory relocation**, i.e., from their protection responsibilities under CEAS and international law. Instead of 'buying their way out' through a financial contribution as envisaged in the 2016 proposal, **Member States may exchange their responsibilities vis-a-vis refugees with options beyond the asylum sphere, such as expulsions and cooperation with third countries.** Although this may be justified on the basis of the newly inserted principle of 'integrated decision-making' and the need for aligning the internal and external dimension, it allows for solidarity to be divided into obligations that may vary in scale and implications from which Member States can choose based on their own interest. Does administrative support with returns offset non-acceptance of asylum seekers in the territory? **Such a considerable margin of discretion can hardly be seen as contributing to the achievement of a common policy on asylum, posing the risk for further differentiation in the area.**⁴⁸⁴

A final point here concerns the so-called **'vertical dimension' of the principle of solidarity** (i.e., where considering the relation between the refugee and the State). The new provisions on return sponsorship and relocation – to the extent that the relocated asylum seeker may be subject to a further transfer if another Member State is found to be responsible by the state of relocation – ⁴⁸⁵ **create a system of greater coercion and commodification of asylum seekers to be 'traded' and transferred across the EU.** This contradicts the principle of solidarity in its vertical dimension, which – through a systemic

⁴⁸² Proposal for a Regulation on Asylum and Migration Management COM(2020) 610 final, 17.

⁴⁸³ A closer look at (former) AG Sharpston's opinion to the CJEU, *C-646/16 Jafari v Bundesamt für Fremdenwesen und Asyl*, 26 July 2017 and *C-410/16 A.S. v Republika Slovenija*, 26 July 2017 indicates that the application of Article 13(1) may lead to unfair and non-solidary based responsibility allocation contrary to Article 80 TFEU.

⁴⁸⁴ In the *Relocation* case, the CJEU underlined the indivisibility of the solidarity obligation under the 2015 emergency quota mechanism contending that "the burdens entailed by the provisional measures must, as a rule, be divided between all the other Member States" and "on the basis of the principle of solidarity and fair sharing of responsibility laid down in Article 80 TFEU that Hungary had to be allocated relocation quotas in the same way as all the other Member States that were not beneficiaries of the relocation mechanism". Ibid, CJEU, *Slovakia and Hungary v Council*, paras 291, 293.

⁴⁸⁵ According to the responsibility criteria in Article 58§2 RAMM.

interpretation of Article 80 TFEU read in conjunction with Article 67§2 TFEU – should entail fair treatment towards TCNs.⁴⁸⁶ To conclude, the RAMM treats asylum seekers as passive objects, directing them towards Member States they have not earlier considered as their destination country and allowing for the possibility of those whose applications have been rejected to be transferred from one Member State to another, only for the latter to return them back to their country of origin.

6.2.3. Fundamental rights compliance

Non-refoulement and systematic deficiencies

A first remark in relation to fundamental rights compliance of the RAMM proposal, and in particular **compliance with non-refoulement requirements as laid out in the EU CFR and CEAS instruments, concerns the systemic deficiencies threshold**⁴⁸⁷ for suspending a transfer (Article 8§2). Although the post-2011 jurisprudence of the ECtHR and CJEU on the matter has lowered the threshold by obliging Member States to look at considerations relating to the individual circumstances (family matters, disabilities etc.),⁴⁸⁸ this development is unfortunately not reflected in the wording of the RAMM. Instead, the proposal reflects preceding CJEU case law, sticking to the higher threshold introduced in the *NS* case.

The same provision raises additional concerns in relation to the scope of *non-refoulement*. In particular, it links **the risk of harm upon return exclusively to Article 4 of the Charter**, whereas the ECtHR has maintained that *non-refoulement* covers violations of rights beyond the prohibition of inhumane and degrading treatment, such as the right to fair trial⁴⁸⁹ (Article 6 ECHR and 47 EU CFR) and the prohibition of slavery⁴⁹⁰ (Article 4 ECHR and 4 EUCFR). Given that litigation on these matters continues to develop, other rights, such as the right to dignity (Article 1 EU CFR) might be equally relevant.⁴⁹¹

Asylum seekers' obligations and sanctions

Another issue to be raised concerns the **legality of the obligations imposed on asylum seekers under Article 9, including the obligation to apply for international protection in the Member State of first entry**, and the related introduction of sanctions in case of non-compliance (Article 10). These provisions are justified by the Commission as a way to tackle secondary movements within the EU,⁴⁹² yet they raise a number of issues from an international refugee law and European law perspective.

⁴⁸⁶ In her opinions on the *Jafari* and *Ghezelbash* cases, (former) AG Sharpston invoked solidarity as the basis on which the injustices for both refugees and borderline states caused by the implementation of the Dublin system could be tackled.

⁴⁸⁷ In its *N.S. and M.E. and others* ruling, the CJEU recognised that Member States should not carry out returns under the Dublin Regulation if the asylum procedures and reception conditions in the responsible Member State suffer from 'systemic deficiencies' which may expose asylum seekers to treatment contrary to applicable human rights standards.

⁴⁸⁸ ECtHR, *Tarakhel v Switzerland*, Application No 29217/12, 4 November 2014 and CJEU, *C.K. and others*, C-578/16 PPU 16 February 2017.

⁴⁸⁹ See ECtHR, *Al Nashri v Poland*, Application No 28761/11, 24 July 2014

⁴⁹⁰ See ECtHR, *Chowdhury v Greece*, Application No 21884/15, 30 March 2017.

⁴⁹¹ On human dignity in the context of reception conditions see CJEU, C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland*, 19 March 2019.

⁴⁹² 2016 Proposal, pp. 14–15 and RAMM Rec. 53.

First, international law does not include an obligation for refugees to apply for protection in a particular country, neither does it envisage sanctions for refugees who do not abide by that requirement. On the contrary, the **non-penalisation principle enshrined in Article 31 Refugee Convention implies that irregular movement might very well be part of the refugee journey** and, thus, it should not be followed by otherwise applicable migration law (penal or administrative) penalties. With the Refugee Convention being part of primary EU law per reference, Article 10 RAMM has to give way.

In Europe, both the ECtHR and the CJEU have concluded that a refugee may have valid reasons to move from one EU country to another, thus rendering the presumption of safety for EU Member States rebuttable.⁴⁹³ Furthermore, given that the Refugee Convention rests on notions of solidarity and interstate cooperation (as reflected in the Preamble), concentrating responsibility in states of first entry by obliging asylum seekers to apply for protection in these countries in fear of sanctions, is a situation not in line with the Convention.⁴⁹⁴ With specific regard to the sanction that entails deprivation of material reception conditions (food, housing, clothing and personal hygiene products) and access to employment, it can be argued that it runs contrary to established CJEU case law, according to which minimum reception conditions should be provided to an asylum seeker, whom the state in question has decided to transfer to the Member State responsible under the Dublin Regulation.⁴⁹⁵

As suggested above, the tightening of procedural rules and the introduction of sanctions are guided by the need to prevent unauthorised movements within the EU, which according to the Commission “put a heavy burden” on Member States other than those of first arrival, “with unwanted effects for the Schengen area”.⁴⁹⁶ **These measures are bound to fail, however, primarily because they are premised on the false assumption that asylum applicants are to be blamed for failing to subscribe to a system that systematically violates their human rights** (i.e. failure to respect family unity and family reunification, dire reception conditions, absence of integration prospects, unfair asylum procedures, etc).⁴⁹⁷

The amendment to the Long-Term Residence Directive introducing the possibility to obtain long-term resident status in a shorter period of time (three years, Article 71(1) RAMM), in combination with the extension of the family definition, are small steps in the right direction, yet **remain inadequate to appropriately address the complexity behind applicants’ motives to move from one Member**

⁴⁹³ Ibid ECtHR, *M.S.S. v Belgium and Greece*; and CJEU, *Joined Cases N.S. and M.E. and others*.

⁴⁹⁴ On this see E. Karageorgiou “The distribution of asylum responsibilities in the EU: Dublin, partnerships with third countries and the question of solidarity”, *Nordic Journal of International Law*, (2019) 88(3), 324.

⁴⁹⁵ CJEU, C-179/11 *Cimade, GISTI v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration*, 27 September 2012. In the *Jawo* case (para 92) the Grand Chamber held that “a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene, and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity” would justify an action challenging a transfer decision. In a more recent case, the CJEU invoked the requirement to ensure “a dignified standard of living” and the Directive’s objective to “promote the self-sufficiency of applicants” to conclude that under the current Directive 2013/33/EU applicants subject to a Dublin transfer cannot be excluded from the labour market. Referring to AG’s opinion, the fourth Chamber underlined that “work clearly contributes to the preservation of the applicant’s dignity, since the income from employment enables him/her not only to provide for his/her own needs, but also to obtain housing outside the reception facilities in which he/she can, where necessary, accommodate his/her family.” CJEU, *Joined Cases C-322/19 and C-385/19 K.S. and others v International Protection Appeals Tribunal and Minister for Justice and Equality Ireland and others*, 14 January 2021, paras 69-70.

⁴⁹⁶ Proposal for a Regulation on Asylum and Migration Management COM(2020) 610 final, 1 and 11.

⁴⁹⁷ See, among others, ECRE, *Beyond Solidarity: Rights and Reform of Dublin*, Legal Note #03 February 2018, 3-4.

State to another.⁴⁹⁸ Mechanisms to ensure uniformity in accepting evidence to prove family ties, educational links, to trace applicants' relatives and other meaningful links, for instance, are not provided for.

Best interests of the child and unaccompanied minors

An additional concern relates to the **best interest of the child** (Article 24(2) EUCFR) and provisions on **unaccompanied minors** under Article 15§5 RAMM, which stipulate that in the absence of family members and relatives in the EU, responsibility lies with the Member State where the minor's application for international protection was *first* registered. This represents another example of the RAMM taking a step backwards when it comes to fundamental rights standards.

Although the provision conditions this rule based on the minor's best interests, **the underlying assumption remains problematic.** In the *M.A.* ruling, the CJEU prohibited any transfer of unaccompanied children which would be contrary to their best interests, arguing that "since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State."⁴⁹⁹ It can, therefore, be safely concluded that the presumption is that **transfers are not in minors' best interests.** In light of this, **Article 15(5) goes against CJEU case law as well as the principle of the best interest of the child,** reversing the burden of proof and placing a disproportionate administrative requirement on the minor to provide evidence as to how the transfer would affect his/her best interests.

Procedural safeguards and effective remedies

Limitations to the procedural rights and remedial mechanisms available to asylum seekers as suggested in the previous section, are also relevant to a discussion of fundamental rights, and in particular of the right to an effective remedy (Article 47 EU CFR), the right to good administration (Article 41 EU CFR), and the right to asylum (Article 18 EU CFR). **Shortening the time available for making and deciding on appeals, limiting the scope of the remedy against a transfer decision, and removing the automatic suspensive effect of an appeal, although justified by the need for efficiency, are in clear opposition to international and EU standards.**

In fact, with a move back to Dublin II standards and earlier CJEU case law,⁵⁰⁰ the Commission suggests that remedy grounds should be limited to family considerations, minors and risk of inhumane and degrading treatment, leaving outside for example issues relating to the application of the first entry criterion, or those related to the issuing of visas.⁵⁰¹ Arguably, such a restriction cannot be seen as compatible with the interpretation of Article 47 EU CFR by the CJEU.⁵⁰² In *Ghezelbach*, the Court explains

⁴⁹⁸ For a detailed analysis on secondary movements in the CEAS and its causes, see Martin Wagner, Jimy Perumadan and Paul Baumgartner, *Secondary Movements*, 2019, ICMPD.

⁴⁹⁹ CJEU, C-648/11 *MA, BT, DA v Secretary of State for the Home Department*, 6 June 2013, para 55.

⁵⁰⁰ CJEU, C-394/12 *Shamso Abdullahi v Bundesasylamt*, 10 December 2013.

⁵⁰¹ RAMM Recital 56 does not justify this limitation at all.

⁵⁰² See e.g. C-582/17 and C-583/17 *Staatssecretaris van Veiligheid en Justitie v H. and R.*, 2 April 2019; C-360/16, *Bundesrepublik Deutschland v Aziz Hasan*, 25 January 2018; C-670/16 *Tsegezab Mengesteab v Bundesrepublik Deutschland*, 26 July 2017; C-201/16, *Majid auch Madzhdi Shiri v Bundesamt für Fremdenwesen und Asyl*, 25 October 2017; C-155/15, *George Karim v Migrationsverket*, 7 June 2016.

that “the drafting of that provision [Article 27(1) Dublin III] makes no reference to any limitation of the arguments that may be raised by the asylum seeker when availing himself of that remedy”.⁵⁰³

In the same court case, the intervening Member States have used the ‘floodgates’ and ‘forum shopping’ arguments to substantiate limitations in judicial review over the application of the responsibility criteria, which have however been rejected by the Court.⁵⁰⁴ It follows that, sticking to earlier (*Abdullahi*) doctrine, the RAMM undermines procedural rights stipulated in the Charter, such as the right to an effective remedy, which, by extension, may lead to a violation of the right to asylum as enshrined in Article 18 EU CFR.

The same conclusion applies to **restricted time limits for appeals**. When examining what qualifies as a ‘reasonable’ time limit in the context of accelerated procedures, the CJEU held that a 15-day time-limit for appealing a decision in an accelerated procedure “appears reasonable and proportionate in relation to the rights and interests involved”.⁵⁰⁵ Given that the Dublin procedure is not an accelerated procedure and applicants need sufficient time to provide all relevant information to challenge the appeal, a two-week time limit, as established in Article 33(2) does not meet the reasonableness and proportionality requirement.

Finally, unlike the 2016 Proposal which prohibited any transfer before a decision on the appeal or review is taken (Article 28(3)), the RAMM removes the automatic application of suspensive effect in the appeal process. Considering that **the presumption of safety in the EU is rebuttable and that it is likely that a transfer may implicate the principle of non-refoulement** as codified in Article 19(2) of the Charter, such a limitation interferes with Article 47 Charter in relation to *refoulement*.⁵⁰⁶

⁵⁰³ CJEU, C-63/15 *Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, 7 June 2016, para 36.

⁵⁰⁴ See AG opinion to *Ghezelbash*, paras 73-74. On the constitutional significance of judicial scrutiny for rule of law and fundamental rights see “Shadow Opinion of Advocate-General Eleanor Sharpston QC - Case C-194/19 HA, on appeal rights of asylum seekers in the Dublin system”, 12 February 2021, EU Law Analysis Blog.

⁵⁰⁵ CJEU, C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration*, 28 July 2011, para 67.

⁵⁰⁶ On the obligation to provide for automatic suspensive effect in the context of return, see C-181/16, *Sadikou Gnandi v État belge*, 19 June 2018, and C-175/17, *X v Belastingdienst/Toeslagen*, 26 September 2018.

7. PROPOSAL FOR A CRISIS AND FORCE MAJEURE REGULATION

7.1. Legal mapping

7.1.1. Context and scope

As pointed out in the Explanatory Memorandum, the proposal for a Crisis and *Force Majeure* Regulation (hereinafter the Crisis proposal) should be read in conjunction with the integrated framework on asylum and migration management laid down in the RAMM proposal. According to the Commission, the new governance and monitoring of the migratory situation laid down in Article 6 RAMM, including provisions on contingency planning – coupled with the solidarity mechanism to support **Member States facing situations of migratory pressure (or risk of such pressure)** – should ensure that Member States are better prepared to face future situations of crisis in the field of migration.⁵⁰⁷ At the same time, the Commission does not exclude the possibility that such situations may still occur due to various factors that operate outside of the control of the EU and its Member States.

The experience and lessons learnt during the 2015/2016 'refugee crisis' are referred to in the proposal as well as in the related section of the Staff Working Document to justify the need for a **separate legislative instrument dealing specifically with crisis situations in the field of migration**. The Commission underlines how the 2015 crisis has made clear that the EU is lacking a 'toolbox' to address exceptional situations of large scale number of entries of third-country nationals arriving in the EU and capable of making a Member State's asylum or reception system non-functional.⁵⁰⁸ During bilateral consultations conducted by the Commission ahead of the launch of the New Pact, several Member States expressed the need for distinguishing between 'normal situations' and 'crisis situations' and "expressed a preference for accommodating them in different instruments".⁵⁰⁹

Accordingly, the proposal under consideration aims to provide the **adaptation to the solidarity mechanism laid down in the RAMM**, providing for a wider scope of compulsory relocation (covering additional categories of persons), different rules on return sponsorship, as well as shortened deadlines for triggering the mechanism.⁵¹⁰

The proposal also grants Member States the **possibility to derogate from the rules on asylum and return procedures provided for in the amended APR proposal**. The envisaged derogations concern the scope of application and prolongation of the asylum border procedure under Article 41 of the amended APR proposal, as well as the possibility for Member States to delay the registration of applications for international protection compared to the time limits provided in the APR. The Crisis proposal also foresees an extension of the maximum duration of the return border procedure and introduces two additional grounds (adding to those set out in the 2018 proposal for a recast Return

⁵⁰⁷ European Commission, Proposal for a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum, COM(2020) 613 final, 23.9.2020, p. 1.

⁵⁰⁸ Ibid. See also European Commission, Staff Working Document accompanying the New Pact on Migration and Asylum, p. 63. European Commission, Staff Working Document, p. 63.

⁵⁰⁹ European Commission, Proposal for a Regulation addressing situations of crisis and *force majeure*, p. 10.

⁵¹⁰ Ibid., p. 13.

Directive) in which the existence of a risk of absconding in individual cases can be presumed, unless proven otherwise.⁵¹¹

Besides situations of 'migration crisis', the proposal under consideration also covers situations of *force majeure*. Here again, according to the Commission, recent events have exposed a gap in the capability of the EU to respond effectively to "abnormal and unforeseeable circumstances outside their control, the consequences of which could not have been avoided in spite of the exercise of all due care".⁵¹² The Commission makes explicit reference to the Covid-19 pandemic as well as the 'political crisis' witnessed at the Greek-Turkish border in March 2020, as examples of situations requiring the introduction of a specific set of rules in the field of asylum and return, a need confirmed by consultations with Member States.⁵¹³

The proposal foresees **specific derogations in the case of force majeure situations**, including the extension of registration time limits of applicants for international protection, extension of time limits for transferring applicants to other Member States and for contributing to solidarity measures towards other Member States under the RAMM.⁵¹⁴

Another key objective of the proposal is to lay down rules for granting, in crisis situations, **immediate protection status** to displaced persons from third countries who face a high degree of risk of being subject to indiscriminate violence, find themselves in exceptional situations of armed conflict, and who are unable to return to their countries of origin.⁵¹⁵ The Commission explains that the new rules on immediate protection status included in the proposal will replace those laid down in the **2001 Temporary Protection Directive (TPD)**,⁵¹⁶ which should then be repealed.

The proposal for a Crisis and *Force Majeure* Regulation has been accompanied by the publication of a **Commission recommendation on an EU mechanism for Preparedness and Management of Crisis Related to Migration (the so-called 'Migration Preparedness and Crisis Blueprint')**. The Crisis Blueprint addresses the identified lack at the EU level of a structured mechanism enabling real-time monitoring, early warning, and a centralised, coordinated EU response to situations of crisis in the field of migration; relying on the mobilisation of structures, tools, human and financial resources across EU institutions and agencies.⁵¹⁷

The Crisis blueprint is expected to complement the procedures envisaged in the Crisis Regulation in two ways: first, by providing timely and up-to-date information based on which the Commission should establish the existence of a situation of crisis; second, to support a coordinated EU response to a crisis situation by identifying suitable solidarity measures in the field of capacity building, operational

⁵¹¹ Ibid., pp. 15-16.

⁵¹² Ibid., Recital 7.

⁵¹³ Ibid., pp. 4 and 9.

⁵¹⁴ Ibid., p. 16.

⁵¹⁵ Ibid., pp. 17-18.

⁵¹⁶ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12, 7.8.2001.

⁵¹⁷ European Commission, Commission Recommendation of 23.9.2020 on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint), C(2020) 6469 final, Brussels, 23.9.2020.

support and cooperation with third countries (aspects which are not covered by the Crisis Regulation).⁵¹⁸

7.1.2. Analysis of key legal changes

This section analyses the key provisions included in the 2020 Crisis proposal. It underlines the main changes the proposal would bring about compared to existing EU legislation in the area of asylum and migration, taking into account the legislative proposals tabled by the Commission during the 2014-2019 legislative term and, when relevant, the outcome of negotiations between co-legislators on those files.

The **concepts of 'crisis' and *force majeure*** included in the Crisis proposal are compared with the same or analogous concepts as formulated in EU primary and secondary legislation. The scope and content of the notion of 'crisis', in particular, is considered against the background of previous initiatives developed in the context of the EU agenda on migration, most notably the 2015 Council decisions establishing an emergency relocation mechanism in favour of Italy and Greece on the basis of Article 78(3) TFEU.⁵¹⁹

The analysis also pays attention the rules governing the **process for establishing the existence of a situation of crisis and *force majeure***, focusing on the role assigned to a range of *knowledge actors and sources* in the assessment process. The role of the **Migration Preparedness and Crisis Blueprint**, established by the Commission in the framework of the New Pact, and the network of actors involved in its implementation is also considered.

The **specific provisions on solidarity** to be activated in case of crisis situations are compared with those of mechanisms that had been envisaged by the Commission in its 2015 and 2016 legislative proposals. These include the already-mentioned 2015 Council decisions on emergency relocation, the 2015 proposal on a Crisis relocation mechanism⁵²⁰ (to be withdrawn following to the publication of the 2020 Crisis proposal), as well as the 2016 proposal amending the Dublin Regulation.⁵²¹

As mentioned in the previous section, the Crisis proposal introduces a **set of derogatory provisions in the field of asylum and return** – including rules foreseeing an expanded scope for applying the asylum border procedure, as well as extended timelines for conducting the asylum and return border procedures and for registering applications for international protection. The analysis focuses on the scope of envisaged derogations compared with the normal rules on asylum and return border procedures established in the amended APR proposal. Furthermore, the analysis underlines how the derogatory provisions included in the Crisis proposal need to be considered in light of derogations already foreseen in existing EU legislative instruments, namely the Asylum Procedure Directive and the

⁵¹⁸ Ibid., p. 14.

⁵¹⁹ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239/146 15.9.2015; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80, 24.9.2015.

⁵²⁰ European Commission, Proposal for a Regulation establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, COM(2015) 450 final, Brussels, 9.9.2015.

⁵²¹ European Commission, Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final.

Return Directive, as well as the proposals on the reform of those two instruments tabled by the Commission in 2016 and 2018 respectively.

Finally, the analysis in this section compares the provisions on **immediate protection** included in the Crisis proposal with the protection regime included in the **2001 Temporary Protection Directive**, which would be repealed by the Crisis proposal. Key elements addressed include the criteria for eligibility, the procedure for triggering protection, the duration of the protection status, as well as the set of rights granted to beneficiaries.

a) Definitions of 'crisis' and 'force majeure'

The existence of a crisis situation or of a situation of *force majeure* is a precondition for unlocking the application of specific solidarity measures and procedural derogations in the field of asylum and return procedures foreseen in the proposal under consideration. Article 1(2) of the Proposal defines a **crisis** as:

[...] **an exceptional situation of mass influx** of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it **renders the Member State's asylum, reception or return system non-functional** (emphasis added).

The definition of crisis is followed by part (b) of Article 1(2) bringing "an imminent risk of such a situation" under the scope of the Regulation, thus extending the derogations provided for in the proposal to cases where there is simply an 'imminent risk' of such a crisis.

The above-mentioned definition of crisis should be read in conjunction with Article 2(w) of RAMM, which defines '**migratory pressure**' as:

[...] **a situation where there is a large number of arrivals** of third-country nationals or stateless persons, or a risk of such arrivals, including where this stems from arrivals following search and rescue operations, as a result of the geographical location of a Member State and the specific developments in third countries which generate migratory movements that **place a burden even on well-prepared asylum and reception systems and requires immediate action** (emphasis added).

The Commission clarifies that the proposal under consideration establishes specific rules to establish a wider scope and a faster activation process compared to the mechanism foreseen in the RAMM and ensures that an effective and efficient system is permanently in place to deal with a situation of crisis.⁵²²

It is further explained that the establishment of specific rules for solidarity in a situation of crisis is without prejudice to the possibility for the Council to adopt, on a proposal from the Commission, **provisional measures for the benefit of a Member State based on Article 78(3) TFEU**. The latter does not make use of the term 'crisis' but refers instead to **the existence of "an emergency situation characterised by a sudden inflow of nationals of third countries"**. As mentioned above, Article 78(3)

⁵²² European Commission, Proposal for a Regulation addressing situations of crisis and *force majeure*, p. 5.

was the legal basis of the 2015 Council decisions setting up an emergency relocation mechanism to the benefit of Italy and Greece.

Based on the experience of the temporary relocation scheme, the Commission presented in 2015 a proposal for a Regulation establishing a 'Crisis relocation mechanism', which is to be withdrawn following to the publication of the 2020 Crisis proposal. The 2015 proposal contained a definition of 'crisis' as a **"situation of extreme pressure characterised by a large and disproportionate inflow of third-country nationals or stateless persons, which places significant demands on [a Member State's] asylum system"** (emphasis added).⁵²³

The 2015 proposal further specified that when ascertaining whether there is a crisis situation, the Commission shall establish that the crisis is of such "a magnitude as to place extreme pressure even on a well-prepared asylum system which is functioning in line with all relevant aspects of the EU asylum *acquis*". When making the assessment, the Commission shall further consider a number of parameters:

[...] the total number of applicants for international protection and of irregular entries of third-country nationals and stateless persons in the six months preceding the adoption of the delegated act, the increase in such numbers compared to the same period in the previous year as well as the number of applications per capita in the Member State benefiting from relocation over the previous 18 months compared to the Union average.⁵²⁴

The 2016 CEAS reform did not envisage any specific mechanism aimed at addressing a situation of crisis. However, one of the key elements of the 2016 proposal for a reform of the Dublin Regulation was the establishment of a compulsory and automatic corrective allocation mechanism to support Member States facing a "disproportionate pressure" or a "disproportionate number of international protection applicants". The corrective allocation mechanism was to be triggered automatically where the number of asylum applications in a Member State exceeded 150% of the figure identified in a reference key, based on two criteria with equal 50% weighting: the size of the population and the total GDP.

In contrast with the approach followed in the 2016 Dublin reform, but in line with the mechanism for establishing a situation of migration pressure (or risk of pressure) under the RAMM, the **2020 Crisis proposal does not include any quantifiable indicators or threshold based on which a crisis (or a risk thereof) should be established**, only indicating vaguely that this should be assessed by reference to the population and GDP of a Member State. As further explained below, this broad and open-ended definition leaves a wide margin of discretion to the Commission when assessing Member States' claims that they are facing a crisis situation.⁵²⁵

By contrast to the concept of crisis, the **2020 Crisis proposal does define the concept of *force majeure***, although Recital 7 refers to "abnormal and unforeseeable circumstances outside the control of Member States, the consequences of which could not have been avoided in spite of the exercise of all due care". The Commission specifies that situations of *force majeure* may occur very quickly and be of such a scale and nature that they require a specific set of tools in order to be effectively addressed.

⁵²³ European Commission, Proposal for a Regulation on a Crisis Relocation mechanism, Article 1(4).

⁵²⁴ Ibid.

⁵²⁵ See above, section 2.1.2.

This language reflects the definition of *force majeure* contained in the case law of the CJEU.⁵²⁶ At the same time, the CJEU has made clear that the concept of *force majeure* is not identical in different branches of law, and that the significance of such a concept and its scope of application must be determined based on the specific legal framework within which it is intended to take effect.⁵²⁷

Examples provided in the Explanatory Memorandum of recent events amounting to situations of *force majeure* include the Covid-19 pandemic declared by the World Health Organization on 11 March 2020 and “the political crisis witnessed at the Greek-Turkish border in March 2020”. The inclusion of such disparate circumstances as a global pandemic and a temporary suspension of the 2016 EU-Turkey Statement by the Turkish government under the umbrella of *force majeure* suggests that the Commission supports a ‘**flexible**’ and **open-ended interpretation of this concept**, which leaves Member States’ authorities a broad margin of discretion to apply this concept in a variety of different circumstances.

b) Knowledge sources and actors

Another novel aspect of the 2020 Crisis proposal, strictly related to the previous, concerns the range of **knowledge sources and actors** that are to be mobilised in the assessment of what constitutes a situation of “crisis” or *force majeure*.

When it comes to assessing a situation of crisis, the 2020 Crisis proposal places the Commission in a leading role. Specifically, the proposal provides that the Commission shall assess a “reasoned request” submitted by a Member States requesting the activation of the crisis regime envisaged in the proposal based on substantiated information provided by the following sources:

- The mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint);
- EASO;
- European Border and Coast Guard Agency (Frontex);
- The Migration Management Report referred to in Article 6 of the RAMM.⁵²⁸

⁵²⁶ See for instance, CJEU, 18 December 2007, C-314/06, *Société Pipeline Méditerranée et Rhône*; CJEU, 18 July 2013, C-99/12, *Eurofit*; CJEU, 18 March 2010, C-218/09, *SGS Belgium and Others*.

⁵²⁷ For instance, CJEU, C-314/06, *Société Pipeline Méditerranée et Rhône*, par. 25. For a detailed analysis on the principles and requirements underpinning potential derogations from EU asylum law in case of emergency situations, including those related to internal and public security and law and order, see, ECRE/ELENA, *Derogating from EU Asylum law in the name of “emergencies”: The legal limits under EU law, 2020*. In recent cases brought before the CJEU, some Member States have argued that Article 72 TFEU authorises derogations from EU rules in the field of asylum, subsidiary protection and temporary protection adopted in accordance with Article 78 TFEU where compliance with those rules would preclude Member States from fully guaranteeing the maintenance of law and order and the safeguarding of internal security, or adequately managing an emergency situation characterised by arrivals of large numbers of applicants for international protection. In both the two cases, however, the CJEU rejected Member States’ arguments. In particular, the Court concluded that, based on settled case-law, the derogation provided for in Article 72 TFEU must be interpreted strictly. The Court further added that Member States are not allowed to unilaterally invoke Article 72 to derogate from EU law based on law-and-order considerations without any oversight by the institutions of the European Union. Finally, the Court held that reliance on Article 72 was not justified as secondary legislation in the field of asylum already includes provisions allowing Member States the possibility to derogate from their obligations under those instruments to safeguard internal security in case of emergency. See CJEU, Judgment of the Court (Third Chamber) of 2 April 2020 *European Commission v Republic of Poland and Others*, Joined Cases C-715/17, C-718/17 and C-719/17, para. 139-172; Judgment of the Court (Grand Chamber) of 17 December 2020, *European Commission v Hungary*, Case C-808/18, para. 212-226.

⁵²⁸ European Commission, Proposal addressing situations of crisis and *force majeure*, p. 14.

The **Migration Preparedness and Crisis Blueprint** plays a key role in the assessment of a situation of crisis under the Crisis proposal. The Recommendation establishing the Blueprint underlines how the latter builds on relevant existing legislation, while at the same time, is designed to support the implementation of the new instruments as proposed by the Pact, notably the Crisis proposal and the RAMM.⁵²⁹

The main objective of the Blueprint is to ensure **real-time monitoring, early warning, and a coordinated EU response to migration situations**. To achieve that aim, it relies on the involvement of a broad **network of actors**: Member States including their liaison officers, the Council, the European Commission, EU Delegations, European Migration Liaison Officers (EMLOs), the European External Action Service, relevant Common Security and Defence Policy missions and operations, and EU Agencies (EASO, Frontex, EUROPOL, eu-LISA, and FRA).⁵³⁰

Representatives of the main third countries of origin, transit and/or destination as well as representatives of key international partners and stakeholders are also to be invited on an *ad hoc* basis to take part in the activities of the network, in order to ensure timely and regular information exchange on migratory flows, smuggling activities and any other factors (including geopolitical, health-related, and environmental) impacting asylum, migration, or border management of the EU.⁵³¹

The Blueprint is supposed to operate in two different stages:

- Monitoring and preparedness (stage one);
- Crisis management (stage two).

During **stage one (monitoring and preparedness)**, actors involved in the network should provide timely and adequate information to establish an updated migration situational awareness and provide for early warning/forecasting, as well as increasing resilience to efficiently deal with any type of migration crisis.⁵³² Based on such contributions, the Commission should issue situational reports – so-called 'Migration Situational Awareness Analysis (MISAA)'.⁵³³

During **stage two (migration crisis management stage)**, to be activated by the Commission upon request of an interested Member State, the mechanism should ensure up-to-date comprehensive information on the migratory situation to all the actors allowing to take timely decisions and ensuring that the implementation of those decisions is monitored and coordinated properly.⁵³⁴ The recommendation includes a '**toolbox**' of possible actions that could be proposed by the Commission to the Member States to address the situation of crisis, which includes a range of measures in countries of origin, transit and destination, measures in Member States at the EU external border, as well as measures in other Member States.⁵³⁵

⁵²⁹ European Commission, Recommendation on a Migration Preparedness and Crisis Blueprint, Recital 14.

⁵³⁰ *Ibid.*, Annex p. 1.

⁵³¹ *Ibid.*, p. 2.

⁵³² In particular, the sharing of situational awareness includes data on migratory flows, information on reception, asylum and border management systems, relevant national developments in the field of migration in Member States and third countries, early warning/forecasting notifications, as well as cooperation actions with third countries.

⁵³³ *Ibid.*, p. 3

⁵³⁴ *Ibid.*, p. 5

⁵³⁵ *Ibid.*, p. 7

Interestingly, the Recommendation on the Blueprint includes a **broader definition of 'crisis' that goes beyond the circumstances defined in the Crisis Regulation**, as "any situation or development occurring inside the EU and in a third country having as an effect and putting strain on any Member State's asylum, migration and border management system, or having such potential".⁵³⁶ The rationale for providing a different and broader notion of crisis in the framework of the Blueprint, compared to the 2020 Crisis proposal, is not explained. This is particularly puzzling given the clear linkage established in the proposal between the monitoring and forecasting activities carried out in the framework of the Blueprint and the assessment of a situation of crisis by the Commission.

EU agencies, Frontex and the EASO, are also assigned a central role in providing information to be used by the Commission for assessing a situation of crisis. It should be noted that Frontex and the EASO have already acquired (or are in the process of acquiring, based on ongoing legislative initiatives) a substantial role in monitoring and assessing the capacity of Member States' authorities to address challenges faced by their asylum and returns systems. Article 32 of the EBCG Regulation, adopted in 2019, gives the agency the task of carrying out a **vulnerability assessment** with the aim of assessing in qualitative and quantitative terms Member States' capacity to carry out border management tasks, including their capacities to deal with potential arrivals of large number of persons on their territory. Based on the outcome of the assessment, the Agency Executive Director shall issue a recommendation to the Member State concerned setting out the necessary measures to be taken in order to remedy the identified challenges.

Along the same line, the proposed Regulation on an EU Asylum Agency (EUAA), on which the Council and the Parliament reached a provisional agreement on June 2021, would task the Agency with a monitoring function of EU Member States capacity and preparedness to manage situations of disproportionate pressure, based on which the Agency should issue recommendations to the Member States concerned, including a set of appropriate measures to address the shortcomings identified in the monitoring exercise.⁵³⁷

The 2020 Crisis proposal, read in combination with the above-mentioned Blueprint Recommendation, reflects a substantial expansion of the role of EU agencies, the EBCG and the EASO, in the monitoring and assessment of migration dynamics and the forecasting of future trends. Additionally, it focuses strongly on the involvement of third countries of origin, transit and/or destination in exchanging information and building situation awareness.

Contrary to the procedure laid down in the case of crisis situations, the 2020 Crisis proposal is silent on the **sources of information to be used to determine a situation of *force majeure***, as well as on the contribution of EU agencies or other actors. Article 7 simply states that "when a Member State is facing a situation of *force majeure* [...] that Member State shall notify the Commission" and indicate the "precise reasons" why it considers it necessary to apply the extended time limits envisaged by the Regulation in case of *force majeure*. This leaves to the Member State in question the power to unilaterally declare whether *force majeure* applies and when it has terminated, without oversight from

⁵³⁶ Ibid., Recital 12.

⁵³⁷ Council of the EU, Extended negotiation mandate for negotiations with the European Parliament, 9905/21, 17 June 2021, Chapter 5; European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 final, Brussels, 4.5.2016, Article 13 and 14.

the Commission and without the involvement of EU “knowledge actors” in assessing the evidence and justifications provided by the Member State.

c) “Crisis Solidarity” mechanism

When the Commission establishes that a Member State is confronted with a situation of crisis based on the procedure detailed in the previous sub-section, the Commission has the power to adopt an **implementing act** triggering a compulsory solidarity mechanism specifically tailored to crisis situations.

As opposed to the mechanism to be applied in situations of migration pressure under the RAMM, the solidarity mechanism in the case of crisis situations **does not allow Member States to contribute through capacity building measures, operational support, and cooperation with third countries** as a substitute for relocation or return sponsorship. A further difference with the solidarity mechanism laid down in the RAMM, is that Member States involved in **return sponsorship** would be obliged to relocate the person if he/she has not returned or has not been removed within four months instead of eight months (Article 2(7)).

In addition, the Crisis proposal **simplifies the procedure and shortens the timeframes for triggering the solidarity mechanism compared to what is envisaged in the RAMM**. Member States would be required to submit a Crisis solidarity response plan within one week from the finalisation of the assessment of a situation of crisis and after the convening of the Solidarity Forum (instead of two weeks).⁵³⁸ Following submission of the Crisis Solidarity Response Plan, the Commission shall adopt an implementing act setting out the solidarity measures for each Member State within one week (instead of two weeks).

The ‘flexibility’ characterising the compulsory solidarity mechanism to be activated in a situation of crisis contrasts with the mechanisms that had been envisaged in the 2015 and 2016 legislative proposals. The **2015 Commission proposal establishing a Crisis relocation mechanism** contained a compulsory solidarity model exclusively consisting of relocation of applicants for international protection.⁵³⁹ The proposal also foresaw the possibility for a Member State to suspend its participation in the mechanism for a period of one year, but only for well-justified reasons and by making a financial contribution to the EU budget instead (amounting to 0,002 % of its GDP).⁵⁴⁰

As already mentioned, **the 2016 Dublin Regulation proposal** introduced an automatically triggered “corrective allocation mechanism” exclusively encompassing relocation of applicants for international protection. It also included the possibility for a Member State to suspend participation in the mechanism for a maximum period of one year and make a financial contribution (250,000 euros) per applicant.⁵⁴¹

Another novelty of the 2020 Crisis proposal regards the **personal scope** of the mechanism. The Crisis proposal provides for a wide scope for compulsory relocation covering asylum applicants in a border

⁵³⁸ The proposal envisages that the Commission shall convene a Crisis Solidarity Forum to discuss the findings of its assessment and define the solidarity response before adopting an implementing Act. See European Commission, Proposal for a Regulation addressing situations of crisis and *force majeure*, p. 14.

⁵³⁹ European Commission, Proposal for a Regulation establishing a crisis relocation mechanism, Article 33a.

⁵⁴⁰ *Ibid.*, Article 33b.2.

⁵⁴¹ European Commission, Proposal for a regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Chapter VII, Article 34.

procedure, irregular migrants, and persons granted immediate protection (Article 2.1, 2.5 and 2.6). By contrast, the two previously mentioned proposals exclusively covered applicants for international protection.

In line with the RAMM Proposal, distribution of persons between Member States under the 2020 Crisis proposal is to be determined on the basis of a **distribution key** based on 50% population and 50% GDP. The 2016 Dublin proposal foresaw a similar reference key based on GDP and population with equal weighting. It is interesting to note how the 2015 Crisis Relocation Mechanism added to these two main criteria (population and GDP) two additional criteria: unemployment rate and average number of asylum applications over the five preceding years per million inhabitants.

d) Procedural derogations and exceptions

The qualification of a specific situation as a 'crisis' unlocks a set of far-reaching derogations and exceptions to procedural safeguards and fundamental rights, which are presented as providing 'flexibility' to EU Member States.⁵⁴² The Crisis proposal envisages three main forms of derogation from the general rules – normal procedures and timelines - laid down in the Pact proposals as well as in existing EU legislative instruments.

First, Member States may **extend the five-day deadline for conducting the screening at the external border, as laid down in the Screening proposal, by an additional five days**. It is noticeable that the Screening Proposal does not make reference to the notion of 'crisis' to justify the extension, but rather to "exceptional circumstances, where a disproportionate number of third-country nationals need to be subject to the screening at the same time".⁵⁴³

Second, two crisis-designed procedures are envisaged, covering asylum and return border procedures respectively:

- a) **Asylum crisis management procedure.** This procedure would grant Member States the possibility to apply the border procedure to decide on the merit of an application for international protection where the applicant is of a nationality with an EU-wide average recognition rate of 75% or lower. This provision constitutes a derogation from Article 41(2)(b) of the amended APR proposal (Article 4.1(a)).

The asylum crisis management procedure also envisages the extension of the border procedure for an **additional period of eight weeks** from the twelve weeks envisaged in the amended APR proposal, for a total of 20 weeks (Article 4.1(b)). The Commission may authorise the application of the above-mentioned rules for a period of six months, which can then be extended for a period not exceeding one year (Article 3.4).

- b) **Return crisis management procedure.** This procedure allows Member States to extend by eight additional weeks the period of twelve weeks (for a total of twenty weeks) during which persons subject to the return border procedure envisaged in Article 41 of the amended APR proposal can be kept "in locations at, or in proximity to the external border or transit zones" or "other locations within the territory". Furthermore, according to of the Crisis proposal, Member States may extend the use of detention throughout this 20-week period (Article 5.1(b)). The

⁵⁴² European Commission, A new Pact on Migration and Asylum, p. 10.

⁵⁴³ European Commission, Proposal introducing a screening of third-country nationals at the external borders, Article 6.3.

Commission may authorise the application of the above-mentioned rules for six months, which can be extended for a period not exceeding one year (Article 3(4)).

The return crisis management procedure introduces two additional grounds, in addition to the four grounds included in the proposal for a recast Return Directive in which the existence of a risk of absconding in individual cases can be presumed unless proven otherwise.⁵⁴⁴ The two additional grounds are: a) explicit expression of the intent of non-compliance with return-related measures; b) when the applicant, third-country national or stateless person concerned is manifestly and persistently not fulfilling the obligation to cooperate. Such a presumption of the risk of absconding may subsequently provide the basis for using detention on the basis of Article 18 of the proposed recast of the Return Directive.

The procedure laid down above needs to be read in combination with provisions in **Article 18(1) of the 2008 Return Directive** (retained in Art 21 of the proposal on a recast Return Directive), which already envisages derogations in case of emergency situations qualified as "situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff".⁵⁴⁵ In those circumstances, the Return Directive allows Member States to apply **lengthier timelines for judicial review of detention** and take **urgent measures in respect of the conditions of detention**, derogating from the requirement to place concerned individuals in specialised detention facilities (Article 16.1) and the requirement to provide a separate accommodation to families guaranteeing privacy to families pending removal (Article 17.2).

Third, Article 6 of the Crisis proposal foresees an **extended time-period of four weeks for registering applications for international protection**, in derogation of the time limits envisaged in the 2016 APR proposal and in the current recast Asylum Procedure Directive Article 6(5). It should be noted that existing rules already foresee the possibility for Member States to extend the registration of applicants of international protection from three to ten working days in cases of "simultaneous applications for international protection by a large number of third-country nationals or stateless persons".⁵⁴⁶

In **cases of force majeure**, the proposal foresees a similarly extended period of four weeks for Member States to register applications for international protection. However, unlike in situations of crisis, Member States do not have to seek authorisation from the Commission to apply the extended

⁵⁴⁴ European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast). A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, Brussels, 12.9.2018 COM(2018) 634 final, Article 6.1(f).

⁵⁴⁵ This provision has not changed in the current version or 'partial general approach' version of the 2018 Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), Article 21, Council of the EU Doc. 12099/18, Brussels, 23 May 2019.

⁵⁴⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180, 29.6.2013, Article 6.5; See also, European Commission, Proposal for establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final, Article 27(3).

registration time-limit, but only provide a 'notification' indicating the 'precise reasons' for the application of the provision, and the period of time during which it will be applied (Article 7.1).

Additional extensions are foreseen as regards the **time limits envisaged in the RAMM for submitting and replying to 'take charge' requests, submitting 'take back' notifications and for carrying out the transfer of asylum applicants to the Member State responsible (Article 8)**. In the latter case, Member States would be allowed to carry out a transfer of an asylum applicant within one year of the acceptance of a take charge request or of the confirmation of the take back notification by another Member State (instead of six months).⁵⁴⁷

Finally, when a Member State is unable to fulfil its **solidarity obligations under the RAMM** due to a situation of *force majeure*, it may notify the Commission and suspend the implementation of its solidarity obligations towards other Member States for a maximum period of 6 months (Article 9).

e) Immediate protection status

The Crisis proposal envisages the possibility to grant "immediate protection status" to applicants of international protection in case a situation of crisis is declared. The 2020 Crisis proposal aims at replacing the TPD (Council Directive 2001/55/EC), which according to the Staff Working Document "does not seem to be fit for purpose" and does not longer respond to Member States "current reality and needs".⁵⁴⁸ The Staff Working Document also underlines that "it has been hardly possible to attain Member State agreement on the possible activation of the Temporary Protection Directive", due to the unclear working definitions "of different types of mass influx", as well as burdensome procedural requirements to activate it.⁵⁴⁹

A first key difference between the immediate protection status and the temporary protection status concerns the **eligibility criteria for receiving protection**. Article 10 of the Crisis proposal provides for the granting of immediate protection status to "displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin [...] unless they represent a danger to the national security or public order of the Member" (Article 10.1). The definition is narrower compared to the one included in the TPD, which also covers refugees in line with Article 1A of the Geneva Convention or other international or national instruments, and persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.

A second key difference concerns the **procedure for triggering immediate protection**. The proposal entrusts the Commission with the power to activate the immediate protection regime by means of an **implementing act** to be adopted in accordance with the examination procedure laid down in Regulation (EU) No 182/2011.⁵⁵⁰ The key role granted to the Commission in the triggering immediate

⁵⁴⁷ See ECRE, Comments on the Commission Proposal for a Regulation Addressing Situations of Crisis and Force Majeure, p. 19.

⁵⁴⁸ European Commission, Staff Working Document, p. 64.

⁵⁴⁹ The Temporary Protection Directive defines 'mass influx' as "arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme", Article 2.d. Temporary protection directive.

⁵⁵⁰ Regulation No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55/13, 28.2.2011.

protection departs from the procedure laid down in the TPD, which assigned the Council the power to activate temporary protection by means of a decision.⁵⁵¹

Both immediate and temporary protection do not prejudice the right of its beneficiaries to apply for international protection, although these statuses give Member States the possibility to suspend the examination of applications for international protection. In the case of immediate protection, Member States shall resume the examination of the applications for international protection after a maximum of one year (Article 10(3)), while the Commission is given the possibility to designate a period less than one year during which processing of international protection applications can be suspended (Article 10(4)(d)). The duration of temporary protection is also set at one year, albeit the Directive specifies that the initial period may be extended for a maximum of three years.⁵⁵²

A final element which distinguishes the immediate protection status from temporary protection concerns the **rights granted to beneficiaries under those two legal regimes**. The Commission envisages that persons holding immediate protection status would be eligible for the economic and social rights that are applicable to **subsidiary protection beneficiaries**, as laid down in the Qualification Regulation proposal (Article 10(2)), which goes beyond the set of rights granted to beneficiaries under the TPD.⁵⁵³

⁵⁵¹ Article 5 Temporary protection directive. On this aspect see M. Ineli-Ciger, "What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration", EU Immigration and Asylum Law and Policy Blog, 11 November 2020, <https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/>

⁵⁵² Article 4 Temporary protection directive.

⁵⁵³ Ineli-Ciger "What a difference two decades make?".

Figure 4: Procedural aspects and derogations in case of crisis situation

PROCEDURE FOR ESTABLISHING A SITUATION OF CRISIS



RULES AND DEROGATIONS APPLICABLE IN A SITUATION OF CRISIS

1. Screening

- **5-day** deadline for conducting the screening extended by 5 days (total 10 days).

2. Specific rules on the application of the solidarity mechanism included in the AMMR

- **Widened scope:** it includes asylum applicants in the border procedure, irregular migrants, and persons granted immediate protection.
- Transfer of irregular migrants in the context of **return sponsorship** after 4 months (instead of 8 months).
- **Shortened timeframe** for triggering the solidarity mechanism: MS required to submit a Crisis Solidarity Response Plan within one week from COM assessment (instead of two weeks). COM shall then adopt an implementing act setting out solidarity measures within one week (instead of two weeks).

3. Derogations from asylum and return procedures

Asylum Crisis Management Procedure

- Possibility to apply the border procedure in the case of applicants coming from a country with an EU-wide **recognition rate of 75% or lower**.
- **8-week** extension of the maximum duration of the asylum border procedure (total 20 weeks).
- These derogations may be authorised for a period of **6 months** and further extended for up to **1 year**.

Return crisis management procedure

- Two additional grounds for presuming a **risk of absconding** in addition to those listed in the Recast Return Directive.
- **8-week** extension of the maximum duration of the return border procedure (total 20 weeks).
- These derogations may be authorised for a period of **6 months** and further extended for up to **1 year**.

4. Registration of applications for international protection

- Possibility to delay the registration of applications for international protection for up to **4 weeks** (instead of 10 working days).
- This derogation may be authorised for a period of **4 weeks**, which may be renewed for a period not exceeding **12 weeks** in total.

Figure 5: Procedural aspects and derogations in case of a *force majeure* situation

PROCEDURE FOR INVOKING DEROGATIONS IN CASE OF FORCE MAJEURE

Member State **notifies** the Commission that is facing a situation of *force majeure*

Member state shall indicate **precise reasons** why it considers derogations envisaged by the Regulation should apply



When a Member State is **no longer** facing a situation of *force majeure* it shall **notify** the Commission of the termination of the situation.

RULES AND DEROGATIONS APPLICABLE IN SITUATIONS OF FORCE MAJEURE

<p>1. Registration of applications for international protection</p>	<ul style="list-style-type: none"> - Possibility to delay registration of applications for international protection up to 4 weeks (instead of 10 working days). - This derogation terminates when a member state notifies the Commission that is no longer facing a situation of <i>force majeure</i>.
<p>2. Extension of time limits set out in the RAMM</p>	<ul style="list-style-type: none"> - Submit and reply to take charge requests. - Submit a take back notification. - Carry out a transfer of an asylum applicant to the member state responsible (within 1 year from acceptance of a take charge request or take back notification instead of 6 months). - These derogations terminate when the member state concerned notifies the Commission that is no longer facing a situation of <i>force majeure</i>.
<p>3. Extended timeframe for solidarity obligation under the RAMM</p>	<ul style="list-style-type: none"> - Member state may suspend the implementation of solidarity measures in favour of other Member States by a maximum period of 6 months.

7.2. Critical Assessment

7.2.1. Legal coherence

Neither the 2020 Crisis proposal nor the Commission Staff Working Document accompanying the New Pact provide **substantive evidence justifying the need for a separate legal instrument dealing specifically with situations of crisis and force majeure**.⁵⁵⁴ Specifically, the proposal does not elaborate on the necessity and added value of the foreseen derogations, as compared to existing provisions under EU law that allow for adaptations in cases of emergency situations. As described earlier, the Return Directive and the Asylum procedure Directive already include rules allowing for adaptation in emergency situations, including extended time-limits in case of emergency situations. The Crisis proposal generically refers to the “experience and lessons learnt from the 2015 refugee crisis” to justify the adoption of “specific rules that can address the exceptional situation of crisis in an effective manner”. However, in the absence of a proper impact assessment accompanying the proposal, **it is not possible to adequately identify the ‘problem(s)’ it aims to address and, consequently, to justify the need for a separate legal instrument addressing situations of crisis or force majeure**.⁵⁵⁵

The definition of ‘crisis’ used in the proposal refers to the existence of an “exceptional situation of mass influx of third-country nationals” arriving through irregular means (or a risk of such situation) “being of such a scale that it would render a Member State’s asylum, reception or return system non-functional”. This open-ended definition of crisis partially overlaps with the definition of migration pressure included in the RAMM, which refers instead to a situation where “there is a large number of arrivals of third-country nationals”, or a risk of such arrivals, “which generate migratory movement that place a burden even on well-prepared asylum and reception systems and requires immediate action”. **The absence of precise and objective qualitative criteria and data to differentiate between situations of ‘migratory pressure’ and ‘crisis’ creates uncertainty as to which circumstances would fall under the scope of each of these two situations.**

The same vagueness characterises the concept of force majeure, which is not defined in the text of the proposal. The few examples included in the proposal to support the need for establishing specific rules to address situations of *force majeure* include the Covid-19 pandemic and “the political crisis witnessed at the Greek-Turkish border in March 2020”.⁵⁵⁶ The proposal, however, does not provide any additional clarification on the criteria on which those two situations qualify as cases of *force majeure*, as understood under the proposed Regulation.

The inclusion of a ‘**political crisis**’ in the conceptualisation of *force majeure* clearly points to the risk that such **a notion may be instrumentalised by Member States to derogate from their obligations under existing EU asylum law**. This was precisely the strategy pursued by the Greek authorities, which in February/March 2020 decided to unilaterally suspend the possibility to lodge

⁵⁵⁴ See ECRE, Comments of the Commission Proposal for a Regulation addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum, Brussels, available at <https://www.ecre.org/wp-content/uploads/2021/03/ECRE-Comments-COM2020-613-V2-2.pdf>. See also Amnesty International, The Proposed Crisis Regulation, Position Paper, 4 March 2021, p. 3.

⁵⁵⁵ *Ibid.*, p. 6.

⁵⁵⁶ European Commission, Proposal addressing situations of crisis and *force majeure*, p. 9.

asylum applications in the country for one month following an announcement by the Turkish government that it would no longer prevent asylum seekers from crossing the land border with Greece. The Greek authorities defended the decision with reference to “the extraordinary circumstances of the urgent and unforeseeable necessity to confront an *asymmetrical threat to national security*, which prevails over the reasoning for applying the rules of EU law and international law on asylum procedures [...]” (emphasis added).⁵⁵⁷ The suspension of asylum procedures by Greek authorities, along with the widespread use of force by Greek forces to prevent border crossings, was widely condemned by UNHCR and human rights monitoring bodies as a violation of *non-refoulement* and the right to asylum under international and EU law.⁵⁵⁸

The Crisis proposal leaves a wide margin of manoeuvre and discretion in the hands of the Member States, the European Commission, and the actors involved in the Blueprint network to assess a particular situation as a ‘crisis’ and justify the activation of derogations from EU legal standards in the field of asylum and return. A specific concern raised by the role assigned to the Blueprint network in informing the assessment of a specific situation designated a crisis, is the **lack of independence of the actors involved in the network**, and the fact those same actors are directly involved in the implementation of a set of measures to respond to a migration crisis foreseen in the Blueprint Recommendation.⁵⁵⁹

The **conceptual fuzziness and malleability of the notion of crisis and force majeure** do not allow the circumscription of the specific set of circumstances that would trigger the application of the proposed derogations in the field of asylum and return. Consequently, it is not possible to assess the impact of the proposed derogatory rules on the uniform application of CEAS standards across Member States on key aspects, such as access to asylum procedures, use of detention and restrictions to freedom of movement, and respect of procedural safeguards to avoid a risk of *refoulement*.

This concern may be illustrated with regard to the proposed expansion of the scope and length of ‘border procedures’ in the context of both the asylum crisis and return management procedures. The Staff Working Document accompanying the Pact provides no evidence substantiating the effectiveness of border procedures and their added value in addressing situations of mass influx on the basis of a thorough assessment of current and past practices in the Member States.

On the contrary, existing evidence reviewed throughout this study lends support to the conclusion that over-reliance on border procedures, in both normal times and situations labelled as ‘crisis’, **risks solidifying a logic of ‘localisation’ inherent in the Dublin system**, exacerbating rather than

⁵⁵⁷ Act of Legislative Content, Suspension of the submission of asylum applications, 2 March 2020 (English translation), <http://odysseus-network.eu/news/translation-of-the-greek-decree-on-asylum-at-the-turkish-border-in-english/>

⁵⁵⁸ UNHCR. “Statement on the situation at the Turkey-EU border”, 2 March 2020, <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>; UN Special Rapporteur on the Rights of Migrants, Greece: Rights violations against asylum seekers at Turkey-Greece border must stop – UN Special Rapporteur, 23 March 2020, <https://www.ohchr.org/EN/News/Events/Pages/DisplayNews.aspx?NewsID=25736&LangID=E>; Commissioner for Human Rights of the Council of Europe, “Statement - Time to immediately act and to address humanitarian and protection needs of people trapped between Turkey and Greece”, 3 March 2020, <https://www.coe.int/en/web/commissioner/-/urgent-action-is-needed-to-address-humanitarian-and-protection-needs-of-people-trapped-between-turkey-and-greece>

⁵⁵⁹ On this point see also ECRE, Comments of the Commission Proposal for a Regulation addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum, p. 10.

correcting the existing uneven allocation of responsibilities between Member States.⁵⁶⁰ In addition, the application of crisis-management border procedures runs the risk of self-perpetuating a dynamic of 'crisis' in countries located along the EU external borders, disincentivising those Member States from complying with their ordinary obligations under the CEAS and from taking adequate measures to address the structural shortcomings impacting on the effectiveness of their asylum and reception systems.

A similar concern is also raised by the set of derogations foreseen in cases of *force majeure*. In particular, the possibility to temporarily suspend solidarity obligations under the RAMM may create an incentive for Member States to declare themselves in a situation of *force majeure*. This would be in contradiction to the Pact's core objective of ensuring fair sharing of responsibility through a solidarity mechanism that embeds fairness into the EU asylum system, and reflects the different challenges created by Member States' different geographical locations.⁵⁶¹

The focus on border procedures as a 'migration management tool' to address situations of 'mass influx' is accompanied by provisions concerning the possibility for Member States to grant immediate protection to displaced TCNs when a situation of crisis is declared. **The scope of immediate protection, however, is limited by the fact that eligibility is narrowly defined** by reference to "a risk of indiscriminate violence due to armed conflict", thus excluding persons fleeing political persecution and systematic violations of their human rights.⁵⁶²

The Commission has motivated the inclusion of provisions on immediate protection in the Crisis proposal by underlying how existing measures to grant quick access to protection under the 2001 TPD "do not seem to be fit for purpose anymore". An evaluation of the TPD carried out in 2016 has identified the absence of a clear definition of 'mass influx', and the cumbersome and lengthy activation mechanism, in particular the need to obtain a qualified majority in the Council, as the reasons explaining why the TPD has never been activated.⁵⁶³

While the Crisis proposal aims to simplify the activation of the mechanism for granting immediate protection compared to its predecessor, the linkage between the triggering of immediate protection and the establishment of a situation of crisis exposes the envisaged procedures to very similar challenges as those for activating the Temporary Protection Directive, putting in to question its added value. In particular, in the absence of well-defined and objective indicators of what constitutes a 'crisis', the risk exists that, as underlined in the study evaluating the TPD, the procedure for activating the mechanism "becomes a political exercise – a debate of subjective interpretations – rather than a mere technical analysis of whether the conditions have been fulfilled (i.e., a "tick box"-exercise)".⁵⁶⁴

⁵⁶⁰ S. Carrera, "Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum", CEPS Policy Insight, September 2020, p. 4.

⁵⁶¹ Commission Staff Working Document, p. 58.

⁵⁶² Ineli-Ciger "What a difference two decades make?".

⁵⁶³ Bereins H. et al., "Study on the Temporary Protection Directive Final report", Study undertaken by ICF Consulting Services Limited ("ICF"), on behalf of DG Migration and Home Affairs, 2016, p. 19.

⁵⁶⁴ Ibid., p. 22.

7.2.2. Solidarity as an EU legal principle

The 'flexible' approach characterising solidarity measures under the New Pact, and notably the model laid down in the RAMM, also applies to the "crisis solidarity mechanism" to be activated in situations of crisis. The crisis solidarity regime envisaged in the 2020 Crisis proposal gives Member States the possibility to choose either to participate in relocation (expanding the scope of potential beneficiaries compared to situations of pressure under the RAMM) or return sponsorship.

The **model of flexible and differentiated solidarity** advanced in the New Pact, and specifically in the 2020 Crisis proposal, **stands at odds with the 'equal solidarity' approach elaborated by the CJEU in its case-law.**⁵⁶⁵ The Court gave further substance to the EU principle of solidarity enshrined in Article 80 TFEU in asylum policy in a judgement of 2 April 2020 where it found that three Member States – Poland, Hungary and Czech Republic – had violated their obligations to participate in the 2015 Council relocation decisions.⁵⁶⁶ Following the same reasoning as its previous 2017 relocation case, the Court concluded that Member States' responsibility towards other Member States faced with an emergency situation characterised by a sudden influx of third-country nationals (in the specific case Italy and Greece) "[...] must, in principle, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, which in accordance with Article 80 TFEU, governs the Union's asylum policy".

As underlined by previous research, **the search for flexibility in the field of EU JHA policies can reach a degree of complexity that may prevent effective cooperation among Member State authorities.**⁵⁶⁷ Interviews conducted for this study underline how, since the outset of negotiations on the Pact, Member States have expressed concerns about the complexity of the solidarity system, underscoring **the need to simplify the system and clarify the situations where they would be legally bound to intervene or act according to the Pact.**⁵⁶⁸ While 'flexibility' may overcome obstacles posed by some Member States when moving forward in supranational cooperation, it may risk increasing dispersion, legal uncertainty and fragmentation in the application of CEAS standards.⁵⁶⁹ **'Flexible solidarity' is also an instance of renewed intergovernmentalism and an expression of 'less Europe' in the field of asylum** and migration, a circumstance that weakens rather than reinforces the possibilities for the EU to fully accomplish a harmonised immigration and asylum policy that is consistent, 'common', and integrated.⁵⁷⁰

7.2.3. Fundamental rights

The 2020 Crisis proposal constitutes a magnifying glass of the fundamental rights issues and challenges identified and examined in all the preceding chapters of this study. Crucial instances include the principle of *non-refoulement* and the right to seek asylum, the right to liberty and

⁵⁶⁵ See Chapter 6 above, section 6.2.2. See also S. Carrera, "Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum", CEPS Policy Insight, September 2020.

⁵⁶⁶ CJEU, 2 April 2020, Joined Cases C-715/17, C-718/17 and C-719/17, European Commission v Republic of Poland and Others, par. 80

⁵⁶⁷ Carrera, S. and F. Geyer (2007), The Reform Treaty & Justice and Home Affairs Implications for the common Area of Freedom, Security & Justice, CEPS Policy Brief, No. 141.

⁵⁶⁸ Interview Member State 1 and 3.

⁵⁶⁹ Meijers Committee Comments on the Migration Pact – The Asylum and Migration Management Regulation, CM2012, November 2020.

⁵⁷⁰ Carrera, "Whose Pact?", p. 1. S. Carrera, R. Cortinovis, "The Malta declaration on SAR and relocation. A predictable EU solidarity mechanism?", CEPS Policy Insight, No 2019-14 / October 2019.

freedom of movement and, more broadly, the requirement to uphold the rule of law and avoid arbitrariness of authorities involved in migration management.

a) **Non-refoulement and right to asylum**

One of the assumptions of the logic of intervention, upon which the 2020 Crisis proposal is based, is that most individuals who will be subject to crisis-led asylum and return procedures are not in need of international protection. The emphasis on the expanded use of border procedures reflects the migration management rationale driving the New Pact, and specifically the objective of preventing abuses of the asylum system by quickly processing unfounded applications and returning those applicants who have been found not to be in need of protection.

However, as the ECRE has rightly underlined in its analysis of the 2020 Crisis proposal,⁵⁷¹ **one of the key lessons learnt from major situations of larger scale irregular entries or movements of TCNs into the EU over the previous three decades**, in particular from ex-Yugoslavia in the '90s and from Syria in 2015-2016, **is that in similar situations of large-scale displacement the majority of people entering into the EU are indeed refugees or in need of international protection.**⁵⁷² The expanded use of border procedures as a migration management tool in these situations **exacerbates already identified protection deficits associated with the use of those procedures**, most notably those related with shortened time limits and practical hurdles faced by asylum applicants in accessing procedural safeguards.⁵⁷³ In the ECRE's view, the merging of asylum and return procedures at the border, in particular in their "crisis version", "will lead to an increase in detention, protection gaps and an increased risk of *refoulement* for individuals, as well as increasing the administrative burden on certain Member States."⁵⁷⁴

The provisions allowing Member States to apply the border procedure to applicants with nationalities with an EU-wide recognition rate of 75% or lower would lead to **most asylum seekers being channelled into procedures carried out at the EU's external borders, with in-merit examination of their claims being conducted under reduced procedural safeguards.** As underlined by the Meijers Committee, asylum seekers would be subject to all legal restrictions associated with the border procedure, apart from the specific time limits applicable in case of an accelerated procedure. Reduced protection safeguards may include, in particular, restrictions to freedom of movement /detention, practical impediments to access legal assistance, and restrictions on legal remedies (only one level of appeal in relation to a decision taken in the context of border procedures).⁵⁷⁵

The above-mentioned provision is also problematic from a fundamental rights perspective, in particular when it comes to the respect of procedural safeguards against *non-refoulement* provided for in EU law. There are still, at present, major divergences across EU Member States regarding

⁵⁷¹ Ibid., p.12.

⁵⁷² ECRE, Comments of the Commission Proposal for a Regulation addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum, p. 7.

⁵⁷³ See, in particular, Chapter 4 section 4.2.3, point a.

⁵⁷⁴ Ibid., p. 13.

⁵⁷⁵ Meijers Committee Comments on the Migration Pact – The Asylum and Migration Management Regulation, p. 3.

recognition rates at first instance and after appeal.⁵⁷⁶ Therefore, as already argued in the analysis of the amended APR proposal,⁵⁷⁷ EU-average statistical threshold cannot constitute a legally acceptable basis for making any *a priori* assumption about the qualification of an individual application for international protection. Furthermore, the use of EU-average thresholds to determine, as in this specific case, the application of border procedures to decisions on merits, violates one of the fundamental principles of the 1951 Geneva Convention relating to the Status of Refugees, the prohibition to discriminate on the basis of country of origin enshrined in Article 3.

b) Right to liberty and freedom of movement

The application of the crisis management asylum and return procedures enshrined by the Proposal will likely lead to more and lengthier detention of individuals, increasing risks of violations of the right to liberty and security under Article 6 EUCFR and Article 5 ECHR. As already pointed out in the analysis of the relevant provisions of the amended APR proposal, the Commission argues that the proposed border procedure for the examination of an application for international protection can be applied without recourse to detention. However, the proposal clarifies that: “Member States should be able to apply the grounds for detention during the border procedure in accordance with the Reception Conditions Directive”.⁵⁷⁸ In the case of the return border procedures, the Staff Working Document specifies that individuals subject to that procedure “would not be subject to detention as a rule. However, when it is necessary to prevent irregular entry, or there is a risk of absconding, of hampering return, or a threat to public order or national security, they may be subject to detention”.⁵⁷⁹

Interviews held with European Commission officers in the context of this study confirmed the ambiguity and lack of legal clarity surrounding the use of detention in the context of border procedures as proposed in the New Pact. Interviewees generally agreed on the fact that use of detention is left to the discretion of Member States, while one of the interviewees acknowledged that the provisions tabled by the Commission, notably **the use of the legal fiction of non-entry during the pre-entry phase, aims at giving Member States more room for detaining asylum seekers at borders**.⁵⁸⁰ The ambivalence of the Pact in relation to detention was confirmed by the presentation of the legislative package by Commissioner for Home Affairs Johansson before the European Parliament’s LIBE Committee on 24 September 2020, where she expressly declared that “we are not proposing detention either for the screening process or border procedures”.⁵⁸¹ **Commissioner’s Johansson conclusion stands in direct contradiction with the analysis and findings of this study.**

⁵⁷⁶ See section 2.2.1. As further underlined by the ECRE, “a 75% threshold will create unjustifiable differences between the nationalities that tend to fluctuate slightly above or below this mark, creating an arbitrary difference in treatment”. See ECRE, Comments of the Commission Proposal for a Regulation addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum, p. 12.

⁵⁷⁷ Chapter 4, section 4.1.2. and 4.2.1.

⁵⁷⁸ European Commission, Amended proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, recital 44.

⁵⁷⁹ European Commission, Staff Working Document, p. 85.

⁵⁸⁰ Interviews European Commission No. 1, 2, 3.

⁵⁸¹ See Q&A session at https://multimedia.europarl.europa.eu/en/committee-on-civil-liberties-justice-and-home-affairs_20200924-0900-COMMITTEE-LIBE-B_vd

As detailed above, provisions under the New Pact leave a wide margin of discretion to national authorities when deciding on the measures to be taken to prevent an individual from entering territory, coupled with the lack of clarity in relation to the qualification of the stay of TCNs during the proposed border procedures. The potential implications of those provisions on the legal regime for persons held at the borders envisaged in the Pact, however, should be considered in light of recent developments in the case-law of the CJEU.

In its **ruling of 17 December 2020 *European Commission v Hungary***,⁵⁸² the Court was asked to assess the legality of the practice of systematic detention of applicants for international protection in a transit zone placed at the border fence between Hungary and Serbia implemented by the Hungarian authorities.⁵⁸³

In contrast to a previous judgment delivered by the ECtHR on this same matter,⁵⁸⁴ the CJEU ruled that **'holding' international protection applicants in the transit zone throughout the border procedure did constitute detention** for the purposes of Article 43 of Directive 2013/33 (Reception Conditions) and Article 8.3 Directive 2013/33 (Asylum Procedures).⁵⁸⁵ The Court held that Hungary had violated EU law by systematically detaining every asylum applicants aged 14 or more, failing to comply with the guarantees required by EU law, including those foreseen in the context of a border procedure.⁵⁸⁶ It underlined that the practice of holding applicants at the transit zone by the Hungarian authorities – irrespective of the fact such practice was conducted when applying a border procedure – had violated EU asylum law.

The CJEU crucially reconfirmed and clarified that detention of an applicant of international protection is an autonomous concept of EU law understood as “any coercive measure that deprives that applicant of his/her freedom of movement and isolates him/her from the rest of the population, by requiring him/her to remain permanently within a restricted and closed perimeter”.⁵⁸⁷

A similar understanding of the concept of detention for the purposes of removal is included in chapter IV of the EU Return Directive.

⁵⁸² Judgment of the Court (Grand Chamber) of 17 December 2020, *European Commission v Hungary*, Case C-808/18.

⁵⁸³ It is interesting to note that the contested practice was carried out by Hungary within the framework of Law n CXL of 2015 amending certain laws in the context of managing ‘mass immigration’. The law introduced the problematic concept of a “crisis situation caused by mass immigration” which, once declared, would make it possible to apply a set of derogations to ordinary procedures. In particular, under the Law on the management of mass immigration, in a ‘crisis situation caused by mass immigration’ applications lodged in the transit zones established at the border are to be examined in accordance with the rules governing the border procedure. See CJEU, *European Commission v Hungary*, para. 46. See also S. Progin-Theuerkauf, Defining the Boundaries of the Future Common European Asylum System with the Help of Hungary? *European Papers Insight*, Vol. 6, 2021, No 1, pp. 7-15 doi:10.15166/2499-8249/446 (European Forum, 29 March 2021).

⁵⁸⁴ The Strasbourg Court held that the applicants were not deprived of liberty by the Hungarian authorities in the transit zone under the scope of Article 5 of the European Convention of Human Rights (ECHR). It gave in this way – in direct contradiction to its mandate - preference to “the rights of States to control migration” (para. 225) over their States parties obligation to first comply with their human rights obligations towards any individual under the ECHR. See paras. 217-249 of the judgment. ECtHR, Grand Chamber, Case *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 21 November 2019.

⁵⁸⁵ The CJEU conclusion contrasts to the ECtHR approach laid down in para. 213 of the 2019 *Ilias and Ahmed v Hungary* judgement, where the ECtHR held that “The Court considers that in drawing the distinction between a restriction on liberty of movement and deprivation of liberty in the context of the situation of asylum seekers, its approach should be practical and realistic, having regard to the present-day conditions and challenges”.

⁵⁸⁶ CJEU, *Commission v Hungary*, C-808/18, para. 167-211.

⁵⁸⁷ CJEU, *Commission v Hungary*, C-808/18, para. 159. Refer also to Joint Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, 14 May 2020, para. 223.

Under the 2020 Crisis proposal, the maximum duration of the border procedure for carrying out return, including detention, is extended by an additional period of 8 weeks, meaning that an individual could be in the return border procedure for up to 20 weeks. As underlined by ECRE, this 20-week period could be preceded by an additional 20 weeks of detention in the context of the asylum border procedure, meaning that a person could be held in detention in the asylum-return border procedure for up to 40 weeks.⁵⁸⁸ This implies that **when a situation of crisis is declared, a higher number of people (due to the 75% EU-wide recognition rate threshold) may be subject to detention for a protracted period of time (around 10 months).**

Finally, the Crisis proposal would introduce additional grounds in which the existence of a risk of absconding in individual cases can be presumed unless proven otherwise. Such a presumption of the risk of absconding may subsequently provide the grounds for using detention on the basis of Article 18 of the proposed recast of the Return Directive. The introduction of a presumption of a risk of absconding would shift the burden of proof to the TCN, absolving national authorities of the responsibility of conducting an individual assessment of the circumstances of the case.⁵⁸⁹

A wider interpretation of the risk of absconding supported by this provision could lead to a reversal of the principle established by EU law according to which **detention should only be considered as a measure of last resort and based on an individual case-by-case assessment.** Therefore, the application of this presumption gives rise to a risk of arbitrary detention – i.e., the use of detention even in cases when it is not necessary and proportionate – in violation of the right to liberty and security under Article 6 EU CFR and Article 5 ECHR.

⁵⁸⁸ ECRE, Comments of the Commission Proposal for a Regulation Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum, p. 14.

⁵⁸⁹ Interview FRA. See also FRA, The recast Return Directive and its fundamental rights implications, FRA Opinion – 1/2019 [Return], pp. 11-12. Amnesty International, The Proposed Crisis Regulation, Position Paper, 4 March 2021, p. 6; ECRE, Comments of the Commission Proposal for a Regulation addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum, p. 14.

8. THE PACT ON MIGRATION AND ASYLUM: CROSS-CUTTING FINDINGS AND LEGAL ISSUES

This chapter identifies and analyses the **crosscutting findings and legal issues** raised by the “common European Framework for Migration and Asylum Management” laid down in the Pact and the package of legislative proposals examined in chapters 3 to 7 of this study. The analysis focuses on: first, the **legal coherency of the proposed Pact’s integrated system and its compatibility with the aims enshrined in the EU Treaties and the Common European Asylum System (CEAS)** (section 8.1); second, its relationship with the EU **general principle of solidarity and fair sharing of responsibility** under Article 80 TFEU (section 8.2); and third, other crosscutting legal issues, including questions related to **legal certainty** and its conformity **with the EU Charter of Fundamental Rights** (section 8.3).

8.1. Coherency

The Pact has been presented by the Commission as advancing an **‘integrated approach’** aimed at bringing together or ‘linking’ policies falling under **distinct legal areas of migration, asylum, and border controls**. As explained in chapter 6 of this study, this is the case in the RAMM Proposal that calls for a **“common framework” merging the fields of asylum** (and distribution of responsibility for assessing asylum applications) **and migration management** (the return sponsorship).⁵⁹⁰ A similar approach can be found in other key components included in the Pact, such as in the so-called **pre-entry phase** encompassing both the screening and the asylum and return border procedures proposals examined in chapters 3 and 4.⁵⁹¹

The European Commission aims at creating a **‘seamless link’ or ‘workflow’** between what the Pact identifies as the various stages of migration management, which range from the first arrival to the processing of asylum requests and returns decisions. The **blurring of asylum, returns and border control policies, however, raises major issues from the perspective of legal incoherency**. According to the EU Better Regulation Toolbox, the coherency criterion pays special attention to the relationship and compatibility of a legislative proposal with “other EU policy objectives, including the Charter for fundamental rights, and with other policy initiatives and instruments”.⁵⁹²

As explained in chapter 2 of this study, the Commission has justified the integrated framework based on the flawed argument of ‘mixed flows’ that results from a **questionable use of data and a partial reading of Eurostat statistics**. This goes alongside the Commission’s disproportionate focus on increasing the number of enforced ‘return decisions’. This priority does not properly consider **the complex range of legitimate factors preventing expulsions** and **the role of restrictive migration policies in co-creating irregularity** of people legitimately seeking international protection in the EU.⁵⁹³

The Pact’s blurring of the boundaries between asylum, external border management and return policies raises **two main structural and constitutional dilemmas**: First, it challenges the **current**

⁵⁹⁰ European Commission, Proposal for a Regulation on Asylum and Migration Management, Recital 3.

⁵⁹¹ See Chapter 3 of this study, p. 40.

⁵⁹² Refer to https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox_2.pdf

⁵⁹³ Refer to Chapter 2, Section 2.2.

structural division of work under each of these areas under EU constitutional and legal systems (section 8.1.1). Second, it disregards the impacts of the proposed system on the composite landscape of national administrative and law enforcement actors responsible for each of these domains, and the competences and independence of professionalised asylum authorities across EU Member States (section 8.1.2).

8.1.1. Incoherency with EU Treaty and secondary law objectives

The **'hybridisation' of the legal basis and substantive provisions** put forward by the Pact runs contrary to separation or division of fields and competences enshrined in EU primary (Treaties and EU Charter) law, where each of these fields serve **different purposes and objectives**.

Asylum legislative acts find their legal basis on Article 78 TFEU. This Treaty provision binds EU action to **an international protection-driven approach primarily informed by international refugee law and human rights**. EU legal acts in this domain are also specific in nature as they are closely tied to **the right to seek and obtain asylum** enshrined in Article 18 of the EU Charter of Fundamental Rights, which is now not only **a general principle of EU law but also a legally enforceable right of individuals in the Union's legal system**. EU asylum policy must also be in full compliance with the principle of *non-refoulement*, the 1951 Geneva Convention and its 1967 Protocol as well as other relevant human rights Treaties as stipulated in Article 78.1 TFEU. Article 78 emphasises that CEAS measures must aim at laying down common procedures for granting/withdrawing international protection status (Article 78.2.d TFEU) and criteria and mechanisms for determining Member States responsibility for assessing applications (Article 78.2.e TFEU), which draw from and have been developed in the CEAS secondary legislation and the EU Dublin *acquis*.

In contrast, the principles and objectives of EU action in **the areas of borders and migration enforcement pursue distinct policy objectives**. Article 77 TFEU stipulates that EU policies in the area on border checks aim at "carrying out checks on persons and efficient monitoring of the crossing of external borders" (Article 77.1.b) and "the checks to which persons crossing external borders are subject". Article 79 TFEU on the other hand focuses on "efficient management of migration flows" and measures to address irregular immigration of people who are not in search of or applicants of international protection in the EU. In this respect, the objective of EU policy in this area covers "removal and repatriation of persons residing without authorisation".

The above EU Treaty constitutional configuration finds direct expression in **a large body of secondary legislation that has emerged under each of these policy areas during the last decades**, chiefly the 2016 Schengen Borders Code (SBC), the EU Dublin Regulation and the EU Returns Directive.

The legal basis of the SBC is Article 77(2)(b) and (e) TFEU. According to Article 1 its core objective is to "lay down rules governing border control of persons crossing the external borders of the Member States of the Union." The SBC includes common EU definitions of what border controls, border checks and border surveillance mean, as well as who qualifies as a 'border guard', for European law purposes. Importantly, Article 3.b stipulates that the SBC applies "without prejudice to the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*". The EU Returns Directive on the other hand is based on Article 79.3.c TFEU (formerly Article 63(3)(b)

TEC). It lays down common EU standards and procedures "for returning illegally staying third-country nationals". It provides a common concept of "illegal stay" and of "return" in EU law.

The legal basis, scope, and objectives of the 2013 EU Dublin III Regulation, and those of other secondary law instruments such as the Asylum Procedures Directive, are fundamentally different in comparison to those in the SBC and the Returns Directive. The Dublin Regulation lays down "the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national". Therefore, **each of these pieces of EU secondary legislation serve different and distinct purposes, each having their own conditions for application and practical operability.**

The importance of the current division of competences between EU border controls, asylum and migration enforcement policies has been confirmed by the CJEU in its 2017 judgement *Jafari*, where the Court concluded that the concept of 'irregular border crossing' **serves different purposes under each of the three above mentioned pieces of EU secondary law**, chiefly the SBC, the Dublin Regulation, and the Returns Directive.⁵⁹⁴

The legal incoherencies resulting from the hybridisation logic driving the Pact has been noticed with concern by the EU Council Legal Service 2021 Opinion.⁵⁹⁵ The Opinion underlines how the APR, the RAMM and the Crisis and Force majeure proposals are devised by the Commission as 'hybrid acts' – which means they include provisions which build upon both the Schengen *acquis* and the Dublin *acquis*. According to the Council Legal service, this situation bears clear consequences for the overall **coherence of the Schengen and Dublin systems in light of the diversified participation of Member States in those systems**. The Council Legal Service concluded that the New Pact: "should be adjusted so as to comply with *the coherence of the Schengen and Dublin acquis*, respectively, and to be made consistent with the relevant Protocols annexed to the Treaties" (Emphasis added).⁵⁹⁶ Indeed, the incoherency resulting from the hybridisation approach advocated by the Pact does not only relate to questions of 'variable geometry' regarding Member States participation in the Schengen and Dublin systems; it is one embedded in a **substantive or thematic inconsistency of the objectives pursued** by three policy areas at stake with the objectives laid down in EU primary and secondary legislation.

8.1.2. Incoherency with the composite field of Member States authorities

The thematic demarcation of fields laid down in the EU Treaties and in the body of EU secondary legislation is inspired by, and finds expression in EU Member States' constitutional, legal and administrative systems. It draws from **the composite field of national authorities with direct or**

⁵⁹⁴ See CJEU C-646/16 – *Jafari*, 26 July 2017. Paragraph 72 states that "although the EU acts adopted in the fields of border control and immigration form part of the context to be taken into account in interpreting Article 13(1) of the Dublin III Regulation, the fact remains that the scope of the concept of an 'irregular crossing' of the border into a Member State within the meaning of that regulation cannot, in principle, be inferred directly from those acts." And paragraph 75 emphasises that "where the border crossed is that of a Member State bound by the Schengen Borders Code, whether the crossing is irregular must be determined by taking into account, inter alia, the rules laid down by that code".

⁵⁹⁵ Council of the European Union, Legal Service, The proposed new Pact on Migration and Asylum - "Variable geometry" - Schengen and Dublin *acquis* relevance of components of the proposed Pact, 6357/21, Brussels, 19 February 2021.

⁵⁹⁶ It further advised that: "the components and provisions of the proposals identified in this Opinion be correctly classified as development, respectively, of the Schengen *acquis* and the Dublin *acquis* and that they be included in Schengen and Dublin relevant instruments, as appropriate". *Ibid.*, 2021, p. 39.

indirect competences under each of these respective policy areas across the EU, which result from the constitutional traditions and specific administrative legal systems of each EU Member States.⁵⁹⁷

Figures 6 and 7 below show that a total of **14 EU Member States** have at present **a specialised or professionalised national authority responsible for assessing asylum decisions** (See Annex 3 of this study for a description of the methodology applied to these findings). These national asylum authorities are often, by design, independent from relevant national Ministries with home affairs competences. They have been also granted distinct competences from those held by national authorities responsible for border controls as well as the issuing of return decisions and the enforcement of removal orders. Professionalised asylum authorities are often conceived of as a direct expression of states' commitment to faithfully implementing the 1951 Geneva Convention regime in their domestic legal systems, the 1981 recommendation (81)16 by the Committee of Ministers of Council of Europe⁵⁹⁸ and in some cases, the existence of a constitutional right to asylum.⁵⁹⁹

In 15 EU Member States, **the actors responsible for assessing and issuing a return decision are designated 'migration enforcement authorities'**. Only in **12 EU Member States** does the asylum and migration enforcement authority issuing both asylum and returns decisions fall under the same actor. The national actors with the responsibility of enforcing removals orders often correspond with **law enforcement and police (or border police) authorities that have no expertise or professionalised skills on international protection, and which are specialised on countering criminality**. The resulting picture is one characterised by a **highly complex and populated multi-actor setting** across EU Member States.

In **24 EU Member States**, the national authority responsible for issuing asylum decisions as well as assessing the Member State responsible under the Dublin III Regulation falls under the same actor (of which, only in **11 Member States** are both decisions adopted by asylum authorities). In **Belgium, France, and Italy**, decisions on asylum claims are adopted by asylum authorities, while decisions on Dublin-related matters are taken by the Immigration Office (**Belgium**), the prefecture (**France**), and the Dublin Unit of the Ministry of the Interior (**Italy**) respectively. Moreover, only in **12 Member States** is it clear that a *separate* unit is responsible solely for Dublin matters (See Annex 3 for a detailed overview).

Furthermore, national authorities working under each of these areas are part of different networks coordinated by EU JHA Agencies like Frontex or the EASO. For instance, a majority of these **police**

⁵⁹⁷ On the notion of 'European composite administration' refer to E. Schmidt-Aßmann (2011), 'Introduction: European Composite Administration and the Role of European Administrative Law', in O. Jansen and B. Schöndorf-Haubold (eds.), *The European Composite Administration, Intersentia*; in respect of its application to EU JHA databases and interoperable networks refer to D. Curtin (2017), 'Security of the interstice and interoperable data sharing: A first cut', in S. Carrera and V. Mitsilegas (eds.), *Constitutionalising the Security Union: Effectiveness, rule of law and rights in countering terrorism and crime*, CEPS Paperback, Brussels, pp. 65-72.

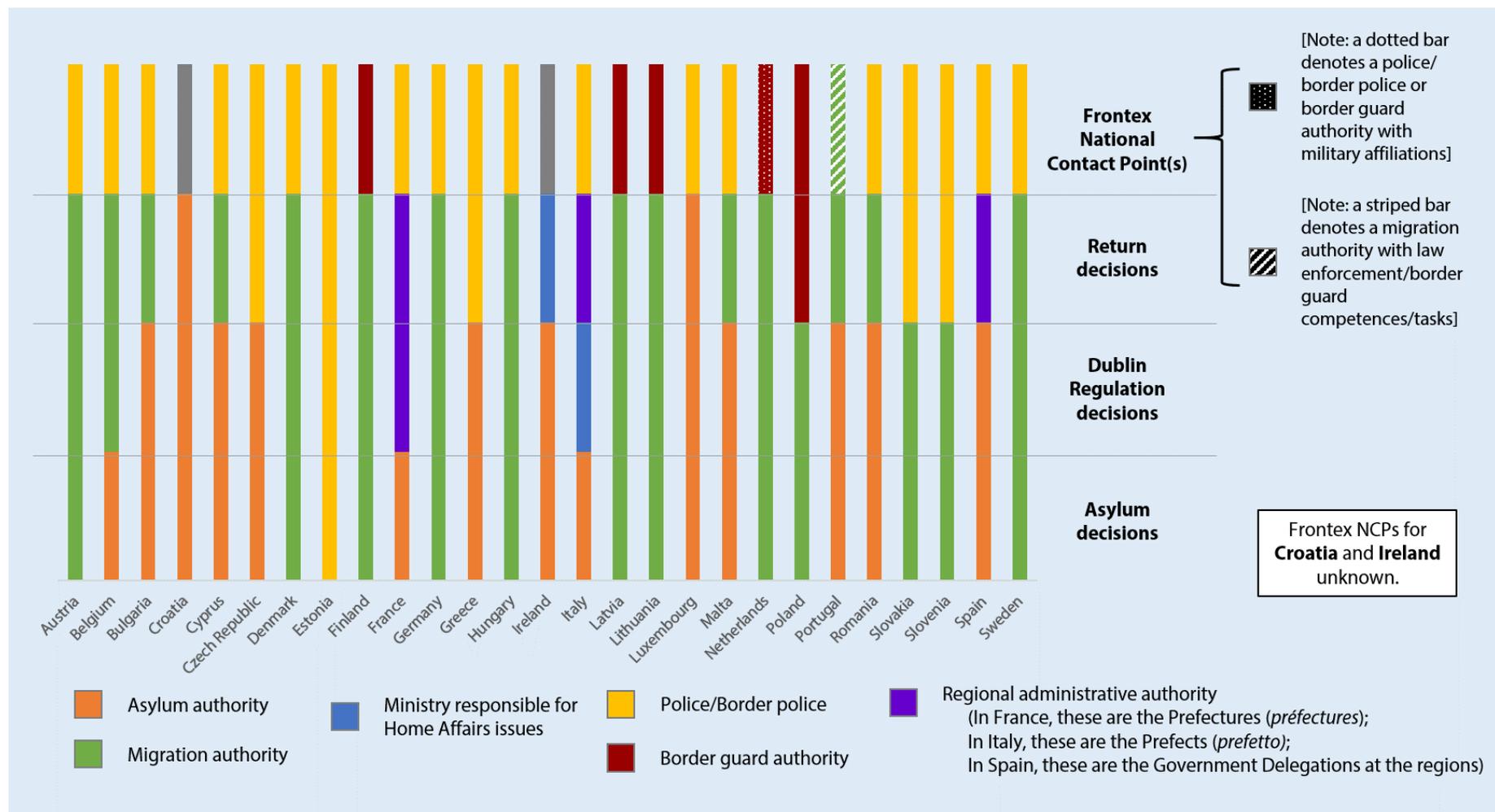
⁵⁹⁸ Council of Europe, Committee of Ministers, Recommendation on the harmonisation of national procedures relating to asylum, No. R (81) 16, 1981. Paragraph of this Recommendation states that "All asylum requests shall be dealt with objectively and impartially". Importantly, paragraph 2 states that "The decision on an asylum request shall be taken only by a central authority".

⁵⁹⁹ In several EU Member States constitutional asylum is conceived as a right of individuals to apply and be granted international protection. Refer to M.T. Gil-Bazo (2008), 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law', *Refugee Survey Quarterly*, Vol. 27, No. 3, pp. 33-52.

or border police actors function as National Contact Points in the EU Frontex (EBCG) Agency.

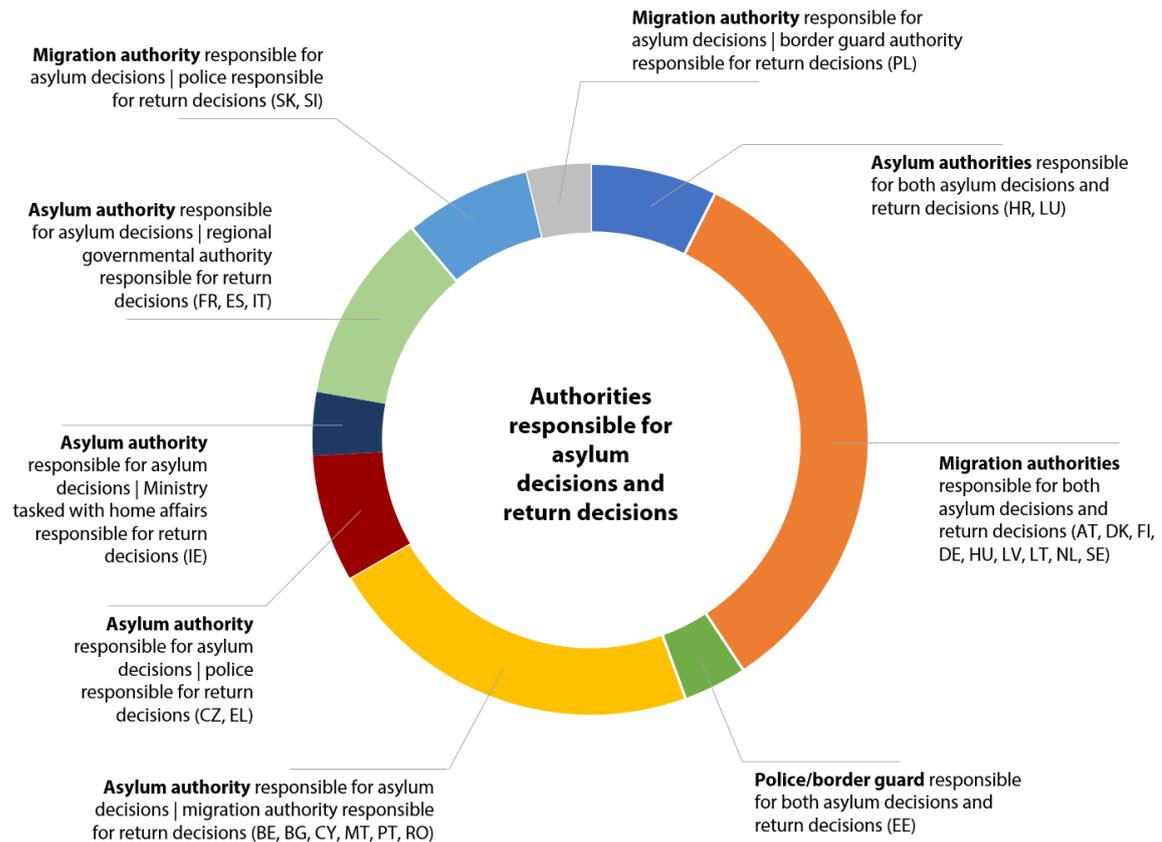
Frontex national contact points can be also generally expected to be the ones mainly involved in the practical implementation of accelerated and border procedures, which (as explained in chapters 3 and 4 of this study) are favoured and promoted by the Pact.

Figure 6: Mapping the Composite Field of National Actors



Source: Authors' own elaboration

Figure 7: National authorities responsible for asylum and return decisions



Source: Authors' own elaboration

The 'integrated approach' put forward by the Pact fundamentally disregards this division of competences across EU Member States by **giving preference to, or prioritising the role by migration enforcement authorities and that of national police (border police) authorities over those responsible for asylum decisions**. The political pressures on the Greek asylum appeal authorities since the emergence of the 2015/2016 refugee humanitarian crisis and the entry into force of the EU-Turkey deal in 2016, have shown that the Pact's priority on increasing expulsions runs at the expense of the independence and responsibilities currently held by professionalised asylum authorities in several EU Member States.⁶⁰⁰ **The overarching migration management logic underpinning the Pact** challenges therefore this well-established division of work between national administrative and law enforcement authorities, and **national legal specificities**, expanding the role of migration enforcement and policing actors at the expense of professionalised asylum authorities in several EU Member States.

⁶⁰⁰ After a couple of decisions coming from the Greek Asylum Appeals Committees which had prohibited returns to Turkey based on safety considerations, the EU put pressure on the Greek government to 'remedy' the situation. In response the Greek government reformed the bodies' composition (removing the members affiliated with the national commission of human rights and the UNCHR) so as to ensure a legal assessment in line with the EU-Turkey agreement. This is certainly a rule of law issue relevant to what you are describing (on the dilution of the independence of these bodies see Costello, *Overcoming Refugee Containment and Crisis*, *German Law Journal*. See also M. Gliati, *The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees*, *Movements*, Vol. 3, Issue 2/2017.

The proposed amendments to the Eurodac Regulation examined in chapter 5 of this study pose a similar challenge by **enlarging even further the set of EU legal domains and national actors in the areas of asylum, migration, police cooperation, internal security, and criminal justice**. This raises profound challenges and negatively impacts the **privacy and data protection of third-country nationals** under Articles 7 and 8 of the EU Charter of Fundamental Rights.

The expansionism characterising the range of national actors (and EU agencies) with access to Eurodac and the categories of personal data to be stored into the newly envisaged electronic system, increases **the risks of incorrect or unlawful use of the Eurodac database**. It can also be expected to **increase mistrust among national authorities in EU databases as it will no longer be clear 'who has access to what data' and under which conditions and safeguards**. This risk is emphasised not only by the differentiated laws and by practices in place at various Member States levels, but also because of the highly complex and technical EU legal framework ensuing from the connection between Eurodac and the newly envisaged Interoperability Regulations (See chapter 5 of this study).

The proposed extension of Eurodac purposes beyond the policy area of asylum and its connection with the Interoperability framework raise similar incoherency dilemmas from an EU Better Regulation perspective. This is particularly so as the Pact's proposal to reform Eurodac would lead to **serious interferences with EU data protection principles**, including those of necessity and purpose limitation as defined by the CJEU.⁶⁰¹

Furthermore, the envisaged 'integration' of asylum and return procedures laid down in the APR Amended Proposal discussed in chapter 4⁶⁰² disregards that **the structural division of asylum and return systems** in several Member States **is functional to ensuring the respect of a set of individuals safeguards** that protect the right to asylum, the principle of *non-refoulement* and the right to an effective remedy. The proposed 'merging' asylum and return procedures under the proposed APR risks weakening national legal and procedural safeguards.⁶⁰³ The Pact has not considered the negative implications of the proposed 'linkage' between asylum and return in light of **the specificities of their national systems and the set of competent judicial and non-judicial actors with different responsibilities on asylum and return procedures and appeals**.⁶⁰⁴

In light of the above, the Pact reinforces in this way an ongoing trend towards an **increasing criminalisation and policing of asylum seekers, refugees, and migrants' mobility to and within the EU**, which stands at odds with international, regional and EU refugee law and human rights standards in EU primary and secondary legislation.⁶⁰⁵

⁶⁰¹ Chapter 5, section 5.2.3, point a.

⁶⁰² See Chapter 4, Section 4.1.2, point d.

⁶⁰³ See Chapter 4, Section 4.2.3, point c. See FRA, The recast Return Directive and its fundamental rights implications, FRA Opinion – 1/2019 [Return], pp. 32 and 38.

⁶⁰⁴ See M. Moraru, The new design of the EU's return system under the Pact on Asylum and Migration, eumigrationlawblog.eu, 14 January 2021, <https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/#more-3568>

⁶⁰⁵ See Chapter 6, Section 6.2.1. On the notions of 'criminalisation' and 'policing' of asylum seekers' mobility', with a focus on recent EU policies and instruments adopted at the EU level to prevent onward mobility of asylum seekers see Carrera et al., "Problematising asylum seekers' secondary movements and their criminalisation in the EU", CEPS Paper in Liberty and Security in Europe, 2019. The authors argue that the framing of 'secondary movements' in EU policies reflects a punitive approach towards asylum seekers' EU mobility, which includes restrictions to asylum seekers' freedom of movement, increased use of detention and a set of sanctions such as the withdrawal of reception conditions for applicants who engage in intra-EU movements. See op. cit., p. 2.

8.2. 'Flexible yet mandatory' asymmetric solidarity

The **'solidarity mechanism'** laid down in the Pact has been tailored to cover different situations – disembarkation following SAR situations, 'migration pressures or risk of pressure', and so-called 'crisis situations'. According to the specific circumstances of the situation to be addressed, the Pact grants Member States a full menu of options to contribute in different ways other than **relocation**. **These include return sponsorship, capacity building in the area of asylum and return, and support in the area of 'the external dimension'**. The proposed system entails combining voluntary pledges and mandatory contributions, to be determined in line with a **distribution key calculated on the basis of Member State's GDP and population**, and supplemented by a **correction mechanism** to be activated when the Commission finds that pledges under a specific form of solidarity (relocation) fall short of identified needs.

As underlined through the various chapters comprising this study, the model of **'flexible yet mandatory' solidarity** embedded in the Pact, and the legal and policy measures proposed to substantiate it, raise several challenges concerning its adherence with **the principle of solidarity and fair sharing of responsibility included in Article 80 TFEU**.

Solidarity has been a fundamental value underpinning the European integration project since the immediate post-war period. It has also been at the core of the discussions relating to the creation of a common European asylum system since the early 1990s.⁶⁰⁶ With the parallel development of the Schengen rules, cooperation in the field of asylum policy in the EU was guided by **a notion of solidarity faithful to the internal market**. Through **the exclusion of refugees from free movement**, solidarity was directed towards the core of Member States' populations who were seen as threatened by irregular movements after the abolition of internal borders. **This logic has eventually determined the rationale of the systems allocating responsibility established through the Dublin framework.**⁶⁰⁷

As highlighted in section 8.1 above, the Lisbon Treaty allowed the CEAS to move beyond minimum standards, providing a legal basis for the adoption of a common EU policy on asylum, subsidiary protection, and temporary protection. Crucially, the Lisbon Treaty elevated **solidarity to the rank of a 'founding principle' of EU asylum policy. Article 80 TFEU**⁶⁰⁸ provides that EU border, migration, and

⁶⁰⁶ It was, in fact, the failure of the 1990s infrastructure to mobilise solidarity schemes to respond to the large refugee movements from Bosnia, and later Kosovo that triggered a heated debate on 'burden-sharing' in the region. Unlike the response to the Bosnian crisis, which was limited to funding for humanitarian relief to the geographically most proximate countries, the Balkan crisis did trigger a rather organised evacuation response.

⁶⁰⁷ On this see Elspeth Guild 'The Europeanisation of Europe's Asylum Policy' (2006) 18(3–4) *International Journal of Refugee Law* 635–6. See also S Lavenex, *The Europeanization of Refugee Policies, Between Human Rights and Internal Security* (Ashgate 2001) 98–9.

⁶⁰⁸ The origins of the provision are traced back in the Draft Treaty establishing a Constitution for Europe, which eventually paved the way for the Lisbon Treaty. Arguably, it was introduced as a reminder of the constitutional limits of the EU and of the role principles -as opposed to hard law obligations- should play in the way the Union will confront the shared challenges posed to European societies, among others, in the area of refugee protection. Solidarity, according to the drafters of the Draft Convention, implied the use of the full range of possible actions available at the EU level: the harmonisation of national legislation; financial measures, such as burden sharing; and measures to ensure the coordination of national policies, such as the establishment of an agreed method of coordination. During the drafting of the provision, it was explicitly stressed that a financial or monetary conception of solidarity should prevail which should first and foremost be implemented through Community Funding and voluntary joint operations between the Member States. The different political priorities of the European Convention members in the area of migration and asylum have informed a conceptualisation of solidarity as a principle that reconciles protection with the standards of the internal market and the Schengen ethos. See Draft Treaty establishing a Constitution for Europe (Convention Working Group X 'Freedom, Security and Justice', The European Convention); and Paper by M Antonio Vitorino, Commissioner, Member of the Convention 'Towards A Single Treaty For The

asylum policies “shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications between the Member States”. This provision has implied that solidarity is no longer simply a subject for political debate but a legal obligation that must be implemented in all the policies adopted by the EU, including in the area of asylum.⁶⁰⁹ Crucially, Article 80 TFEU should be read in conjunction with Article 4.3 TEU requiring Member States to assist each other in carrying out tasks that flow from the Treaties in light of **the principle of sincere and loyal cooperation**.

Solidarity in the scope of EU asylum policy can take different forms and shapes. While **Article 80 TFEU explicitly mentions “financial implications”**, other means are available to give substance to this principle, such as relocating asylum seekers, enhancing operational support through EU agencies, or establishing links with other policy fields. Accordingly, a key dimension of EU debates on solidarity in the field of asylum, in both the academic and policy domains, has addressed the forms in which solidarity should be conceptualised and operationalised, be it through sharing “norms”, “money” or “people”.⁶¹⁰

Arguably, **Article 80 TFEU expands the notion of international solidarity** reflected in the Preamble of the 1951 Refugee Convention **by demanding more than mere cooperation between states**. Article 80 TFEU is concerned with approaching an issue collectively and supporting each other (solidarity), requiring a concrete division of labour (fair sharing of responsibilities). The duty of Member States and EU institutions to engage in solidarity and fair responsibility sharing practices is not limited to ‘emergency situations’ and should be guided by **the shared duty to ensure that the fundamental right to seek asylum is fully respected in practice**.

Despite its incorporation in the Lisbon treaty and the calls by certain leaders across Europe for ‘more Europe’ in order to meet common challenges, a majority of national governments have been **hesitant to discuss actual measures that would put solidarity into practice** beyond the channelling of EU funding to these countries. Carrera and Guild (2010) have attributed such national resistance to the limitations of ‘European solidarity’, which “often collides with **the boundaries of the principle of national sovereignty and subsidiarity** which still continue to greatly inspire EU discussions around these domains”.⁶¹¹

In EU debates, this notion has adopted **a predominant inter-state focus alienated or dissociated from individuals**. It has been mainly nurtured by a state-centric understanding and framing of responsibility in relation to international protection, side-lining states accountability in cases of human rights and refugee protection violations and refugee agency. **Solidarity is wrongly framed as something voluntary and as a charity-based option, as opposed to an obligatory EU legal**

Delivery Of The Area Of Freedom, Security And Justice?', Brussels, 15 November 2002, WD14. See Karageorgiou (2018), *Rethinking Solidarity*, page 75.

⁶⁰⁹ P. De Bruycker and L. Tsourdi, “Building the common European asylum system beyond legislative harmonisation: Practical cooperation, solidarity and external dimension.” in V. Chetail, P. De Bruycker and F. Maiani (eds.), *Reforming the common European asylum system: The New European refugee law*, Boston: Brill Nijhoff, 2016, pp. 471-538.

⁶¹⁰ Noll, G., *Negotiating Asylum, the EU Acquis, Extraterritorial Protection and the Common Market of Deflection*. The Hague: Martinus Nijhoff Publishers, 2020.

⁶¹¹ S. Carrera and E. Guild, ‘Joint Operation RABIT 2010’ – FRONTEX Assistance to Greece’s Border with Turkey: Revealing the Deficiencies of Europe’s Dublin Asylum System, November 2010, CEPS ‘Liberty and Security in Europe’ publication series, 12.

principle to be **equally shared among all EU Member States** with due regard to its human and fundamental rights dimension.⁶¹²

Solidarity measures within the Union following the Lisbon Treaty and the incorporation of Article 80 TFEU show that **the allocation of responsibilities continued to be based on the old Dublin principles**, complemented by solidarity measures such as proper monitoring and financial compensation. The predominant view has been that any solidarity initiative was to respect and not to contradict the rules of responsibility established by the Dublin Convention. Equally, there seems to have been a consensus that refugees should remain either in their countries of origin (internalisation) or in the neighbouring region (containment).⁶¹³ In particular, elaborating rules on the basis of which an asylum application would not be considered on its merits by EU Member States but rather shifted to a third country has been seen as way “to reduce pressure on asylum determination systems” that are excessively burdened.⁶¹⁴

The 2015 Relocation Council Decisions in favour of Italy and Greece were adopted as emergency measures on the basis of Article 78.3 TFEU, which grants the Council the possibility, upon proposal from the Commission, to adopt provisional measures for the benefit of Member States confronted with an ‘emergency situation’ due to a sudden entry of third-country nationals into their territory. Relocation was envisaged in this context as a **‘temporary derogation’ from the rules laid down in the Dublin Regulation**, in particular the responsibility criteria set out in chapter III of that Regulation.

The launch of the emergency relocation mechanism underscored major political divergences among some EU Member States, with a small group of them declaring their principled opposition to any kind of mandatory redistribution mechanism. Slovakia and Hungary, which, like the Czech Republic and Romania, had opposed the adoption of the relocation mechanism in the Council of Ministers, brought an action for annulment of the second Relocation Decision in front of the CJEU. In a judgment delivered in September 2017, the Court dismissed in their entirety the actions brought by Slovakia and Hungary. The Court made it clear that the binding **relocation scheme** established by the Council should be considered an **appropriate measure to give effect to the principle of solidarity and fair sharing of responsibility**, which applies when the EU common policy on asylum is implemented.⁶¹⁵

As discussed in chapter 2 of this study,⁶¹⁶ the same divisions between Member States on solidarity featured strongly in the negotiations on the CEAS reform launched in 2016. While the Commission proposed to establish **a permanent corrective relocation mechanism** to be activated automatically when applications received by a Member State reach a certain threshold, the Council – especially during the Austrian Presidency – could not agree on any mechanism of mandatory relocation, even in cases of disproportionate pressure faced by a Member State’s asylum system.

The only concrete alternative mechanism elaborated at the EU level to go ‘beyond’ the Dublin system was the one included in **the EP Wikström report on the Commission’s proposal reforming the**

⁶¹² S. Carrera et al., *Implementing the United Nations Global Compact on Refugees? Global Asylum Governance and the Role of the European Union*, Migration Policy Centre Policy Brief, 2021, <https://cadmus.eu/en/handle/10101/181471755>

⁶¹³ D. Joly, *Haven or Hell: Asylum Policies and Refugees in Europe* (Macmillan 1996) 75.

⁶¹⁴ Meetings of Ministers Responsible for Immigration, Summaries and Communiqués, October 1986–June 1993, Doc. No. 10518/92 (Presse 230 - G).

⁶¹⁵ See Chapter 2, Section 2.1.1 of this study.

⁶¹⁶ See Chapter 2, section 2.1.2.

Dublin Regulation.⁶¹⁷ The EP report called for abolishing the 'first entry criterion' giving instead priority to a set of criteria based on 'meaningful links' of an asylum applicants with a specific Member State (or example after having had a prior residence or having studied there). In the case of those asylum applicants lacking such links with a specific Member State, the EP proposal foresaw the establishment of a permanent relocation mechanism replacing the previous "fall-back-criterion" of the Member State of first entry.

Seen against the backdrop of previously unresolved EU debates and initiatives on **solidarity and fair sharing of responsibility**, the Pact's model represents **a clear step backwards**, not only from the ambitious reform attempt contained in the above-mentioned 2017 European Parliament Report,⁶¹⁸ but also from the approach based on 'mandatory solidarity' (albeit in the form of a corrective mechanism) pursued by the Commission in its 2016 Dublin proposal.

The system proposed under the Pact fails to tackle the structural imbalances in the allocation of responsibilities produced by the Dublin system, which have been identified by previous evaluations and acknowledged by the Commission Staff Working Document accompanying the Pact. As underlined in chapter 7 of this study, the **RAMM maintains the connection between irregular external border crossing and the responsibility for examining asylum applications**, envisaging solidarity measures as a way to compensate for the imbalances co-produced by the system. **The responsibility of the state of first irregular entry is not only retained but even reinforced** by significantly limiting the possibility for cessation and shift of responsibility between Member States.

In this regard, it should be recalled that the reinforcement of the responsibility of the 'state of first entry' cannot be considered in isolation from the potential impact of the implementation of the pre-entry phase on the distribution of responsibilities between Member States, and in particular **the additional administrative and infrastructural effort that such model of reception would entail on the countries located at the EU eastern and southern borders**. In the absence of a thorough impact assessment of the costs and impacts associated with the implementation of the pre-entry phases, **it remains impossible to assess if EU funds alone would be able to compensate for the expected increase of administrative responsibility produced by the implementation of the pre-entry screening and border procedures.**⁶¹⁹

The '**asymmetric interstate solidarity model** advanced with the New Pact, including the crisis solidarity mechanism advanced by the Crisis proposal, examined in section 7.2.2 of chapter 7 of this study, stands at odds with the CEAS goal of developing a common policy on asylum with a view to offering appropriate status to any third-country national requiring international protection. Under the proposed mechanism, **contributions are to be decided based on a 'pick-and-choose menu' featuring options** other than relocation, which stands at odds with the shared commitment of EU Member States to safeguard their international responsibilities towards refugees and the fundamental right to asylum.

⁶¹⁷ European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)(COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)).

⁶¹⁸ Ibid.

⁶¹⁹ Refer to Chapter 3, Section 3.2.2; and Chapter 4, Section 4.2.2 of this study.

Asymmetric inter-state solidarity also runs contrary to the notion of 'equal solidarity' advanced by the CJEU in its rulings covering the 2015 Council Relocation Decisions. In its ruling of April 2020, joined cases C-715/17, C-718/17 and C-719/17, *European Commission v Republic of Poland and Others*, the Luxembourg Court underlined in paragraph 80 that in accordance with the EU solidarity principle, in cases characterised by a sudden influx of third-country nationals, responsibility "[...] must, in principle, be divided between all the other Member States".⁶²⁰

A systemic interpretation of Articles 80 and 67.1 TFEU – which calls for the establishment of a common policy on asylum, immigration and external border control, based on solidarity between Member States, and which is fair towards third-country nationals – lends support to the conclusion that a **'horizontal' notion of solidarity** (focusing on support to Member States under pressure) should be integrated with a **'vertical' understanding of solidarity calling for fairness towards of asylum seekers and refugees and protect their rights** (see chapter 6 of this study).⁶²¹ This vertical understanding of solidarity, however, is largely absent from the Pact to the extent that asylum-seekers' agency and voices are disregarded.⁶²²

The so-called 'return sponsorship' constitutes a highly questionable proposal to give meaning to the concept of EU solidarity enshrined in the Treaties. It risks blurring Member States' responsibilities for applying EU law standards in the field of asylum and hindering accountability for potential fundamental rights violations in the context of forced and voluntary expulsion procedures. The RAMM (Article 55.4) makes it clear that during the procedure of return sponsorship the 'benefitting state' would remain responsible for applying the standards included in the EU Returns Directive. At the same time, the so-called 'sponsoring country' would assume responsibility for a range of activities – including leading or supporting policy dialogue with a specific third country, contacting third country authorities for the purpose of verifying the identify of a third-country national and obtaining a valid travel document, or organising the practical arrangements for return operations such as charter or scheduled flights.

As these are activities that may have multiple implications for the respect of EU standards in the field of return, concerns arise as to the possibility of **establishing clear responsibilities between the variety of actors involved in the implementation of different aspects of the return procedure.**⁶²³ The Pact fails to consider however that the application and enforcement of return policies still varies significantly across EU Member States – with EU countries using different grounds to consider return to a particular country as 'safe' or not (e.g., returns to Afghanistan),⁶²⁴ something that may add a further

⁶²⁰ On the notion of equal solidarity refer to refer to S. Carrera and R. Cortinovis, The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism? CEPS Policy Insight, 2019,

https://www.ceps.eu/wp-content/uploads/2019/10/PI2019_14_SCRC_Malta-Declaration-1.pdf https://www.ceps.eu/wp-content/uploads/2019/10/PI2019_14_SCRC_Malta-Declaration-1.pdf

⁶²¹ V. Moreno-Lax, "Solidarity's Reach: Meaning, dimensions and implications for EU (external) asylum policy", *Maastricht Journal of European Law*, 24(5), 2017, 740-762. See also AG Opinion to *Jawo* case (para 145) where it is emphasised that the occurrence of cases of substandard protection for asylum seekers and refugees can be eliminated by ensuring that the principle of solidarity delivers not only in relation to interstate demands but, above all, in relation to the human beings concerned (emphasis added).

⁶²² See Chapter 6, Section 6.2.2.

⁶²³ Vosyliūtė, L., 'When principles are compromised: EU return sponsorship in light of the UN Global Compacts', ASILE project Blog, 17 February 2021.

⁶²⁴ ECRE, No Reason for Returns to Afghanistan, Policy Note #17 —2019, <https://www.ecre.org/wp-content/uploads/2019/02/Policy-Note-17.pdf>

level of complexity in the implementation of the return sponsorship scheme, if not a 'race to the bottom'.

8.3. Other cross-cutting issues

This subsection focuses on other additional cross-cutting legal and fundamental rights issues characterising the Pact, in particular those related to legal uncertainty and an excessive level of discretion by Member States (*section 8.3.1*), and other fundamental rights challenges (*section 8.3.2*).

8.3.1. Legal uncertainty and Member States discretion

An additional cross-cutting legal issue raised by the Pact has to do with a **lack of legal clarity as to the differing degree of 'mandatoriness', discretion or 'margin of manoeuvre'** left to Member State authorities in applying some of the key provisions included in the Pact's proposals. **The resulting picture is one of legal uncertainty and obscurity.** Despite the stated objective of contributing to the CEAS aim of increasing harmonisation of asylum law and limiting Member States' discretion in applying EU standards, the Pact fails to bring legal clarity and precision on some central issues addressed in the proposed integrated EU asylum and migration system.

a) The legal 'fiction of non-entry' in the pre-entry phase

The wide level of discretion left to Member States in the implementation of key elements of the Pact is evident in the case of **pre-entry procedures**. The fact that third-country nationals subject to pre-entry procedures are **not authorised to enter the territory** (in line with the so-called fiction of non-entry) creates legal uncertainty as to the relationship between the screened individual and the responsible national authorities.

The legal fiction of non-entry cannot discharge state authorities from fulfilling their fundamental rights obligations under EU and international law,⁶²⁵ including protection of the right to asylum, the prohibition of *non-refoulement* and collective expulsions. However, the absence of clear EU rules concerning the right to enter and remain within Member States' territory and the legal position of individuals subject to the screening may create an incentive for Member States to circumvent legal standards and carry out illegal practices. These include **pushbacks and expedited expulsions whose systematic character in some Member States has been the source of increasing concerns and criticism from international organisations, civil society, academia and the European Parliament.**⁶²⁶

Another source of legal ambiguity in the New Pact concerns the fact that the provisions on **pre-entry procedures do not envisage clear rules as regards the legal qualification of the stay of those "held" at the border**, leaving wide discretion in Member States' hands as to the use of detention during the screening and to the provisions of the Reception Conditions Directive and the Return

⁶²⁵ Interview FRA.

⁶²⁶ Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Displaced Persons. Pushback policies and practice in Council of Europe member States, Report, Doc. 14909, 08 June 2019, <https://pace.coe.int/en/files/27728>; European Union Agency for Fundamental Rights (FRA), Migration: Fundamental Rights Issues at Land Borders, November 2020, <https://fra.europa.eu/en/publication/2020/migration-fundamental-rights-issues-land-borders>; European Parliament Press Release, Investigate alleged pushbacks of asylum-seekers at the Greek-Turkish border, MEPs demand, 06-07-2020, <https://www.europarl.europa.eu/news/en/press-room/20200703IPR82627/investigate-pushbacks-of-asylum-seekers-at-the-greek-turkish-border-meps-demand>

Directive in the case of border procedures. As further discussed in section 8.3.2.2 below, **the failure of the Pact to clarify the relation between pre-entry procedures and detention risks perpetuating practices of automatic detention at the border, be it formal or *de facto* detention.** This outcome would not be compatible with EU law standards, according to which detention should instead be applied exceptionally and only when less coercive measures cannot be applied.

It should be recalled in this regard that the Commission **has not yet delivered the evaluations of the existing *acquis*, namely of the Asylum Procedures Directive and the Reception Conditions Directive**, which were due in 2017, thus failing to comply with a fundamental obligation under EU law to evaluate existing rules before proposing new legislation.⁶²⁷ It is of particular concern that the Commission has not proposed an evaluation of border procedures carried out in the Member States given the reliance on this instrument in the Pact as a key 'migration management tool'.

The lack of evaluation from the side of the Commission pushed the European Parliament to request an Implementation Assessment on Asylum procedures at the border. One of the key conclusions of EP report is that there is a persistent lack of reliable data concerning the application of border procedures in the Member States, confirming the need for establishing better monitoring mechanisms and collect more comprehensive data on the use of this instrument across Member States.⁶²⁸

The same European Parliament Implementation Assessment also stressed how **the Commission had not conducted an evaluation of the quality of decision-making in the context of border procedures** – which would allow determining which specific cases are best suited to be dealt with in those procedures – or on the use of detention in the same context. This is in spite of increasing evidence of failures by several Member States to respect EU standards on detention of asylum seekers and migrants the border.⁶²⁹

b) Procedures for triggering the solidarity mechanism

The '**flexible**' **solidarity mechanisms envisaged in the RAMM**, which together with the pre-entry phase is the other key building block of the Pact, raises a set of additional challenges. The different options for solidarity envisaged by the RAMM (relocation, return sponsorship, capacity building in the field of asylum and return) reflect the attempt to strike a compromise between divergent interests and political sensitivities of Member States on the issue of solidarity.

As underlined above, interviews conducted for this study have underlined how some Member States have expressed concerns about the **extreme complexity of the system**, which makes it difficult to assess the redistributive effects of the 'solidarity regimes' (e.g. in the context of SAR cases or situations of migration pressure) laid down in the proposal.⁶³⁰ In particular when a Member State is allowed to contribute to solidarity through capacity building measures or other support in the field of the external dimension, it is for the Commission to assess if the pledges can be considered in 'proportion' to the contribution that a Member State would have made by means of relocation and return sponsorship and propose adjustments.⁶³¹ The proposal, however, does not specify based on which criteria measures

⁶²⁷ Both the Asylum Procedures Directive (Article 50) and the Reception Conditions Directive (Article 30) requires the Commission to report, by July 2017, to the European Parliament and the Council on the application of the Directive and propose any amendments that are necessary.

⁶²⁸ G. Cornelisse and M. Reneman, "Border procedures in the Member States", European Implementation Assessment", 45.

⁶²⁹ Ibid., p. 44.

⁶³⁰ Interview Member States 1, 2, 3.

⁶³¹ RAMM proposal, Article 48(2) and 53(2).

in the area of capacity building or the external dimension are going to be 'compared' with contributions in the area of relocation or return sponsorship.

The relevance accorded by the new system to Member States' political sensitivities is also reflected in the procedure proposed **for triggering compulsory solidarity**. The procedure leaves wide discretion to the Commission in assessing if a situation of migration pressure exists based on **an open-ended list of factors**, which includes (among others) the level of cooperation on migration with third countries of origin and transit and the geopolitical situation in relevant third countries that may affect migratory movements. Departing from the approach put forward by the Commission in its 2016 Dublin proposal, the new system **does not provide objective indicators for triggering solidarity mechanism**, failing to provide legal certainty on the key issue of solidarity.⁶³²

c) The concepts of crisis and *force majeure*

The Pact's proposal on a Crisis and Force Majeure Regulation introduces **open-ended and vague legal concepts that raise important concerns in terms of both legal certainty and the proportionality test**. As studied in chapter 7 of this study, akin to the procedure for triggering solidarity in the RAMM, the Crisis proposal leaves too wide a margin of discretion to the Commission to assess a particular situation as a "crisis" and justify a set of procedural derogations from EU standards in the field of asylum and return as well as the activation of a specific solidarity regime 'in the name of crisis'.⁶³³

An even greater level of vagueness characterises the concept of *force majeure*, which is not defined in the text of the proposal, but only described with reference to a 'few examples', which includes grounds such as the Covid-19 pandemic and 'the political crisis witnessed at the Greek-Turkish border in March 2020'. Moreover, differently from the case of crisis situations, the assessment of a situation of *force majeure* is left entirely in the hands of Member States, which are simply requested to 'notify' to the Commission that they are facing such a situation, indicating a 'precise reason' for the application of the derogations envisaged by the Regulation.

The legal vagueness accompanying the notions of crisis and *force majeure* and the level of discretion left to the Commission (in the case of crisis) and the Member States (in the case of *force majeure*) to determine the existence of such situations raise strong concerns not only regarding the possible impact of the envisaged derogatory rules on the uniform application of CEAS standards by the Member States but, more broadly, on the respect of the rule of law and the principle of legal certainty in the EU.⁶³⁴

8.3.2. Fundamental rights compliance

When it comes to respect of fundamental rights, the Pact relies on a **metaphor of 'balance'**, putting emphasis on the need to combine the fundamental rights of asylum seekers with "security considerations in situations of crisis" and 'flexibility' of EU Member States Ministries of Interior.⁶³⁵ The

⁶³² See Meijers Committee Comments on the Migration Pact – The Asylum and Migration Management Regulation, November 2020.

⁶³³ See Chapter 7, section 7.1.2., points a, b.

⁶³⁴ Ibid., Section 7.2.1. of Chapter 7 of this study.

⁶³⁵ The envisaged crisis-management model by the Crisis proposal aims at: "striking a balance between the need of national authorities" to manage 'flexibly' situations of crisis or force majeure and "the need for legal certainty and uniformity of

Pact gives no consideration to the specific impact of this ‘balancing exercise’ on legally binding commitments of EU Member States, EU institutions and agencies under EU law as well as international refugee and human rights law. The ‘balance metaphor’ is premised on **the flawed possibility to establish a ‘trade-off’ between the objective of ‘flexibility’ and ‘security’** on the one hand and unnegotiable legal commitments – covering core procedural and individual rights safeguards in currently existing EU migration, borders, and asylum law – on the other.⁶³⁶

Some of these rights are in fact of an **absolute nature, which means that no exception or derogation is permissible under either international refugee and human rights law or the EU CFR.**⁶³⁷ Crucial instances include the principle of *non-refoulement*, the prohibition of collective expulsions in the context of external border controls and surveillance and the requirement of effective remedies to uphold the rule of law and avoid arbitrariness. The fact that the Pact has not taken into account these impacts constitutes a clear case of violation of EU Better Regulation rules and particularly the **Toolbox 28 (Fundamental Rights and Human Rights) of the EU Better Regulation Guidelines.**⁶³⁸ Toolbox 28 requires the Commission to carry out a ‘Fundamental Rights Check list’ and carefully assess the extent to which the rights limited by any new legislative proposal are absolute in nature. If that is the case, Toolbox 28 calls on the Commission to “discard” the policy option altogether.

Nevertheless, the policy choice by the Commission to establish a **‘pre-entry phase’**, including the screening and the integrated asylum and return border procedure, is presented as motivated by the need of providing rapid access to procedures for those with genuine protection needs and ensure equal treatment in terms of procedural safeguards and legal certainty of asylum decisions. This objective would be achieved by quickly channelling individuals into the appropriate asylum procedure in line with their specific circumstances.⁶³⁹

It raises concern, however, that the **amended APR** considers existing gaps and delays in ensuring effective access to asylum procedures as a direct consequence of the administrative burden that national asylum authorities face due to the increasing proportion of asylum applicants who are unlikely to receive protection in the EU, and the increasing political pressures for them to expel legitimate international protection applicants.⁶⁴⁰ In this way, **the objective of improving protection of fundamental rights of asylum seekers, notably access to asylum, is subsumed under the overall migration management logic driving the New Pact.** In fact, while the Pact recognises episodes of **excessive use of force and police violence against** migrants attempting to cross EU external borders

application of such derogations” and “the need to protect the rights of applicants and third-country nationals” (Point 2.5 of the Crisis proposal).

⁶³⁶ On the use of the ‘balance metaphor’ in the EU Area of Freedom Security and Justice see D. Bigo et al., “Freedom, Security and Justice in the EU. Recommendations for the future”, Challenge Project Policy Brief, 2008, https://ec.europa.eu/home-affairs/sites/default/files/what-is-new/public-consultation/2008/pdf/contributions/ceps_i_en.pdf See also Carrera, S., D. Bigo, E. Guild and R. Walker (2010), *Europe’s 21 Century Challenge: Delivering Liberty*, Ashgate.

⁶³⁷ See V. Moreno-Lax et al., “The EU Approach on Migration in the Mediterranean”, Study requested by the LIBE Committee, 2021, p. 88.

⁶³⁸ Refer to https://ec.europa.eu/info/sites/default/files/file_import/better-regulation-toolbox-28_en_0.pdf

⁶³⁹ European Commission, Amended Proposal for an Asylum Procedure Regulation, COM(2020) 611, p. 3

⁶⁴⁰ *Ibid.*, p. 1.

by sea or by land,⁶⁴¹ such episodes are not understood within the context of containment policies to limit access to protection to refugees and people looking for international protection.⁶⁴²

Consequently, and more generally, the Pact fails to provide a comprehensive analysis of the underlying causes of **international protection gaps in the CEAS**, including structural containment policies and practices aimed at limiting entry and intra-EU mobility of asylum seekers, and the structural lack of safe and regular channels for those trying to reach the EU for seeking international protection.

a) **Restriction of procedural rights and impact on the right of asylum and the principle of non-refoulement**

This study has underlined how the implementation of **pre-entry procedures** envisaged by the Pact risks putting asylum seekers' fundamental rights at stake. It is widely recognised that the specific circumstances prevailing in border and accelerated procedures, notably the reduced time limits for assessing entry conditions and protection needs, and the likely use of detention (or *de facto* detention) throughout the procedure, **constrains asylum seekers' ability to have effective access to justice, to make use of their procedural rights and to seek effective remedies**. This enhances the risk of serious fundamental rights violations, including the prohibition of *refoulement* and collective expulsions, as well as the EU fundamental right to seek asylum.

The pre-entry screening procedure is particularly concerning in this regard, most notably in relation to the **use that will be made of the information collected during screening and included in the so-called 'de-briefing form'**. As the information included in the de-briefing form may be used to determine the referral of asylum applicants into an accelerated or border procedure, such information can be expected to directly impact on third-country nationals' access to rights, diverting them to **procedures providing lower safeguards and effective legal and judicial protection**. This makes it imperative to establish appropriate procedural safeguards during screening, giving third-country nationals the **possibility to raise concerns regarding the information collected in the de-briefing form – and eventually request correction and erasure of inaccurate data**.⁶⁴³

The **amended APR proposal** includes an obligation for Member States to apply the asylum border procedure in cases falling within a new acceleration ground, namely in the case of applicants coming from a country with a recognition rate lower than 20%. As underlined in chapter 4 of this study, the mandatory application of the asylum border procedure coupled with the requirement to accelerate the examination of claims based on a purely statistical ground, risk exacerbating procedural shortcomings characterising border procedures, leading **to a reduction of the overall quality and fairness of decisions taken on applications for protection**.⁶⁴⁴

⁶⁴¹ Commission Staff Working Document, p. 8.

⁶⁴² C. Costello and I. Mann, "Border Justice: Migration and Accountability for Human Rights Violations", *German Law Journal*, 2020, 21, 311–334; N. Feith Tan & J. Vedsted-Hansen, "Inventory and Typology of EU Arrangements with Third Countries Instruments and Actors", March 2021; for a comparative analysis of refugee containment policies and practices in Europe and other world region see S. Carrera & A. Geddes, *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees*, Florence: European University Institute, 2021.

⁶⁴³ See Chapter 3, section 3.2.3, point e; Chapter 4, section 4.2.1.

⁶⁴⁴ See Chapter 4, section 4.2.3, point b.

In addition, the amended APR proposal would introduce **strict time limits for lodging appeals as well as limitations to the automatic suspensive effect of appeals** in the context of border procedures.⁶⁴⁵ These provisions may infringe respect of **the right to an effective remedy (Article 47 EU Charter of Fundamental Rights), which is a key safeguard to ensure the right to seek asylum and ensuring respect of the principle of non-refoulement (Article 18 and 19 of the Charter)**. The amended APR proposal also does not adequately address practical obstacles that may hinder applicants' **access to legal assistance** in the specific context of border procedures, related to the widespread use of detention and strict time limits, which may render the right to an effective remedy ineffective and prevent access to justice.⁶⁴⁶

b) Use of detention in pre-entry procedures

The analysis conducted in the study underlines how several substantive provisions included in the Pact's proposals have important implications for the **fundamental right of liberty and security, as well as for the associated procedural rights of asylum seekers**, leading to tensions with EU fundamental rights standards and relevant case-law of the CJEU and the ECtHR. Civil society organisations have rightly argued that the Pact "risks fostering the model of hosting large detention centres, especially in countries tasked with controlling the external borders of the European Union."⁶⁴⁷ The **fundamental rights implications of keeping people arbitrarily in protracted situations for a long time in remote areas and the dangers that accommodation in these types of centres poses for the physical and mental health of asylum seekers** have been widely documented, most notably in a number of reports carried out by the EU Fundamental Rights Agency (FRA).⁶⁴⁸

In the case of TCNs submitted to screening or to the asylum and return border procedure, the person concerned would **not be considered as being legally authorised entry into the Member State's territory**. The interviews conducted with several European Commission officers for the purposes of this study have not been fully conclusive or consensual as to whether the Pact proposals actually call for, or allow for the use of detention by national authorities.

As highlighted in section 8.3.1 (point a.) above, **within the scope of EU law, the value added by the fiction of non-entry for purposes of detention is not clear**. As outlined in chapter 7 of this study, the CJEU ruling of 17 December 2020 *European Commission v Hungary* confirmed that the deprivation of liberty of asylum seekers in transit zones framed as a non-territory in the context of border procedures constitutes 'detention' in European law. **Detention is now an autonomous concept of EU law that undoubtedly unlocks EU Member States responsibilities and liabilities** in cases of violations with

⁶⁴⁵ ECRE, Comments on the Amended Proposal for an Asylum Procedures Regulation COM(2020) 611, December 2020, p. 37.

⁶⁴⁶ See G. Cornelisse and M. Reneman, "Border Procedures in the Commission's New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality?", *European Law Journal*, 2021, 15. At the same time, it is welcomed that the 2016 APR proposal (Article 15), unlike the Recast asylum procedures Directive provides for the right to free legal assistance during both the administrative and appeal phase of the asylum procedure.

⁶⁴⁷ Migrants: 18 associations ask EU to abandon hotspot centres, Infomigrants, 2020/12/14, <https://www.infomigrants.net/en/post/29073/migrants-18-associations-ask-eu-to-abandon-hotspot-centers>

⁶⁴⁸ Interview with the FRA. See FRA, Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy, 2016, pp. 42-23; Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy, 2019, p. 50-54; European Union Agency for Fundamental Rights (FRA), Migration: Fundamental Rights Issues at Land Borders, 2020, pp. 29-30.

EU asylum legislation and the EU Charter of Fundamental Rights.⁶⁴⁹ This therefore renders the presumption or legal fiction of non-entry meaningless and without any relevant purpose.

Irrespective of the ambivalent position by the Commission in this regard, chapters 3 and 4 of this study clearly conclude that **the Pact does indeed envisage and indirectly encourages detention**. It remains unclear how Member States may prevent entry without depriving persons of their liberty and placing them in detention. **The legal uncertainty** characterising the Pact in relation to the measures that may be taken by national authorities to prevent entry into their territory, while still controlling the persons involved, **risks encouraging or indirectly supporting the existing controversial practice of holding TCNs in conditions of *de facto* detention**, in locations such as 'transit zones', islands, or other geographically remote areas.⁶⁵⁰ The Pact fails to lay down in a **clear and predictable manner** the exact scope of limitation of the liberty and security of third-country nationals, which runs contrary to the **Toolbox 28 of the EU Better Regulation Guidelines**.⁶⁵¹

Practices of *de facto* detention clearly constitute a profound violation of the right to liberty and **undermine essential procedural safeguards** to which applicants are entitled in the case of detention, including a written detention order setting out the grounds for detention, and the right to a swift judicial review of the detention measure.⁶⁵² As underlined by the ECRE, ***de facto* detention represents the worst-case scenario from a fundamental right perspective**, as detainees are deprived of basic safeguards that need to be respected in case of formal detention.⁶⁵³

The Pact's failure to address Member States' discretion in determining whether and under what conditions TCNs subject to pre-entry procedures will be held **disregards existing challenges in upholding fundamental rights of asylum seekers and migrants at the EU external borders**, including the **proliferation of instances of 'informal or quasi-detention'**.⁶⁵⁴

A wider application of the notion of '**risk of absconding**' in the context of return procedures, including the pre-entry border procedure for carrying out returns, represents an additional factor that risks laying the ground for the systematic use of detention or similar means of deprivation of liberty of TCNs. This also runs contrary to **Toolbox 28 of the EU Better Regulation Guidelines**, which requires the Commission to comply with the principle of proportionality and not go beyond what is strictly necessary when presenting any new legislative initiatives seriously interfering with fundamental rights.

The **2018 Proposal on a recast Return Directive** significantly expanded the grounds for detention in the context of return procedures. According to its Article 18(1), concerned people may be detained on one of three grounds: a) if there is a risk of absconding, b) if they avoid or hamper the preparation of return or the removal process, or c) if they pose a risk to public policy, public security, or national

⁶⁴⁹ The fact that the Pact envisages the linkage between pre-entry procedures and detention may have to do with a previous Strasbourg Court ruling which held that the same practices in Hungarian transit zones did not qualify as deprivation of liberty in the scope of the European Convention of Human Rights. This judgement has been now overruled by the Luxembourg ruling for the purposes of EU law. See paras. 217-249 of the judgment. ECtHR, Grand Chamber, Case *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 21 November 2019 as referred to in Chapter 7, Section 7.2.3.b.

⁶⁵⁰ Chapter 3, Section 3.2.1., referring to CJEU judgments on Hungarian "transit zones" *Commission v. Hungary* C-808/18, and *FMS v. Hungary* C-924/19 PPU and C-925/19 PPU.

⁶⁵¹ Refer to https://ec.europa.eu/info/sites/default/files/file_import/better-regulation-toolbox-28_en_0.pdf

⁶⁵² G. Cornelisse and M. Reneman, "Border Procedures in the Commission's New Pact on Migration and Asylum", 14.

⁶⁵³ ECRE, Comments on the Commission Proposal for a Screening Regulation COM(2020) 612, November 2020, pp. 14-15.

⁶⁵⁴ Chapter 3, section 3.2.3, point b, of this study; Chapter 4, section 4.2.3, point a.

security. Article 6 of the same proposal also introduced an open-ended, non-exhaustive list of sixteen criteria that Member States must use to determine a 'risk of absconding', on the basis of "an overall assessment of the specific circumstances of the individual case".

The criteria included in the list are formulated in too broad a manner and cover a wide range of situations such as lack of documentation proving identity, lack of financial resources, and illegal entry into the territory of the Member States. **These criteria may effectively mean that detention will become the rule rather than the exception in the scope of EU law.** As underlined by the FRA and ECRE, **the application of such a broad list of criteria to assess the existence of a risk of absconding would likely result in the systematic use of pre-removal detention** in the case of all TCNs arriving in Europe in an unauthorised manner. It would thus run contrary to international and EU law requirements of necessity and proportionality of immigration detention.⁶⁵⁵

Additionally, Art 6(2) of the Recast Return Directive states that Member States shall establish that a **risk of absconding is to be presumed** in four of the specific grounds included in the list mentioned above, thus shifting the burden of proof from the authorities to the TCN.⁶⁵⁶ As discussed in chapter 7, the **2020 Crisis proposal would introduce two additional grounds** (adding to those set out in the proposal for a recast Return Directive) in which the existence of a risk of absconding in individual cases can be presumed, unless proven otherwise. Specifically, under the so-called Return crisis management procedure (see subsection 7.1.2) Member States shall presume a risk of absconding in case of an explicit expression of intent of non-compliance with return-related measures, or when the person concerned is manifestly and persistently not fulfilling the obligation to cooperate established by Article 7 of the Recast Return Directive.⁶⁵⁷

Read together, the grounds for presuming a risk of absconding included in the recast Return Directive and the proposal for a Crisis and *Force Majeure* Regulation advance **a wide interpretation of the risk of absconding. This risks violating the principle of necessity and proportionality established in EU asylum and return law**, as less onerous preventative alternatives other than detention for preventing absconding (in particular in situations of migration crisis) are not considered.

In addition, those provisions stand at odds with **the principle of non-penalisation for irregular entry** enshrined in Article 31 of Geneva Convention and the right of **freedom of movement** under Article 26 of the same Convention. Insofar as they contribute to weaken the requirement of a proper individual assessment of the specific circumstances of each case and reverse the presumption according to which detention should only be considered as a measure of last resort, the same provisions may have a negative impact on a set of fundamental rights enshrined in the EU Charter of Fundamental Rights – most notably **the right to liberty and security (Article 6), the right to be heard (Article 41.2), and the right to an effective remedy (Article 47)**.⁶⁵⁸

⁶⁵⁵ FRA, The recast Return Directive and its fundamental rights implications, FRA Opinion – 1/2019 [Return], p. 47; ECRE, Comments on the Commission proposal for a Recast return directive, COM(2018) 634, November 2018, p. 7.

⁶⁵⁶ The four criteria are: m) using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by Union or national law; n) opposing violently or fraudulently the return procedures; not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3); not complying with an existing entry ban.

⁶⁵⁷ Chapter 7, section 7.1.2. of this study.

⁶⁵⁸ FRA, The recast Return Directive and its fundamental rights implications, FRA Opinion – 1/2019 [Return], p. 49.

c) Fundamental rights monitoring and freezing of EU Agencies' operational activities

To address existing 'protection gaps' at the EU external border – including in the context of mounting evidence of systematic and violent rejections of asylum seekers at EU borders⁶⁵⁹ – the proposal for a Screening Regulation includes an obligation for each Member State to establish an **independent monitoring mechanism** aimed at ensuring compliance with EU and international law, including the EU Charter of Fundamental Rights, during the screening procedure.

The proposed mechanism should be read in the context of a set of other initiatives undertaken at the EU level to ensure monitoring of fundamental rights in the context of border control, asylum, and migration management activities. EU JHA agencies – in particular Frontex and the EASO - have already acquired (or are in the process of acquiring) a more substantial role in monitoring Member States' asylum and returns systems, including in relation to compliance with fundamental rights and EU law standards. However, **Frontex and EASO mandates are not fundamental or human rights driven and their own coordination and operational support activities can in fact lead to serious fundamental rights violations.**

The attribution of a monitoring function to EU agencies, however, raises a number of challenges **from a fundamental rights and good administration perspective**,⁶⁶⁰ not least in light of the **underlying tension between this monitoring role and the expanding operational mandate** assigned to them in the implementation of a wide range of migration management, asylum, and external border control activities.⁶⁶¹ Over 2020, discussions about the direct or indirect involvement of Frontex-coordinated vessels in pushback operations in the Aegean Sea⁶⁶² has brought to the fore once again **the challenges associated in ensuring EU JHA agencies' accountability and responsibility for fundamental rights violations** in the context of their activities.⁶⁶³

⁶⁵⁹ For a review of existing evidence of pushback cases at EU external and internal borders see: European Union Agency for Fundamental Rights (FRA), Migration: Fundamental Rights Issues at Land Borders, November 2020, at p. 18; Refugee Rights Europe and End Pushbacks Partnership, "Pushbacks and rights violations at Europe's borders. The state of play in 2020", November 2020; Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Displaced Persons, Pushback policies and practice in Council of Europe member States, Report, Doc. 14909, 8 June 2019,

⁶⁶⁰ Refer to the European Code of Good Administrative Behaviour available at <https://www.ombudsman.europa.eu/en/publication/en/3510>

⁶⁶¹ L. Tsourdi, The New Pact and EU Agencies: an ambivalent approach towards administrative integration, EU Immigration and Asylum Law and Policy Blog, 6 Friday 2020. See also V. Moreno Lax et al., The EU Approach on Migration in the Mediterranean, Study requested by the LIBE Committee, 2021.

⁶⁶² In November 2020, upon an urgent request from the European Commission, the Frontex Management Board held an extraordinary meeting to discuss the issue of pushbacks, in which it called upon the agency's Executive Director to ensure a 'solid' mechanism for internal reporting and prompt follow-up of reported incidents and envisaged the establishment of a 'sub-group' within the Management board. See European Commission Press Release, Extraordinary meeting of Frontex Management Board on the alleged push backs on 10 November 2020, https://ec.europa.eu/home-affairs/news/extraordinary-meeting-frontex-management-board-alleged-push-backs-10-november-2020_en; Allegation of Frontex involvement in pushbacks episodes also led the EP LIBE Committee to establish a Frontex Scrutiny Working Group (FSWG) to carry out a fact-finding investigation on alleged violations of fundamental rights involving Frontex. See European Parliament Press Release, 'First meeting of the Frontex Scrutiny Group with Leggeri and Johansson', 03-03-2021, <https://www.europarl.europa.eu/news/it/press-room/20210303IPR99105/first-meeting-of-the-frontex-scrutiny-group-with-leggeri-and-johansson>

⁶⁶³ On Frontex fundamental rights accountability see M. Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable', *German Law Journal*, 2020, 21, pp. 532–548; For a discussion of fundamental rights accountability issues in the work of EASO see L. Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?', *German Law Journal*, 2020, 506–531.

Against this backdrop, the Pact's proposal for the establishment of a new monitoring mechanism to be set up by the Member States in the proposed Screening Regulation has been presented by the Commission as a key instrument to address violations of fundamental rights at the EU borders, including 'pushback' episodes. At the same time, **the potential added value and effectiveness of the proposed mechanism** to remedy existing accountability gaps and ensure compliance with fundamental rights **raises a number of questions** addressed in what follows.⁶⁶⁴

A first point of concern surrounds the uncertainty regarding the **scope of the proposed monitoring mechanism**. Some of the Commission officers interviewed for this study have stated that the proposed monitoring mechanism would play a key role in addressing cases of pushbacks at external borders.⁶⁶⁵ However, this assumption is problematic from an EU law perspective, given that the *ratione materiae* of the proposed Screening Regulation implies **that scope of the monitoring mechanism would be limited to possible violations occurring during activities covered by screening** (e.g., identity, security, and health checks). Existing evidence of 'pushbacks' at the EU's external borders, however, underlines how these practices are performed in the context of **border surveillance and interceptions taking place in remote or specific areas which do not correspond with official 'border crossing points' and which are often not accessible to independent monitors**.⁶⁶⁶ In addition, in light of previously outlined concerns regarding the fundamental rights' implications of the expanded operational mandate of EU JHA agencies, including in the form of a range of executive powers granted to their staff, it would be crucial to clarify **if the proposed monitoring mechanism will cover only the actions of national authorities or also that of EU agencies involved in border control, return, and asylum procedures**.

Another aspect of concern when assessing the added value of the proposed mechanism has to do with its **degree of independence from Member States' authorities (relevant national Ministries and authorities responsible for border policing and surveillance) and EU agencies**. In this regard, the Commission's proposal assigns the EU Fundamental Rights Agency (FRA) the role of providing guidance to Member States in ensuring the independence of the mechanism, as well as in providing a monitoring methodology and appropriate training schemes. **The proposed legislation, however, does not further specify how the effectiveness of the monitoring mechanism would be guaranteed in practice**.

Another challenge to be considered is the failure of the proposal to specify clear **independent monitoring methods and follow-up procedures** (including for instance the possibility to conduct unannounced visits/inspections as well as relevant internal disciplinary provisions and judicial investigations) to be activated when cases of non-compliance with fundamental rights and EU law

⁶⁶⁴ Interview FRA; ENNHRI's Opinion on Independent Human Rights Monitoring Mechanisms at Borders under the EU Pact on Migration and Asylum, 10 March 2021, <http://ennhri.org/our-work/topics/asylum-and-migration/opinion-on-independent-human-rights-monitoring-mechanisms-at-borders-under-the-eu-pact-on-migration-and-asylum/>; ECRE et al., Turning rhetoric into reality: New monitoring mechanism at European borders should ensure fundamental rights and accountability, November 2020, <https://www.ecre.org/wp-content/uploads/2020/11/FINAL-Statement-IBMM-November-2020.pdf>

⁶⁶⁵ Interview Commission 2, 3.

⁶⁶⁶ Interview FRA; M. Stefan and R. Cortinovis, "Setting the right priorities: is the new Pact on Migration and Asylum addressing the issue of pushbacks at EU external borders?", ASILE Forum Blog contribution, 25 November 2020, <https://www.asileproject.eu/setting-the-right-priorities-is-the-new-pact-on-migration-and-asylum-addressing-the-issue-of-pushbacks-at-eu-external-borders/>

administrative guarantees are identified by the monitoring mechanism.⁶⁶⁷ This aspect is particularly relevant considering that **a lack of thoroughness in follow-up procedures** has been identified as one of the problematic aspects that have limited the effectiveness of the individual complaint mechanism established under Article 111 of the EBCG Regulation. Addressing this issue in the context of the proposed monitoring mechanism will thus be crucial to ensure that an **effective remedy** for victims of fundamental rights violations is guaranteed, in line with Article 13 ECHR and Article 47 EUCFR.⁶⁶⁸ Furthermore, in order to ensure the effectiveness of the proposed monitoring mechanism, the **European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment** (CPT) has recommended foreseeing the possibility for **border monitors** to be present as **"independent observers** during "diversion" and "interception" operations at the border" and **"to collect real-time information on possible cases of malpractices"**.⁶⁶⁹

This is also crucial during EASO operations and for the envisaged new mandate for an EU Asylum Agency. There are currently no transparent and accountable rules for the EASO to withdraw its operational activities in cases where EU Member States are clearly violating EU asylum law and fundamental rights, including the right to seek asylum. Too much discretion is left to the EASO Director and there is a lack of accountability in its current and newly envisaged mandate around situations calling for freezing of operational activities. The newly politically agreed negotiating mandate clearly links the Agency more closely with the EU Charter.⁶⁷⁰ However, it still foresees a key weakness regarding the lack of independent monitoring of the Agency's activities and the possibility to enforce withdrawal or freezing of its operational activities in cases of fundamental rights violations and systematic deficiencies of national asylum reception systems.⁶⁷¹

⁶⁶⁷ Interview FRA; See Carrera, S. and Stefan, M., *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* Brussels: CEPS, 2018, p. 22.

⁶⁶⁸ *Ibid.*, Chapter 1.

⁶⁶⁹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 1 January – 31 December 2020, 30th General Report of CPT, Strasbourg: Council of Europe, 15-16.

⁶⁷⁰ See <https://www.consilium.europa.eu/en/press/press-releases/2021/06/16/eu-asylum-agency-council-agrees-extended-mandate-for-negotiations-with-the-european-parliament/> and <https://data.consilium.europa.eu/doc/document/ST-9905-2021-INIT/en/pdf>

⁶⁷¹ If one compares the EASO Operating Plans in countries like Greece, Italy, and Spain, it is clear that fundamental rights and potential withdrawing comes only as an afterthought, and in some cases these issues have been only formally included in the Operating Plans in the last year. See <https://easo.europa.eu/archive-of-operations>. Section 2.3 in Operating Plan for Italy https://easo.europa.eu/sites/default/files/2021_Italy_OP_Final.pdf states: "EASO may temporarily suspend the implementation of the Plan in cases of severe violations of the applicable law, especially the Fundamental Rights" compared with Section 1.4 which does not include a similar sentence <https://easo.europa.eu/sites/default/files/operating-plan-italy-2020.pdf>

9. EVIDENCE-BASED POLICY RECOMMENDATIONS

Based on the analysis conducted and evidence provided in the preceding chapters, this concluding chapter provides a set of policy recommendations for each of the five legislative proposals accompanying the Pact. They mainly target EU co-legislators involved in interinstitutional negotiations, and specifically the European Parliament.

9.1. Proposal for a Screening Regulation

9.1.1. EU co-legislators need to limit the use of detention (including practices of de facto detention) in the context of screening processes. In line with the EU principle of proportionality, alternatives to detention should be prioritised to limit the impact of detention and quasi-detention practices on the fundamental rights of third-country nationals. Detention should always remain a measure of last resort and subject to regular independent monitoring.

- The Screening proposal leaves to national law the legal qualification of the measures that may be taken by Member States' authorities to prevent entry into the territory (see Article 4.1). In light of the overall CEAS objective of harmonising asylum standards in the Member States, co-legislators need to clarify if the holding of TCNs at the border pending screening will amount to a deprivation of liberty, in light of Article 6.1. EUCFR (as opposed to restrictions on free movement).
- Deprivation of liberty needs to be based on an individual assessment and, in line with the principle of proportionality, needs to be strictly necessary and a measure of last resort, to be taken only after exhausting other less infringing alternatives. The proposal is opaque on how the legal fiction of non-entry relates to TCNs' right to personal liberty and this may lead to the implementation of a policy generalised or *de facto* detention upon entry in breach of EU legal set in the Reception Conditions Directive and the Returns Directive. The legal fiction of non-entry should be therefore deleted.
- When alternatives to detention are not available, deprivation of liberty needs to be accompanied by a higher degree of procedural safeguards, to ensure the availability of an effective legal remedy. This should be accompanied by an independent quantitative and qualitative EU monitoring mechanism of detention, *de facto* detention and other forms of 'accommodations' limiting liberty and free movement of third-country nationals across EU Member States. This mechanism should be an additional component to the 'Independent Monitoring Mechanism' proposed by the Screening Proposal (See Recommendation 9.1.2. below).
- The added value of extending the personal scope of the Screening procedure to third country nationals apprehended within the territory of Member States is not clear and legally incoherent. This provision needs to be deleted as it can be expected to encourage discriminatory practices in the context of police identity checks, and expand the recourse to detention. If the current personal scope is maintained, the submission of the same TCNs to repeated screening must be explicitly prohibited.
- The Screening Proposal needs to detail what reception conditions must be offered to third-country nationals subject to screening. In line with the requirement to ensure coherence with CEAS standards, such conditions should be equivalent to the ones outlined in the EU Reception Conditions Directive.

9.1.2. EU co-legislators need to further strengthen and extend the scope and competences of the independent monitoring mechanism foreseen in Article 7 of the Screening proposal so that: first, such a mechanism can represent an effective instrument to address fundamental rights violations and infringements of EU law in the context of border control and asylum procedures at the border; and second, it can enforce the 'freezing' of EU Agencies operational activities in cases of fundamental rights and CEAS standards violations.

- The independence and effectiveness of the monitoring mechanism must be ensured and reinforced by making the participation of the "relevant national, international and non-governmental organisations and bodies" in the monitoring model (Article 7.2 of the Proposal) mandatory rather than optional. The selection of civil society in such bodies need to be open and transparent. Border monitors should have the competence to be present during border surveillance operations, to conduct unannounced inspections/visits of border policing and border surveillance patrol authorities' establishments, files and recordings, and to compile real-time information on malpractices.
- Clear consequences and follow-up procedures must be established to respond to non-compliance of fundamental rights obligations reported in the framework of the monitoring mechanism. The monitoring mechanism should be granted the competence to directly communicate with relevant national/local prosecutorial authorities. The European Commission should start timely and effective investigations of alleged violations. When relevant, the violations should be brought to national and EU courts so as to ensure effective legal remedies and justice for victims.
- The Screening proposal does not significantly alter the legal mandate of EU agencies. This results in a situation whereby the novel functions envisaged for EU agencies are not satisfactorily embedded in their current legal framework. EU co-legislators need to ensure that the monitoring mechanism covers not only the actions by national authorities but also those by relevant EU agencies involved in the screening procedure. The monitoring mechanism should include the possibility to issue a binding recommendation to EU agencies' Executive Directors (Frontex and the EASO), based on the opinions of their respective Fundamental Rights Officer (FRO), Consultative Forums, and the FRA, to 'freeze' their operational activities in cases of violations of fundamental rights and CEAS legal standards. EU agencies Executive Directors should issue a written Reasoned Opinion in these situations. In this context, the European Parliament should reserve the right to speedily 'freeze' EU financial or budgetary support of Frontex and EASO joint operations in these situations.
- EU co-legislators need to extend the scope of the mechanism so as to cover other border control activities performed outside the locations in which the screening procedure will take place. It is crucial to ensure that the mechanism provides added value in addressing illegal pushbacks at the EU external border, since those practices constitute major violations of fundamental rights and EU rule of law. Extending the scope of the independent monitoring is central for the European Parliament to ensure democratic well as financial accountability for EU action at the borders.

9.1.3. EU co-legislators need to ensure the right to effective legal remedy in relation to the information included in the de-briefing form filled by national authorities after completing the screening procedure. The filling of de-briefing forms should be accompanied by appropriate legal safeguards, including full compliance with EU data protection law, since the information therein included is likely to indirectly impact

on third-country nationals' access to justice, diverting them to accelerated procedures at the border with limited procedural rights.

- The European Parliament should give priority to ensuring that all third-country nationals concerned with screening procedures – irrespective of status – have access to an appeal or complaint procedure to raise concerns regarding the information collected in the de-briefing form – and eventually request correction and erasure of inaccurate data (Article 13).
- It should be ensured that third-country nationals have the possibility to rebut the representation of the facts included in the debriefing form and that the screening authorities be obliged to give an account of the third-country nationals' counter-deductions, justifying in writing the referral decision taken as a consequence of screening.
- In light of potential consequences of the outcome of screening on the right of *non-refoulement*, concerned third-country nationals should also maintain the right to legal aid and assistance during the screening process and in relation to the information included in the de-briefing form. If the envisaged deadlines for the completion of the screening are not respected, TCNs should be referred to the ordinary asylum and return procedures ensuring the highest procedural standards.

9.2. Amended Proposal for an Asylum Procedure Regulation

9.2.1. EU co-legislators need to abolish the additional acceleration ground based on applicants' recognition rate (20% or lower), as it runs contrary to the principle of proportionality and non-discrimination based on nationality.

- The European Parliament should delete the amendment included in Article 40.1 and 5 of the amended APR proposal introducing a new ground for accelerating the examination procedure in cases where the applicant is from a third country for which the proportion of decisions by the determining authority granting international protection is 20% or lower, according to the latest available yearly EU-wide average Eurostat data.

9.2.2. EU co-legislators need to limit the use of detention and restrictions to freedom of movements in border procedures to what is strictly necessary.

- The Parliament should delete provisions on the legal 'fiction of non-entry' or the presumption that third-country nationals are presumed not to have entered into an EU Member States' territory, both in the amended Asylum procedures proposal and in the Screening proposal. In line with CJEU case-law standards, deprivation of liberty and detention are EU autonomous concepts in the scope of EU law and the non-entry presumption does not exempt relevant EU Member States authorities from responsibility and liability from non-applying EU asylum standards and the right to seek/obtain asylum in the EU Charter.
- In line with relevant case law of the CJEU and ECtHR on restrictions of liberty of asylum seekers and other migrants, the Proposal should state that use of detention in the context of asylum procedures should remain exclusively a measure of the last resort. They should also increase the procedural safeguards for applying detention and other restrictions of movement in the scope of both asylum and return border procedures. (See Recommendation 9.1.1. above).

9.2.3. EU co-legislators need to ensure effective access to international protection at the EU external borders, both in the context of border controls and border surveillance.

- In light of ample evidence of fundamental rights violations at EU external borders, including denial of access to the territory for asylum seekers, the European Parliament should ensure legal clarity and structural certainty, including by means of independent monitoring, on the right to access to asylum procedures at EU external borders (see in combination with *Recommendation 9.1.2 above*).

9.2.4. EU co-legislators must increase legal safeguards against refoulement in connection with return decisions.

- The Proposal should stipulate that Member States must respect the principle of *non-refoulement* when issuing a return decision in combination with a rejection of an application for protection (Article 35a APR). Return decisions need to be based on an individual assessment of additional refoulement risks even if the previous asylum application has been rejected.
- EU co-legislators need to better justify and clarify the scope, and implications on legal coherency, of the 'hybrid' legal basis (asylum and illegal immigration/unauthorised residence) of this proposal. Specific safeguards should be included in the proposal to guarantee the independence of national asylum authorities and ensure that these authorities are able to carry out international protection tasks independently from national authorities dealing with expulsion and return.

9.2.5 Children's rights.

- Notwithstanding the limitations on the application of the asylum border procedure for children, the proposed additional acceleration ground, based on the average recognition rate for applicants from the relevant country of origin, will apply also to children applying for protection. The fact that the rule on accelerated examination will be optional for unaccompanied minor applicants does not make it less problematic from a fundamental rights perspective, and it therefore ought to be abolished regardless of the potential adoption of the new acceleration ground in general.

9.3. Proposal for an amended Eurodac Regulation

9.3.1. The Eurodac proposal should not be adopted until the European Commission conducts a rigorous impact assessment providing independent evidence demonstrating that the proposed amendments are strictly necessary, proportionate and privacy-proof.

- Evidence on the necessity and proportionality of the Eurodac proposal, including the extended content, scope and use of Eurodac, and the effects of linking datasets foreseen in the Interoperability Regulations for the use of Eurodac, is an absolute requirement from a fundamental rights perspective. This is especially the case when considering the wide and indiscriminate central storage of personal and biometric data on unsuspected persons, including refugees and children.
- Before adopting the new Eurodac proposal, the European Commission needs to conduct an impact assessment on the necessity and added value of the proposed amendments in light of its Better Regulation Guidelines.
- This impact assessment should include an evaluation of the use and effectiveness of existing databases within the field of asylum and migration policies; address the specific impact of the use of Eurodac within the interoperability system adopted in 2019 for data protection and

fundamental rights; and explicitly address the specific concerns and recommendations by the FRA and EDPS in earlier opinions on Eurodac and related proposals and legislation.

9.3.2. EU co-legislators need to include clear data retention limits and reinstate the time-period for blocking of data in the Eurodac proposal.

- Ensure shorter data retention limits for applicants for international protection in light of the principle of proportionality, and specifically for minors in light of the principle of the best interest of the child.
- Apply the same standards with regard to prior erasure of Eurodac data to all third-country nationals; ensure that erasure (and non-accessibility for law enforcement purposes) applies when third-country nationals receive long-term resident status, EU citizenship, or international protection.
- Reinstate the 2016 proposal of blocking of data for applicants for international protection after three years for law enforcement purposes and apply the same rules with regard to the blocking of data for all categories of individuals in Eurodac. This prevents the stigmatisation and criminalisation of TCNs as potential criminals in contravention with the presumption of innocence and right to non-discrimination.
- Ensure that the existence of a link in Eurodac to other databases shall be deleted once a record is deleted and should not be visible to national authorities;
- Add safeguards in Article 4(6) that the authorities of Member States and EU bodies should continue to be able to see only the data that is relevant for the performance of their specific tasks, even if the records are linked in a sequence.
- Reinstate the general prohibition, as included in the 2016 proposal, of disclosing information to third states on the fact that an asylum application was made in a Member state to ensure the protection of *non-refoulement* of the asylum seeker.

9.3.3. EU co-legislators should ensure that biometrics are collected with full respect for the human dignity of TCN's, including vulnerable persons and minors. In light of absolute prohibition of inhuman and degrading treatment, the use of coercion should be explicitly prohibited.

- EU co-legislators must explicitly prohibit the use of coercion when collecting biometric data from all categories of TCNs falling within the scope of the Eurodac Regulation. EU co-legislators must explicitly provide that only administrative measures are allowed for the purpose of ensuring compliance with the obligation to provide biometric data and develop further rules for the harmonisation of such measures in the Member States.
- EU co-legislators should provide for an explicit obligation for Member States to inform the data subject of their obligation to cooperate with the procedure by providing their biometric data, and on the consequences of any refusal to provide biometrics.

9.3.4. Protecting the rights and best interests of children.

- The use of any coercion against minors, including detention, for the collection of biometrics must be absolutely prohibited. In light of the principle of the best interest of the child, if there is doubt with regard to the age of persons, the EU and national authorities should treat them as minors unless it is proven otherwise.

- EU co-legislators should, in close cooperation with independent experts, civil society actors and the FRA, develop precise and binding rules ensuring that a 'child-friendly' and 'child-sensitive' approach is adopted by national authorities when dealing with children, and guarantee the independency and relevant training of 'accompanying persons'.
- Problems as regarding the tracing of missing children will not be solved by the general and indiscriminate storage of personal information of every minor of six years and older in Eurodac. Instead, the EU legislator and the Commission should consider further measures to improve the effective follow up of SIS alerts on missing persons in practice and strengthen the effective cooperation amongst the relevant authorities.

9.3.5. EU co-legislators need to avoid racial profiling, invasive checks, and abuse of discretion when implementing the Eurodac Regulation.

- The European Commission should request the FRA to develop guidelines or a handbook for national authorities so as to avoid racial profiling, invasive checks, and abuse of discretion in the context of Eurodac. Guidelines or a handbook need to be followed up via tailored training programs for border and coast guards and other law enforcement officials.
- Claims of cases of racial profiling and discrimination within the framework of the Eurodac Regulation need to be effectively remedied. Thus, there is a need for an accessible and independent complaints mechanism and a system of consistent monitoring and evaluation of controls at the external borders and within border areas.
- Such a complaints mechanism, within the framework of the Eurodac Regulation, should enable any person to submit a complaint without fear of repercussions or returns. It also should enable civil society actors and EU citizens to act on behalf of, or to represent, the complainants.

9.3.6. EU co-legislators need to clearly define the procedure according to which a person will be flagged or marked in Eurodac as posing an internal security threat following the screening procedure, and to provide an effective remedy against such flagging or marking in the Eurodac database.

- Eurodac should include the obligation for authorities to inform the individual concerned on the flagging or marking in Eurodac as posing an internal security threat following the screening procedure and provide access to an effective remedy to refute the entry of such information in Eurodac.
- The burden of proof that the flagging or marking as a security risk was needed should be on the issuing agency, so as to avoid the situation where asylum seekers are requested to rebut the presumption for the issuing of a flag in Eurodac.

9.3.7. EU co-legislators should aim to improve the independent supervision of the Eurodac database by strengthening the role and mandate of controllers and trained data protection officers.

- The EU co-legislators should include, as a separate provision in the Eurodac Regulation, the obligation currently described in recital 49a of the proposal on the appointment of controllers with central responsibility for dealing with individual rights of access, correction, and deletion. Such controllers need to be sufficiently trained on the issues of data protection, fundamental rights, and rights of the child.

- The Commission needs to ensure that the EDPS and national level data protection authorities have access to and otherwise are equipped with sufficient means and staff to perform their supervisory tasks on the Eurodac database.
- The EU co-legislators need to include, as recommended by the EDPS, the single model of coordinated supervision, by referring to Article 62 Regulation 2018/1725, ensuring cooperation between national data protection authorities and the EDPS.

9.3.8. Access to effective judicial protection.

- EU co-legislators should provide for an explicit right to effective judicial protection for data subjects with regard to their rights concerning the entry, rectification, completion, and deletion of their personal data in Eurodac, comparable as provided with regard to SIS II. This allows data subjects to bring an action before any competent authority, including a court, under the law of any Member State to access, rectify, erase, obtain information or obtain compensation in connection with information relating to him/her in Eurodac.

9.4. Proposal for an Asylum and Migration Management Regulation (RAMM)

9.4.1. The 'hybridisation' of legal basis of the RAMM proposal poses serious legal coherency challenges in light of EU Better Regulation Guidelines, EU primary and secondary legislation and the composite constitutional and administrative field of actors responsible respectively for asylum, borders and return decisions. EU co-legislators should ensure that the RAMM proposal is solely focused on asylum policy objectives and not on migration enforcement or return priorities.

- The European Parliament should place a special focus on preventing the proposed 'integrated' approach or 'hybridisation' of asylum legal basis/policy domains with those covering immigration enforcement/policing and borders controls. By deleting all the provisions dealing with migration enforcement and returns sponsorships, the RAMM proposal should be solely based on Article 78.2.e TFEU.

9.4.2. EU co-legislators need to revise the criteria for determining the Member State responsible for the asylum application in light of the right to private and family life.

- Such criteria should include adult children in the definition of family member (Article 2.g) as well as siblings in the provisions on dependent persons (Article 24).

9.4.3. EU co-legislators need to revise the rules on the cessation of responsibility included in the RAMM, to ensure alignment with CJEU case law and conformity with fundamental rights. In particular:

- In Article 8.3, reference to "systemic flaws in the asylum procedure and in the reception conditions for applicants" in a Member State as a condition for suspending a transfer should be replaced by the following lower threshold along the lines of relevant ECtHR jurisprudence: "there are substantial grounds for believing that there is a real risk of a serious violation of fundamental rights".
- The inclusion of solidarity within the RAMM system should start first with a revision of responsibility criteria and then move on to the establishment of a mechanism designed to address situations of pressure. In light of this, a) the irregular entry criterion should be withdrawn, along the lines of Wikström 2017 EP Report, and b) the solidarity mechanism should be adapted to the remainder of criteria.

- The European Parliament should delete the first irregular entry criterion under Article 9 of the RAMM proposal. In case the criterion of irregular entry is maintained, the one-year time limit for cessation under the current Dublin Regulation should be retained, instead of the 3 years period proposed under Article 21.1 RAMM.
- Cessation clauses deleted by the RAMM should be reintroduced, including the continuous stay rule currently included in Article 13.2 Dublin III Regulation.
- Article 15.5 of the RAMM should be amended to ensure that the Member State responsible to examine an application of an unaccompanied minor should be the Member State where the minor is physically present, unless best interests require otherwise.
- Article 25(2) RAMM should be amended to expand the rules of discretionary clauses to include any case relating to humanitarian grounds, beyond family relations.

9.4.4. When revising RAMM, EU co-legislators should clarify and provide adequate legal safeguards when implementing asylum and return procedures.

- In Article 28 RAMM, EU co-legislators need to determine when an application is registered (see Article 20.2 Dublin III).
- Obligations of applicants under Article 9 RAMM should be limited to a duty to cooperate and be available to the authorities. Non-compliance sanctions included in Article 10 should be withdrawn; instead, a provision should be introduced prohibiting sanctions, in order to avoid divergent application of such sanctions on the ground.
- Ensure that effective remedial mechanisms against a transfer decision are in place to lower the risk for substantive and procedural rights violations. In relation to this, the following should be considered:
 - Ensure the right to be heard in case where personal interview is omitted (Article 12 RAMM).
 - Combine the applicant's obligation to provide all information relevant to their claim with an obligation of the Member State to cooperate with the applicant in gathering this information (e.g., by asking questions about family ties, etc.), in order to ensure a correct assessment of the responsibility criteria. Further harmonisation of the rules of evidence applicable when tracing family ties, educational record and other meaningful links of applicants is also recommended (see e.g., Articles 30 and 40 RAMM).
 - Remove limitations to the scope of effective remedy.
 - Re-introduce suspensive effect of appeal against transfer decisions (Article 33 RAMM).
 - Impose a 30-day time limit for a remedy.
 - Remove the requirement of 'tangible prospect of success' for providing legal assistance and representation in cases of appeal (Article 33 RAMM).
- Take charge deadlines should not be reduced, so that better determination of family unity possibilities is ensured (Article 29 and 30 RAMM).
- Ensure mutual recognition of positive asylum decisions as proposed by the 2016 Dublin reform.

9.4.5. EU co-legislators need to bring the notion of solidarity in the RAMM in line with the principle of solidarity and fair sharing of responsibility enshrined in Article 80 TFEU and subsequently interpreted by

recent CJEU case law. Namely, any extension or expansion of the notion of solidarity should not result in the possibility for Member States to evade their responsibilities for relocating asylum seekers, and artificially expand it to returns policy.

- EU co-legislators should aim to withdraw the return sponsorship (Article 45(b) RAMM) as it distorts the meaning of European asylum solidarity, which essentially aims at facilitating support between Member States to achieve their CEAS obligations – of which return is not a part. As this study has shown, return sponsorship is likely to create more ‘implementation gaps’ than those it is supposed to resolve. In addition, it may have various unintended consequences, first and foremost, the prolonged use of administrative detention as well as potential violations of fundamental rights of those subject to return and/or to those relocated to the state sponsoring the return. Return sponsorship should be withdrawn to avoid multiple transfers of the asylum seekers from the benefiting Member State to Member State of relocation and further to the Member State responsible.
- EU co-legislators should revise the solidarity mechanisms established by the RAMM (Part IV, chapter 1) by introducing clear relocation commitments for the Member States. An automated solidarity system along the lines of the 2016 proposal, to be triggered as soon as a country’s capacity is reached, might be considered in this regard. The EU legislators should include the possibility for asylum seekers’ preferences to be taken into account in case of relocation.
- The European Commission’s assessment on ‘migratory pressure’ and on ‘corrective contributions’ should be subject to the European Parliament’s approval.

9.5. Proposal for a Crisis and Force Majeure Regulation

9.5.1. The Crisis proposal should be withdrawn, as its coherency, necessity, proportionality, and fundamental rights compliance have not been proven by the European Commission. If the proposal is to be adopted, EU co-legislators should focus on narrowing the definition of crisis to the notion of emergency as laid down in Article 78.3 TFEU in light of the principles of proportionality and good administration. Otherwise, crisis and force majeure notions risk being used discretionally, and legitimising crisis-led responses undermining the overall rationale and coherence of CEAS and essential justice guarantees enshrined in the EU Charter of Fundamental Rights.

- The European Parliament should call for a clearer and narrower definition of ‘crisis’ so that it is aligned with the concept of ‘emergency’ as outlined in the Treaties. This should include the design and application of objective qualitative criteria and take comparative account of the scale of international protection movements in other neighbouring world regions and major refugee hosting countries. The reference to an ‘imminent risk of crisis’ as a ground for triggering any derogations or exceptions should be deleted from the Pact, as this provision is too vague and not linked to clearly defined conditions to determine – in a proportionate and legally certain manner - when such risk materialises (Article 1).
- The European Commission shall use the knowledge of relevant international and regional human rights organisations (United Nations and Council of Europe), including civil society and human rights defenders and the FRA, when assessing the existence of an “emergency situation characterised by a sudden inflow of nationals from third countries” (Article 78.3 TFEU). Such an assessment needs to take into account all potential fundamental rights impacts and risks for asylum seekers and other migrants.

- The concept of *force majeure* should be deleted as even more uncertain and subjective than that of 'crisis'. The European Parliament should consider the CJEU case-law on the principles and requirements under EU law to be respected by Member States when derogating from their obligations in the field of asylum in cases of 'emergency situations'.
- In line with Policy Recommendation 9.4.5 in relation to the solidarity mechanism included in the RAMM, the European Parliament should exclude the possibility for Member States to contribute to the crisis solidarity mechanism in the form of return sponsorship or by relocating irregular migrants (Article 2.5).

9.5.2. *Deleting procedural derogations and exceptions.*

- The Asylum crisis management procedure (Article 4) should be deleted. Those provisions greatly extend the possible use of the border procedures in crisis situations and give Member States the option to extend the length of the asylum border procedure under the proposed APR, including detention, for an additional period of 8 weeks. As such, those provisions would substantially increase risk of fundamental rights violations associated with the use of border procedures, those related to increased use of detention and short time limits for examining applications.
- The Return crisis management procedure (Article 5) should be deleted. Those provisions would allow Member States to extend the duration of the return border procedure as laid down in the proposed APR, including the possibility of detention, by an additional eight weeks (Article 5). Those provisions also include an additional ground for presuming a risk of absconding, which risks leading to a systematic use of detention.

9.5.4. *EU co-legislators should expand the eligibility criteria for granting immediate protection status and accompany it with a predictable and effective solidarity mechanism.*

- The eligibility criteria of beneficiaries of immediate protection status should be expanded in order to include refugees in line with the definition of the Geneva Convention as well as persons at serious risk of, or who have been victims of, systematic or generalised violations of their human rights (Article 10.1). The activation of the immediate protection status regime should be underpinned with a predictable solidarity mechanism focused on the mandatory relocation of beneficiaries of immediate protection (Refer to Policy Recommendation 9.4.3 above).

The Pact should better reflect a ***principled and rights-based understanding of solidarity***. It should involve not only a fairer and more equal sharing of responsibility between Member States (**equal solidarity**), but should also be inclusive of **individuals agency and unequivocally uphold third-country nationals' access to justice, human dignity, and international protection**.

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- ECtHR, *Shahzad v. Hungary*, judgment of 8 July 2021, application no. 12625/17.
- ECtHR, *D.A. and Others v. Poland*, judgment of 8 July 2021, Application no. 51246/17.

ANNEX 1. LIST OF INTERVIEWS

- Interview Commission Officer, Unit ASYLUM (HOME C3), DG Home Affairs, European Commission, 9 February 2021
- Interview Commission Officer, Secretariat-General, European Commission, 22 February 2021
- Interview Commission Officer, Vice President Margaritis Schinas' Cabinet, 24 February 2021
- Interview Commission Officer, DG HOME, Situational Awareness, Resilience and Data Management (HOME.F.2), 1 April 2021
- Interview Member State representative, Home Affairs Department, 9 February 2021
- Interview Member State representative, Permanent Representation to the European Union, 1 March 2021
- Interview Member State representative, Home Affairs Department, 31 March 2021
- Interview Administrator of Secretariat of the Committee on Civil Liberties, Justice and Home Affairs, 4 March 2021
- Interview advisor to Executive Director, EASO 18 February 2021
- Interview, Legal research officer, Asylum and Migration, FRA, 5 March 2021

ANNEX 2. KEY CHANGES INTRODUCED BY THE LEGISLATIVE PROPOSALS⁶⁷²

Annex, Table 1: Proposal on a Screening Regulation

2020 Proposal on a Screening Regulation (COM(2020)612)	Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17) Proposal Recast Return Directive (COM(2018) 634) Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)	Schengen Border Code (Regulation (EU) 2016/399) EBCG Regulation (Regulation (EU) 2019/1986) COM Best practices implementation hotspot approach (SWD(2017) 372 final) Return Directive (Directive 2008/115/EC) Reception conditions Directive (Directive 2013/33/EU)
1. Aim and personal scope of the screening		
<p>The proposed Regulation on screening of third-country nationals at the external borders shall apply to:</p> <ul style="list-style-type: none"> - All TCNs “apprehended in connection with an unauthorised crossing of the external border of a Member State by land, sea or air or disembarked in the territory of a Member State following a search and rescue operation” (art. 3(1)(a)(b)). - All TCNs “who apply for international protection at external border crossing points or in transit zones and 		<p>The Schengen Borders Code lays down rules governing checks on persons crossing the internal and external borders of the Member States of the Union (art. 3), establishing in particular:</p> <ul style="list-style-type: none"> - entry conditions for TCNs (art. 6) - common rules on how identity and security checks on all TCN crossing external borders at border crossing points shall be performed (art. 8(3

⁶⁷² The Tables included in this Annex provide a synthetic description of the outcome of the legal mapping exercise conducted in this study. The Tables compares the key provisions included in the key five legislative proposals under the New Pact with provisions covering the same or related aspects/issues included in the proposals of the 2016 reform package (taking into account the text of provisional agreements between co-legislators), as well as with provisions of relevant legislative instruments currently in force.

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
<p>who do not fulfil the entry conditions set out in Article 6 of the Schengen Border Code (art. 3(2)).</p> <p>- All third-country nationals found within the territory of a Member State “where there is no indication that they have crossed an external border to enter the territory of the Member States in an authorised manner” (art. 5).</p> <p>The screening procedure will not concern:</p> <ul style="list-style-type: none"> - TCNs with regard to whom Member States are not expected to collect biometric data pursuant to the Eurodac Regulation because are immediately turned back or kept in custody, confinement or detention pending their removal, when removal is executed within 72 hours from apprehension (art. 3(1)(a)). - TCNs whose entry is authorised on the basis of the derogations to ordinary entry conditions referred to in Article 6(5) of the Schengen Borders Code (art. 3(3)). 	<p>2021 Provisional Agreement EUAA:</p> <ul style="list-style-type: none"> - Where a Member State requests operational and technical reinforcement by migration management support teams or where migration management support teams are deployed at hotspot areas, the Executive Director shall launch the procedure for deployment of asylum support teams as part of migration management support teams. - The operational and technical reinforcement provided by the asylum support teams may include assistance in screening of third-country nationals, including their identification, registration, and where requested by the host Member State, their fingerprinting and provision of information of the purpose of those procedures (Article 21). 	<ul style="list-style-type: none"> - the treatment of those intercepted while attempting to cross the borders outside border crossing points (art. 13(1)). <p>2019 Regulation on the European Border and Coast Guard Agency (EBCG)</p> <ul style="list-style-type: none"> - establishes that in circumstances of “disproportionate migratory challenges at particular hotspot areas of its external borders characterised by large inward mixed migratory flows”, Member States may “request technical and operational reinforcement by migration management support teams composed of experts from relevant Union bodies, offices and agencies that shall operate in accordance with their mandates” for the screening of TCNs arriving at the external borders (art. 40).

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
		<p>2015 Commission best practices on the implementation of the “hotspot approach provided detailed guidance on how to perform the screening of incoming third-country nationals in hotspot areas.</p>
<p>2. Activities included in the screening</p>		
<p>2.1 Identity checks</p>		
<p>The identity of third-country nationals submitted to the screening shall be verified or established, by using in particular the following, in combination with national and European databases:</p> <p>(a) Identity, travel or other documents;</p> <p>(b) data or information provided by or obtained from the third-country national concerned;</p> <p>(c) biometric data.</p>		<p>Schengen Borders Code:</p> <p>- on entry and exit, third-country nationals shall be subject to “thorough checks”, comprising the verification of entry conditions, including examination of the third-country national’s personal and travel documents, travel itinerary, and availability of sufficient means of subsistence (art. 8(3) Regulation (EU) 2016/399).</p>

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
<p>- For the purpose of identification, the competent authorities shall query any relevant national databases as well as the common identity repository (CIR) referred to in Article 17 of Regulation (EU) 2019/817.</p>		<p>2019 EBCG Regulation:</p> <p>- activities performed by “migration management support teams” in cooperation with Members States include the offering of support in the “identification, registration, and debriefing” of third-country nationals arriving in hotspot areas (art. 40(4)(a), Regulation (EU) 2019/1986).</p>

2020 Proposal on a Screening Regulation (COM(2020)612)	Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17) Proposal Recast Return Directive (COM(2018) 634) Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)	Schengen Border Code (Regulation (EU) 2016/399) EBCG Regulation (Regulation (EU) 2019/1986) COM Best practices implementation hotspot approach (SWD(2017) 372 final) Return Directive (Directive 2008/115/EC) Reception conditions Directive (Directive 2013/33/EU)
2.2 Security checks		
<p>Third-country nationals submitted to the screening shall undergo a security check to verify that they do not constitute a threat to internal security.</p> <ul style="list-style-type: none"> - For the purpose of conducting the security check the competent authorities shall query relevant national and Union databases, in particular the Schengen Information System (SIS).” (art. 11(1)(2)). - Competent authorities shall also query all other relevant databases, such as the Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS), the Visa Information System (VIS), the ECRIS-TCN, Europol data and Interpol Travel Documents Associated with Notices database (Interpol TDAWN) (art. 11(3)). 		<p>Schengen Borders Code</p> <ul style="list-style-type: none"> - thorough checks on entry, including thorough consultation of relevant national and European database, should be conducted to verify that “the third-country national concerned is not likely to jeopardise the public policy, internal security of any of the Member States” (art. 8(3)(vi) Regulation (EU) 2016/399). <p>2015 best practices on the implementation of the hotspot approach:</p> <ul style="list-style-type: none"> - debriefing activities performed by migration management support teams in hotspots areas are key to gather information on migratory routes, smuggling networks or/and security aspects.
2.3 Medical screening		
<p>Third-country nationals submitted to the screening at the externa borders shall be subject to a preliminary medical</p>		<p>Schengen Border Code:</p>

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
<p>examination with a view to identifying any needs for immediate care or isolation on public health grounds (art. 9(1).</p> <p>Where relevant, it should also be checked whether TCNs are in a vulnerable situation, victims of torture or have special reception or procedural needs within the meaning of Article 20 of the [recast] Reception Conditions Directive.” (art. 9(2))</p> <p>Where there are indications of vulnerabilities or special reception or procedural needs, the TCN shall receive timely and adequate support in view of their physical and mental health (art. 9(3)).</p>		<p>- while performing thorough checks on third-country nationals, border guards shall verify that third-country national concerned his/her means of transport and the objects he or she is transporting are not likely to jeopardise the (...) public health of any of the Member States (art. 8(3)(vi) Regulation (EU) 2016/399).</p> <p>2015 Best practices on the implementation of the hotspot approach:</p> <p>- “medical assessment and reception” of incoming third-country nationals in hotspot areas should be possible on a 24/7 basis” (...) “Screening activities as well as age and vulnerability assessment should be done by trained personnel on the basis of standard procedures and templates. Unaccompanied minors should be appointed a guardian and adequately accommodated without delay” (§ 6, SWD(2017) 372 final.</p>
<p>4. Location where the screening is performed</p>		

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
<p>In the case of third countries submitted to the screening at the external borders the procedure should be conducted “at or in proximity to the external border” (art. 6(1)).</p> <p>In the cases of third-country nationals apprehended within the territory, the screening shall be conducted “at any appropriate location within the territory of a Member State” (art. 6(2), COM(2020)612)</p>	<p>2021 Provisional Agreement EUAA:</p> <ul style="list-style-type: none"> - Where a Member State faces specific and disproportionate migratory challenges at particular areas of the external borders, referred to as hotspot areas, it should be able to request the Agency to provide operational and technical assistance and it should thus be able to rely on increased operational and technical reinforcement by migration management support teams composed of teams of 	<p>The Schengen Border Code states that Border checks shall be performed at border crossing points (art. 2(11)). Where facilities exist and if requested by the third-country national, “thorough checks” shall be carried out in a private area (art. 8(4)).</p> <p>When the need for further checks arises (second line check), these “may be carried out in a special location away from the location at which all persons are checked (first line)” (art. 2(13), Regulation (EU) 2016/399).</p> <p>2019 Regulation EBCG:</p> <ul style="list-style-type: none"> - Screening procedures performed by the Member State in cooperation with the ‘migration management support teams’ shall be performed in “hotspot areas”, defined as “an area created at the request of the host Member State in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge, characterised by a significant increase in the

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
	<p>experts from Member States deployed through the Agency (Recital 20).</p>	<p>number of migrants arriving at the external borders" (art. 2(23)).</p>
<p>6. Entry on the territory</p>		
<p>All third countries submitted to the screening at the external borders "shall not be authorised to enter the territory of the Member State" (art. 4(1)).</p>		<p>Schengen Border Code:</p> <ul style="list-style-type: none"> - pending the verification of the conditions for entry, third-country nationals shall not be authorised to enter the territory unless "on humanitarian grounds, on grounds of national interest or because of international obligations." (art. 6(5)(c), Regulation (EU) 2016/399). - In case of refusal of entry, border authorities shall "take appropriate measures, in compliance with national law and having regard to local circumstances, to prevent third-country nationals who have been refused entry from entering illegally." (art. 14 and Annex V, part A, 2(b)).

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
<p>7. Detention</p>		
<p>“The screening should be conducted at or in proximity to the external border, before the persons concerned are authorised to enter the territory.</p> <p>Member States should apply measures pursuant to national law to prevent the persons concerned from entering the territory during the screening. In individual cases, where required, this may include detention, subject to the national law regulating that matter” (Recital 12).</p>	<p>2018 provisional agreement on a proposal Recast Reception Conditions Directive</p> <p>When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.</p> <p>An applicant may be detained only:</p> <p>(a) in order to determine or verify his/her identity or nationality;</p> <p>(...)</p>	<p>2013 Reception Conditions Directive:</p> <p>When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.</p> <p>An applicant may be detained only:</p> <p>(a) in order to determine or verify his/her identity or nationality;</p> <p>(...)</p>

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
	<p>(d) in order to decide, in the context of a border procedure (...), on the applicant's right to enter the territory" (art. 8(2)(3).</p> <p>The standards on detention conditions for applicants of international protection are set by Articles 10 and 11.</p> <p>2018 Proposal for a recast Return Directive:</p> <p>The recast Return Directive includes the grounds for detaining TCNs pending the execution of a removal order (Article 18) and the standards on the conditions of detention (Articles 19 to 21).</p> <p>Same provisions as in the 2008 Return Directive (art. 2(2)(a) and art. 4(4)(a)).</p>	<p>(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory" (art. 8(2)(3), Directive 2013/33/EU).</p> <p>The standards on detention conditions for applicants of international protection are set by Articles 10 and 11 of the Directive.</p> <p>2008 Return Directive:</p> <p>The Return Directive sets the grounds for detaining TCNs pending the execution of the removal order (art. 15) and the standards on the conditions of detention (Articles 16 to 18).</p> <p>- Member States may decide not to apply the Return Directive to third-country nationals "who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection</p>

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
		<p>with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay” (art. 2(2)(a),).</p> <p>- Member States shall ensure that their treatment and level of protection of third-country nationals excluded from the scope of this Directive are no less favourable than as set out [...] in Articles 16 and 17 (detention conditions)” (art. 4(4)(a)).</p>
<p>8. Outcome of the screening</p>		
<p>On completion of the screening procedure, the authorities responsible shall fill the so called “de-briefing form” (art. 13)</p> <p>The de-briefing form should include the following information:</p> <ul style="list-style-type: none"> - name, date and place of birth and sex - initial indication of nationalities, countries of residence prior to arrival and languages spoken. 	<p>2021 Provisional Agreement EUAA:</p> <p>The operational and technical reinforcement provided by the asylum support teams in the framework of the migration management support teams deployed in hotspot areas may include:</p> <ul style="list-style-type: none"> - the provision of initial information to third-country nationals who wish to make an application for international protection and their referral to the competent national authorities of the Member States; 	<p>2019 Regulation on the EBCG Agency:</p> <ul style="list-style-type: none"> - The outcome of the screening procedures performed in hotspot areas by the Member State in cooperation with the migration management support teams’ may be: <ul style="list-style-type: none"> ▪ referral of those wishing to apply for international protection to the competent authorities (art. 40(4)(b)) ▪ referral to the authorities responsible for return (art. 40(4)(c), Regulation (EU) 2019/1986).

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
<ul style="list-style-type: none"> - reason for unauthorised arrival, entry, and, where appropriate illegal stay or residence, including information on whether the person made an application for international protection - information obtained on routes travelled, including the point of departure, the places of previous residence, the third countries of transit and those where protection may have been sought or granted as well as the intended destination within the Union - information on assistance provided by a person or a criminal organisation in relation to unauthorised crossing of the border, and any related information in cases of suspected smuggling <p>After the filling of the de-briefing form, third-country nationals shall be referred to the appropriate authorities.</p> <p>In particular:</p> <ul style="list-style-type: none"> - TCNs crossing external borders outside border crossing points, who have not requested international protection and with regard to whom the screening has 	<ul style="list-style-type: none"> - the provision of information to applicants on the procedure for international protection and with regard to reception conditions as appropriate, relocation and the provision of necessary assistance to applicants or potential applicants that could be subject to relocation; - the registration of applications for international protection and, where requested by the host Member State, the examination of such applications (Art 21). 	<p>2015 best practices on the implementation of the hotspot approach:</p> <ul style="list-style-type: none"> - in order to increase the effectiveness and efficiency of the asylum and return procedures, it is advisable to establish, within the existing national legislative framework, a closer nexus between the initial steps of the hotspots approach and the asylum and return procedures which should follow these initial steps in order to expedite processes and ensure efficiency gains". In light of this, the Commission suggests that the

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
<p>not revealed that they fulfil entry conditions may be refused entry in accordance with Article 14 of the Schengen Border Code (art. 14(1)).</p> <ul style="list-style-type: none"> - TCNs disembarked after a search and rescue operation who have not requested international protection shall be referred to the authorities competent for return pursuant the procedures set in the 2008 Return Directive (art. 14(1)). - TCNs apprehended within the territory of Member States who do not apply for international protection and with respect to whom the debriefing has not revealed that they fulfil the conditions for stay, shall be referred to the authorities competent for return pursuant the procedures set in the 2008 Return Directive (art. 14(4)). - TCNs who apply for international protection shall be referred to the authorities responsible for asylum. In these cases, the de-briefing form shall indicate any elements which seem “at first sight to be relevant to refer the third-country nationals concerned into the accelerated examination procedure or the border procedure” (art. 14(2)). 		<p>asylum and return procedures are initiated and finalised in the hotspots, with the support of EU agencies (§ 7).</p>

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
<p>The screening could also be followed by relocation, under the mechanism for solidarity established by Regulation (EU) XXX/XXX [Asylum and Migration Management] (art. 14(3))</p>		
<p>9. Duration of the Screening</p>		
<p>The proposed duration of the screening process is as follows.</p> <ul style="list-style-type: none"> - 5 days for third-country nationals apprehended in the external border areas, disembarked after search and rescue, or presenting themselves at border crossing points (art. 6(3)) - 3 days for third-country nationals apprehended within the territory (art. 6(5), COM(2020)612). <p>There are only two exceptions to this general rule (Article 6(3)):</p> <ul style="list-style-type: none"> - In cases concerning third-country nationals apprehended at the external border who have already been kept in detention or custody for more than 72 		<p>Schengen Border Code:</p> <p>No specific time limit within which a decision on the authorisation to enter the territory or a refusal of entry shall be issued.</p> <p>However, control procedures at external borders should “not constitute a major barrier to trade and social and cultural interchange”. To this end, specific rules for the relaxation of border checks when the waiting time at the border become excessive are set (art. 9).</p>

<p>2020 Proposal on a Screening Regulation (COM(2020)612)</p>	<p>Provisional agreement of 17 June 2021 on the 2016 Proposal for a European Union Agency on Asylum (doc 10555/17)</p> <p>Proposal Recast Return Directive (COM(2018) 634)</p> <p>Provisional agreement of 18 June 2018 on the 2016 Proposal recasting the Reception Conditions Directive (doc 10009/18)</p>	<p>Schengen Border Code (Regulation (EU) 2016/399)</p> <p>EBCG Regulation (Regulation (EU) 2019/1986)</p> <p>COM Best practices implementation hotspot approach (SWD(2017) 372 final)</p> <p>Return Directive (Directive 2008/115/EC)</p> <p>Reception conditions Directive (Directive 2013/33/EU)</p>
<p>hours pending their removal, the screening procedure should not exceed 2 days.</p> <p>- In exceptional circumstances, where a disproportionate number of third-country nationals needs to be screened, the period of 5 days for completing the screening procedure may be extended by a maximum of an additional 5 days.</p> <p>Where not all the checks have been completed within the deadlines, the screening shall nevertheless end with regard to that person, who shall be referred to a relevant procedure, be it asylum, refusal of entry, or return (art. 14(7), COM(2020)612).</p>		<p>Best practices on the implementation of the hotspot approach:</p> <p>- the processing of incoming migrants should take place “at the earliest stage possible” (§ 6, SWD(2017) 372 final).</p>

Annex, Table 2: Amended Asylum Procedures Regulation

2020 Proposal (COM(2020) 611 final)	2016 CEAS Proposal (COM(2016) 467 final)	Asylum Procedure Directive (Directive 2013/32/EU)
1. Scope and purpose		
<p>The objective of this proposal is to make targeted amendments to the 2016 proposal for an Asylum Procedure Regulation and to put in place, together with the proposal for a Regulation introducing a screening, a seamless link between all stages of the migration process, from arrival to processing of asylum requests and, where applicable, return. (Arts. 35a, 41(1) and 41(a)).</p>	<p>The objective of this proposal is to establish a common procedure for granting and withdrawing international protection which replaces the various asylum procedures in the Member States ensuring the timeliness and effectiveness of the procedure.</p> <p>The Commission underlined that the degree of harmonisation of national procedures for granting and withdrawing international protection that was achieved through Directive 2013/32/EU did not prove to be sufficient to address differences in the types of procedure used, the time-limits for the procedures, the rights and procedural guarantees for the applicant, the recognition rates and the type of protection granted.</p>	<p>The main objective of the 2013 Directive was to further develop the standards for procedures in Member States for granting and withdrawing international protection laid down in Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for granting and withdrawing refugee status.</p>

2020 Proposal (COM(2020) 611 final)	2016 CEAS Proposal (COM(2016) 467 final)	Asylum Procedure Directive (Directive 2013/32/EU)
2. Mandatory asylum border procedure		
<p>The Amended Proposal entails mandatory application of the asylum border procedure for decisions on the merits in three categories of cases:</p> <p>a. if the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity or nationality that could have had a negative impact on the decision;</p> <p>b. if the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member States;</p> <p>c. if the applicant is from a third country for which the share of positive asylum decisions is 20% or lower. (Article 41(3), cf. Article 40(1)(c), (f) and (i) of the APR Proposal as amended).</p>	<p>Border procedure optional (Article 41):</p>	<p>Border procedure optional (Article 43)</p>
3. Additional acceleration ground		
<p>A new acceleration ground compared to the 2016 APR proposal is added:</p> <ul style="list-style-type: none"> - Member States shall accelerate the examination on the merits of an application for international protection in cases where the applicant is from a 	<p>The determining authority shall accelerate the examination on the merits of an application for international protection, in the cases where:</p> <p>a) in submitting his/her application and presenting the facts, has only raised issues that are</p>	<p>Member States may provide that an examination procedure be accelerated and/or conducted at the border or in transit zones if:</p>

2020 Proposal (COM(2020) 611 final)	2016 CEAS Proposal (COM(2016) 467 final)	Asylum Procedure Directive (Directive 2013/32/EU)
<p>third country for which the proportion of decisions by the determining authority granting international protection is 20% or lower.</p> <p>Exception shall be made if:</p> <ul style="list-style-type: none"> - a significant change has occurred in the third country concerned since the publication of the relevant Eurostat 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. <p>(Article 40(1)(i) and (5)(c) of the APR Proposal, as amended by no. 14 of the Amended Proposal).</p>	<ul style="list-style-type: none"> not relevant to the examination of whether he or she qualifies as a beneficiary of international protection. b) The applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations. c) The applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents. d) the applicant is making an application merely to delay or frustrate the enforcement of an earlier or imminent decision resulting in his/her removal from the territory of a Member State. e) A third country may be considered as a safe country of origin for the applicant within the meaning of this Regulation. f) the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member States. g) the applicant does not comply with the obligations set out in Article 4(1) and Article 20(3) of Regulation (EU) No XXX/XXX (Dublin Regulation), unless he or she demonstrates that his/her failure was due to circumstances beyond his/her control. h) the application is a subsequent application, where the application is so clearly without 	<ul style="list-style-type: none"> a) the applicant has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection b) the applicant is from a safe country of origin within the meaning of this Directive. c) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision. d) it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality. e) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of origin information f) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5); g) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal;

2020 Proposal (COM(2020) 611 final)	2016 CEAS Proposal (COM(2016) 467 final)	Asylum Procedure Directive (Directive 2013/32/EU)
	<p>substance or abusive that it has no tangible prospect of success. (Article 40(1))</p>	<p>h) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible, given the circumstances of his/her entry;</p> <p>i) the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with Eurodac Regulation.</p> <p>j) The applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law. (Article 31(8))</p>
<p>4. Geographical scope of asylum border procedure</p>		
<p>Applicants shall normally be kept at or in the proximity to the external border or transit zone if their applications are subject to the asylum border procedure.</p> <p>Member States will have the possibility to designate other locations within their territory for the accommodation of applicants in situations where the</p>	<p>In the event of arrivals involving a disproportionate number of persons lodging applications for international protection at the border or in a transit zone, making it difficult in practice to apply the border procedure at such locations, the border procedure may also be applied at locations in proximity to the border or transit zone (Article 41(4)).</p>	<p>In the event of arrivals involving a large number of persons lodging applications for international protection at the border or in a transit zone, making it impossible in practice to apply there the border procedure, that procedure may also be applied where and for as long as these persons are accommodated normally at locations in proximity to the border or transit zone (Article 43(3)).</p>

2020 Proposal (COM(2020) 611 final)	2016 CEAS Proposal (COM(2016) 467 final)	Asylum Procedure Directive (Directive 2013/32/EU)
<p>capacity of the normal locations is temporarily insufficient (Article 41(13) and (14)).</p>		
<p>5. New border return procedure</p>		
<p>The amended APR proposal establishes a new procedure for carrying out return (Article 41a).</p> <p>The procedure applies to TCNs and stateless persons whose application has been rejected in the context of the border procedure.</p> <p>Persons subject to this procedure shall not be authorised to enter Member States' territory and should be kept at the external borders, or in their proximity, or in transit zones for a period not exceeding 12 weeks.</p> <p>TCNs subject to the procedure may be held in detention throughout the duration of the procedure in individual cases; the procedural safeguards and guarantees set by the Return Directive will apply.</p>	<p>Not included</p>	<p>Not included</p>
<p>6. Appeal procedure for asylum and return</p>		

2020 Proposal (COM(2020) 611 final)	2016 CEAS Proposal (COM(2016) 467 final)	Asylum Procedure Directive (Directive 2013/32/EU)
<p>Applicants shall have the right to an effective remedy before a court or tribunal against:</p> <ul style="list-style-type: none"> a) a decision rejecting an application as inadmissible; b) a decision rejecting an application as unfounded in relation to both refugee and subsidiary protection status; c) a decision rejecting an application as implicitly withdrawn; d) a decision withdrawing international protection; e) a return decision. <p>Return decisions shall be appealed before the same court or tribunal and within the same judicial proceedings and the same time-limits as decisions referred to in points (a), (b), (c) and (d). (Article 53(1)).</p>	<p>Applicants have the right to an effective remedy before a court or tribunal against the following:</p> <ul style="list-style-type: none"> a. A decision taken on their application for international protection, including a decision: <ul style="list-style-type: none"> (i) rejecting an application as inadmissible referred to in Article 36(1); (ii) rejecting an application as unfounded or manifestly unfounded in relation to refugee status or subsidiary protection status referred to in Article 37(2) and (3) or Article 42(4); (iii) rejecting an application as explicitly withdrawn or as abandoned referred to in Articles 38 and 39; (iv) taken following a border procedure as referred to in Article 41. b. A decision to withdraw international protection pursuant to Article 52 (Article 53(1)). 	<p>Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:</p> <ul style="list-style-type: none"> a. decision taken on their application for international protection, including a decision: <ul style="list-style-type: none"> (i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status; (ii) considering an application to be inadmissible pursuant to Article 33(2); (iii) taken at the border or in the transit zones of a Member State as described in Article 43(1); (iv) not to conduct an examination pursuant to Article 39; b. a refusal to reopen the examination of an application after its discontinuation pursuant to Articles 27 and 28; c. a decision to withdraw international protection pursuant to Article 45(Article 46(1))
7. Limitations of appeal		
<p>The Amended Proposal will retain the existing option for Member States to consider an appeal against a decision considering an application for refugee status inadmissible when the appellant has been granted</p>	<p>Persons recognised as eligible for subsidiary protection have the right to an effective remedy against a decision considering an application unfounded in relation to refugee status. (Article 53(2))</p>	<p>Option for Member States to consider an appeal inadmissible on the grounds of insufficient interest when the applicant has been recognised as eligible for subsidiary protection status and that status offers the</p>

2020 Proposal (COM(2020) 611 final)	2016 CEAS Proposal (COM(2016) 467 final)	Asylum Procedure Directive (Directive 2013/32/EU)
<p>subsidiary protection status with the same rights and benefits as refugee status (Article 53(2)).</p> <p>It is further proposed to allow for only one level of appeal in relation to decisions taken in the border procedure (Article 53(9)).</p>	<p>Not included (Article 53)</p>	<p>same rights and benefits as those offered by refugee status (Article 46(2), second subparagraph).</p> <p>Not included (Article 46).</p>
8. Limitations of suspensive effect		
<p>Exception to the general rule of automatic suspensive effect of appeal in the following cases:</p> <ul style="list-style-type: none"> - a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply (including safe country of origin) or in the cases subject to the border procedure; - a decision which rejects an application as inadmissible pursuant to Article 36(1)(a) (first country of asylum) or (c) (subsequent applications without new elements); - a decision which rejects an application as implicitly withdrawn 	<p>Exceptions from the general rule of automatic suspensive effect in the following cases:</p> <ul style="list-style-type: none"> - A decision which considers an application as manifestly unfounded or unfounded in relation to refugee or subsidiary protection status in the cases subject to an accelerated examination procedure or border procedure; - A decision which rejects an application as inadmissible pursuant to Article 36(1)(a) or (c) and - A decision which rejects an application as explicitly withdrawn or abandoned in accordance with Article 38 or Article 39, respectively (Article 54(2)(a)-(c)) 	<p>Exceptions from the general rule of automatic suspensive effect in the following cases:</p> <ul style="list-style-type: none"> - is considered manifestly unfounded or unfounded after an accelerated examination procedure, - in certain cases of inadmissible or discontinued applications. (Article 46(6)(a)-(d)).

2020 Proposal (COM(2020) 611 final)	2016 CEAS Proposal (COM(2016) 467 final)	Asylum Procedure Directive (Directive 2013/32/EU)
<p>- a decision which rejects a subsequent application as unfounded or manifestly unfounded;</p> <p>- a decision to withdraw international protection in accordance with Article 14(1), points (b), (d) and (e), and Article 20(1), point (b), of Regulation No XXX/XXX (Qualification Regulation). (Article 54.3)</p> <p>No automatic suspensive effect of a further appeal against a first or subsequent appeal decision (Article 54(7)).</p>		
<p>9. Limited possibility of interim measures</p>		
<p>The Amended Proposal will introduce a mandatory time limit of at least 5 days for the applicant's request for interim measures (Article 54(5)(a)).</p>	<p>No time limit for the applicant's request for interim measures (Article 54(3) and (4))</p>	<p>No time limit for the applicant's request to interim measures (Article 46(6)-(8))</p>
<p>10. Subsequent applications</p>		
<p>The Amended Proposal will include the following amendments compared to the 2016 proposal:</p> <ul style="list-style-type: none"> - point (a) is deleted <p>The following point (c) is added:</p>	<p>Member States may provide an exception from the right to remain on their territory and derogate from the suspensive effect of appeals where:</p> <ul style="list-style-type: none"> a) a subsequent application has been rejected by the determining authority as inadmissible or manifestly unfounded; 	<p>Member States may make an exception from the right to remain and derogate from the suspensive effect of appeals when the applicant:</p> <ul style="list-style-type: none"> a) has lodged a first subsequent application, which is not further examined pursuant to Article 40(5), merely in order to delay or

2020 Proposal (COM(2020) 611 final)	2016 CEAS Proposal (COM(2016) 467 final)	Asylum Procedure Directive (Directive 2013/32/EU)
<p>- (c) Member States may provide for a general exception from the right to remain on the territory where a first subsequent application has been lodged merely in order to delay or frustrate the enforcement of a return decision which would result in the applicant's imminent removal, provided that it is immediately clear to the determining authority that no new elements have been presented to support the subsequent application. (Article 43(c))</p>	<p>b) a second or further subsequent application is made in any Member State following a final decision rejecting a previous subsequent application as inadmissible, unfounded, or manifestly unfounded (Article 43(a) and (b)).</p>	<p>frustrate the enforcement of a decision which would result in his/her imminent removal from that Member State;</p> <p>b) makes another subsequent application in the same Member State, following a final decision considering a first subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject that application as unfounded (Article 41(1) and (2)(c)).</p>

Annex, Table 3: Proposal for an amended Eurodac Regulation

2020 Proposal (COM(2020) 614 final)	2018 EP/Council provisional agreement on the 2016 Recast Eurodac proposal ⁶⁷³	2013 Eurodac Regulation (Regulation 603/2013)
<p>1. Purpose of Eurodac</p>		

⁶⁷³ The analysis of the provisional agreement is based on the table of 21 June 2018 describing the partial provisional agreement of 19 June 2018 and which was published on 22 June 2021 at the Public Register of the European Parliament.

2020 Proposal (COM(2020) 614 final)	2018 EP/Council provisional agreement on the 2016 Recast Eurodac proposal ⁶⁷³	2013 Eurodac Regulation (Regulation 603/2013)
<p>Further broadening of purpose of Eurodac compared to the 2018 provisional agreement (Article 1):</p> <ul style="list-style-type: none"> - prevent Assisted Voluntary Return and Reintegration (AVRR) 'shopping'; - assist in the correct identification of TCNs pursuant to Article 20 of the Interoperability Regulation; - support to the European Travel Information and Authorisation System (ETIAS) objectives; - support to the Visa Information System (VIS) objectives; - extended use for statistical purposes, allowing cross-system statistics using data from Eurodac and other data systems, connected via interoperability scheme and by counting applicants instead of applications (Article 9) 	<p>Broadening of purpose of Eurodac compared to 2013 Regulation to include the following activities:</p> <ul style="list-style-type: none"> - Assist with control of illegal immigration to the Union and with the detection of secondary movements within the Union and with the identification of illegally staying third-country nationals for determining the appropriate measures to be taken by Member States, including returns of illegally staying third-country nationals and repatriation of persons residing without authorisation. (1(1) (B)) - assist in the application of the rules on the EU resettlement network. 	<p>Eurodac may only be used for purposes laid out in Eurodac Regulation (Article 1(3)).</p> <ul style="list-style-type: none"> - to assist in determination of responsible Member State for examining asylum application (Dublin) (Article 1(1)) - Eurodac Regulation lays down rules for which national designated authorities and Europol may have access to Eurodac for law enforcement purposes (Articles 1(2). 19-20)
2. Categories of persons in Eurodac		
<p>Additional category of persons to be recorded in Eurodac compared to the 2018 provisional agreement extensions:</p> <ul style="list-style-type: none"> - persons disembarked following SAR operations: (14(a) (1)) 	<p>Extending categories of person and lowering age of recorded persons compared to 2013 Regulation:</p> <ul style="list-style-type: none"> - third-country nationals and stateless persons found illegally staying in a Member State (Article 14) 	<ul style="list-style-type: none"> - applicants for international protection

2020 Proposal (COM(2020) 614 final)	2018 EP/Council provisional agreement on the 2016 Recast Eurodac proposal ⁶⁷³	2013 Eurodac Regulation (Regulation 603/2013)
	<ul style="list-style-type: none"> - including minors of at least 6 years 	<ul style="list-style-type: none"> - third-country nationals and stateless persons apprehended for irregular border crossing (14) - including minors of at least 14 years
3. Categories of personal data in Eurodac		
<p>Extensive broadening of categories of personal data to be stored in Eurodac, many of these new categories of personal data contain 'soft information' dependent of interpretation of national authorities. The proposal maintains the categories of the 2013 Regulation, and the 2018 provisional agreement and adds new categories connected to the Migration Pact proposals:</p> <ul style="list-style-type: none"> - indication whether asylum application is rejected to 'reinforce link with return procedures'; - indication/flag whether person could pose an internal security threat following the screening (Articles 12(v), 13(2)(r), 14(2)(s) and 14a(2)(r)); - whether provided with voluntary return and reintegration assistance (AVRR): in order to prevent 'AVRR shopping' (Articles 12(z), 13(2)(q), 14(2)(r) and 14a(2)(q)); 	<p>New categories of personal data, in addition to 603/2013 to be stored in Eurodac:</p> <ul style="list-style-type: none"> - facial image - surname and forename(s) including previously used names; - age; - date and place of birth; - nationality; - where available, type and number and scanned colour copies of travel and identity documents; 	<p>Eurodac only contain few categories of information on asylum applicants or persons apprehended for irregular border crossing, identification only based on fingerprints and reference number</p> <ul style="list-style-type: none"> - fingerprint; - Member State of origin; - place and date of asylum application; - sex; - reference number used by Member States; - date on which fingerprints were taken and;

2020 Proposal (COM(2020) 614 final)	2018 EP/Council provisional agreement on the 2016 Recast Eurodac proposal ⁶⁷³	2013 Eurodac Regulation (Regulation 603/2013)
<ul style="list-style-type: none"> - 'indications' that a visa was issued to the applicant, MS which issued or extended the visa or on behalf of which the visa has been issued, and the visa application number 		<ul style="list-style-type: none"> - date on which data were transmitted to Central Unit; - operator user ID
<p>4. Data retention time limits - advanced erasure, blocking and marking of data</p>		
<p>Compared to the 2018 provisional agreement, the 2020 proposal includes the following changes:</p> <ul style="list-style-type: none"> - persons disembarked following SAR operations: 5 years. - data on persons granted international protection stored in Eurodac Central System and in the CIR will be marked, but remain available for law enforcement purposes until such data are automatically erased from the Central System and the CIR (Article 19(2), 17(4)). - data on persons disembarked following a SAR operation granted a residence permit will be marked, but remain available for law enforcement purposes until such data are automatically erased from the Central System and the CIR (Article 19(4)). 	<ul style="list-style-type: none"> - applicants for international protection: 10 years (still under negotiation). - Third-country nationals and stateless persons apprehended for irregular border crossing: 5 years - Third-country nationals and stateless persons found illegally staying in a Member State: 5 years (Article 17). - Obligation to block data on persons granted international protection after three years until their erasure has been deleted. - No agreement between co-legislators on the provision to ensure the advanced erasure of data of persons who have been granted a long-term resident status in accordance with Directive 2003/108. - advanced erasure of data of persons who acquired EU citizenship; but not for irregularly border crossing TCNs or stateless persons granted a residence permit or who left the territory. 	<ul style="list-style-type: none"> - applicants for international protection: 10 years (Article 12); - third-country nationals and stateless persons apprehended for irregular border crossing: 18 months (Article 16) - data on asylum applicants granted international protection are to be 'marked'. During three years after the international protection was granted, access for law enforcement purpose remains possible. After three years the data are automatically blocked until their erasure. (Article 18) - advanced erasure of data on persons who acquired EU citizenship and on irregularly border crossing TCNs or stateless persons granted a residence permit or who left Member State's territory.

2020 Proposal (COM(2020) 614 final)	2018 EP/Council provisional agreement on the 2016 Recast Eurodac proposal ⁶⁷³	2013 Eurodac Regulation (Regulation 603/2013)
5. Authorities/agencies with power to collect and transmit data to Eurodac (including biometrics)		
No change	Allows members of EBCG teams and experts of asylum support teams of EU Agency for Asylum to collect and transmit fingerprints and facial images (Articles 10, 13, 14).	Collecting and transmitting of fingerprints only allowed by national authorities of Member States (Articles 9, 14,17)
6. Authorities/agencies with access to Eurodac		
Addition of ETIAS national units (Article 8b) and competent visa authorities (Article 8c) as new users of Eurodac and those based on the implementation of the Interoperability Regulations.	2018 provisional agreement adds no new users.	2013 recast Eurodac Regulation grants national designated authorities for law enforcement purposes (Article 5, 19-20) and Europol (Article 7, 21) access to Eurodac.
7. Sharing information with third countries, international organisations, or private entities		
No change	Transfer of data to third countries generally prohibited (Article 37). However, transfer of data to third countries allowed for return purposes under specific conditions (Article 38).	Transfer to third states generally prohibited (Article 35 and 27 (5))

Annex, Table 4: Proposal for a Regulation on asylum and migration management (RAMM)

2020 Proposal	2016 Recast Dublin IV proposal	Dublin Regulation 604/2013
1. Purpose of RAMM		
<p><i>Broadens the purpose by introducing two additional objectives</i></p> <ul style="list-style-type: none"> - Sets out a common framework for the management of asylum and migration in the Union, Article 1(a) - Establishes a mechanism for solidarity, Article 1(b) 	<p><i>No change</i></p>	<ul style="list-style-type: none"> - It lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection (Article 1)
2. Scope		
<p><i>Aligns the scope with the new Asylum Procedure Regulation, retains the expanded definition of 'family members' and adds new category of persons within the scope of the Regulation:</i></p> <ul style="list-style-type: none"> - applicants for international protection Article 2(c) not subject to border procedure under APR, Article 45(1)(a) - applicants for international protection Article 2(c) subject to border procedure under APR, Article 45(2)(a) - illegally staying TCNs, Article 2(aa), Article 45(1)(b), 45(2)(b) - resettled or admitted persons, Article 2(x) 	<p><i>Expands the scope of 'family members' and adds a new category of persons within the scope of the Regulation</i></p> <ul style="list-style-type: none"> - 'family members' to include siblings and families existed before the applicant arrived on the territory of the Member State, Article 2(g) - resettled persons, Article 2(q) 	<ul style="list-style-type: none"> - applicants for international protection, Article 2(c) - beneficiaries of international protection, Article 2(f) - 'family members' to include families existed in the country of origin: spouses, partners, unmarried minor children, and in case of unmarried minors, the father, mother or another adult Article 2(g)

2020 Proposal	2016 Recast Dublin IV proposal	Dublin Regulation 604/2013
3. Responsibility criteria		
<p><i>Retains the changes on responsibility for unaccompanied minors and on continuous stay</i> <i>Inserts two additional responsibility criteria</i></p> <ul style="list-style-type: none"> - A member State has issued a diplomas or other qualification issued by a Member State and the applicant has left the Member States following completion of her studies (Article 20) - Entry in the territory of a Member State after disembarkation following a SAR, Article 21(2) 	<p><i>Change rules on responsibility for unaccompanied minors in the absence of family members and relatives.</i> <i>Deletes the continuous stay criterion</i></p> <ul style="list-style-type: none"> - The Member States responsible should be the one where the unaccompanied minor's application was first registered, unless best interests require otherwise, Article 10(5) - Continuous stay for, at least, 5 months in a Member State is no longer a criterion for responsibility, Article 15 	<ul style="list-style-type: none"> - Minors (Article 6) - family members of beneficiaries of international protection (Article 9) or applicants for international protection (Article 10) - family procedures (Article 11) - issuance of residence documents/visas (Article 12) - entry and/or stay (Article 13) - visa waived (Article 14) - application at the airport (Article 15)
4. Discretion		
<ul style="list-style-type: none"> - Withdraws the 2016 limitations so that the scope of discretionary clauses is brought back in line with 2013 standards (Article 25) 	<p><i>Narrowed the scope of the 'sovereignty clause':</i></p> <ul style="list-style-type: none"> - It can be applied only when no Member State has been determined responsible, and only based on family grounds relating to 'wider family', Article 19(1) <p><i>Narrowed the scope of the 'humanitarian clause':</i></p>	<ul style="list-style-type: none"> - Discretionary Clauses (Article 17)

2020 Proposal	2016 Recast Dublin IV proposal	Dublin Regulation 604/2013
	<ul style="list-style-type: none"> - It can only be applied when a Member State has been determined responsible, and only to bring together any family relations, Article 19(2) 	
<p>5. Cessation clauses</p>		
<p><i>Cessation clauses are reintroduced except when the person concerned has left the territory on her/his own initiative.</i></p> <p><i>Responsibility for irregular entry ceases after three years.</i></p> <p>Responsibility of a Member State shall cease if:</p> <ul style="list-style-type: none"> - Residence documents/visas issued by that Member State have expired more than three years before the application's registration (Article 19(4)) - Irregular entry or following SAR: if application is registered more than three years after irregular crossing (Article 21) - Entry into a country in which the need for a visa is waived: if application registered more than three years after entry (Article 22) - Person concerned left the territory of a member State in compliance with a return decision (Article 27(2)) 	<p><i>Cessation clauses are deleted</i></p> <p><i>Responsibility for irregular entry becomes permanent</i></p> <ul style="list-style-type: none"> - Person concerned has left the territory of a Member State: no longer a ground for cessation of responsibility (Article 14 and Article 21) - Irregular entry: no cessation of responsibility if an application is registered more than 12 months after the irregular crossing (Article 15). 	<p>Responsibility of a Member State shall cease if:</p> <ul style="list-style-type: none"> - Residence documents/visas: expired more than two years/six months previously (Article 12) - Irregular entry: application registered more than 12 months after irregular crossing (Article 13(1)). - Person concerned left the territory of MSs for at least three months (Article 19(2)) or left in compliance with a return decision (Article 19(3))

2020 Proposal	2016 Recast Dublin IV proposal	Dublin Regulation 604/2013
6. Cessation/transfer of responsibility in the context of procedures		
<p><i>Expands time limits for carrying out a transfer</i></p> <p><i>Re-introduces rules on transfer/shift of responsibility in cases where the time limit for transfer is not respected</i></p> <ul style="list-style-type: none"> - Take charge request: if not submitted within two months of the lodging of the application or, in case of Eurodac hit, within one month, responsibility lies with the MS where the application was registered (Article 29) - Take back notification: to be made within two weeks after receiving a Eurodac hit, Article 3. No shift of responsibility if the time limit is not respected. - Transfer: if not carried out within six months (extended to one year in case of imprisonment of the person concerned) of acceptance of take charge request or confirmation of take back notification, responsibility transferred to the requesting MS (Article 27 and Article 35) 	<p><i>Restricts time limits for transfers</i></p> <p><i>Failure to respect time limits in relation to take back notification and transfer no longer amounts to transfer/shift of responsibility</i></p> <ul style="list-style-type: none"> - Take charge request: if not submitted within one month of the lodging of the application or, in case of Eurodac hit, within two weeks, responsibility lies with the MS where the application is lodged, Article 24 - Take back notification: to be made within two weeks after receiving the Eurodac hit, Article 26 (<i>no shift of responsibility if the time limit is not respected</i>) - Transfer: to be carried out within four weeks from the final transfer decision, Article 30 (<i>no shift of responsibility if the time limit is not respected</i>) 	<ul style="list-style-type: none"> - Take charge request: if not submitted within three months of the lodging of the application or, in case of Eurodac hit, within two months, responsibility lies with the MS where the application is lodged, Article 21 - Take back request: not submitted within three months of the lodging of the application or, in case of Eurodac hit, within two months, responsibility lies with the MS where the new application is lodged Article 23 - Transfer: not carried out within six months (extended to one year in case of imprisonment or to eighteen months in case of absconding) from the acceptance of the take charge or take back request, responsibility lies with the requesting MS, Article 29

2020 Proposal	2016 Recast Dublin IV proposal	Dublin Regulation 604/2013
7. Procedural safeguards		
<p><i>Retains the obligations for applicants and sanctions in case of non-compliance, except the subjection of the application to accelerated procedures</i></p> <p><i>Extends the time limit for exercising a remedy and for delivering a decision on the substance</i></p> <p><i>No automatic suspension of transfer - the applicant has the right to request suspensive effect</i></p> <ul style="list-style-type: none"> - Applicant has an obligation to: a) make the application in the MS of first entry (in case of irregular entry), in the MS which issued her valid permit or visa, or in the MS where she is present (in case of an expired permit or visa); and b) to submit at the latest during the interview all information relevant for determining the MS responsible, Article 9 - non-compliance would entail a) no reception conditions in any MS other than where he is required to be present -without prejudice to the need to ensure 'a standard of living' in accordance with EU law, the Charter and IL, and b) information submitted after expiry of time limit to not be taken into account, Article10 	<p><i>Introduces obligations for applicants and sanctions in case of non-compliance</i></p> <p><i>Imposes a time limit for exercising a remedy and for delivering a decision on the substance</i></p> <p><i>Limits the scope of the remedy</i></p> <ul style="list-style-type: none"> - Applicant has an obligation to: a) make the application in the MS of first entry (in case of irregular entry), in the MS where she is present (in case of legal presence); and b) to submit at the latest during the interview all information relevant for determining the MS responsible, Article 4 - non-compliance would entail a) examination of the application by the MS responsible in an accelerated procedure, b) the MS where she is required to be present shall continue the examination of the MS responsible even when the applicant leaves that MS or is unavailable, c) no reception conditions in any MS other than where she is required to be present except for emergency health care, and d) information submitted after expiry of time limit to not be taken into account, Article5 	

2020 Proposal	2016 Recast Dublin IV proposal	Dublin Regulation 604/2013
<ul style="list-style-type: none"> - The right to a remedy must be exercised within two weeks after the notification of a transfer decision, Article 33(2) - if the applicant does not request suspensive effect, within a reasonable period of time, the appeal does not suspend the transfer, Article 33(3) - decision on the substance within one month of the decision to grant suspensive effect, Article 33(3) 	<ul style="list-style-type: none"> - The right to a remedy must be exercised within 7 days after the notification of a transfer decision, Article 28(2) - The scope shall be limited to an assessment of: a) risk of inhuman or degrading treatment, and b) criteria relating to minors, family members, family procedure and dependency are infringed upon, Article 28(4) - decision on the substance within 15 days, no transfer take place before such decision, Article 28(3) 	<ul style="list-style-type: none"> - Effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal, Article 27(1); - The right to a remedy must be remedy exercised Remedy exercised within a reasonable period of time, Article 27(2) - Right to remain should be granted pending the outcome of appeal or review, Article 27(3)(a) - Automatic suspension of the transfer until the court or tribunal decides on suspensive effect, Article 27(3)(b)
8. Solidarity		
<p><i>Replaces the automated solidarity system of mandatory relocation with a new 'flexible' compulsory solidarity system</i></p> <ul style="list-style-type: none"> - Compulsory solidarity for situations of migratory pressure and for disembarkations following SAR operations through relocation, return sponsorship and capacity building measures (Part IV, Ch. 1, Solidarity Mechanisms, Article 45-56) 	<p><i>Abolishes the early warning mechanism Introduces a solidarity system of mandatory relocation based on a distribution key</i></p> <ul style="list-style-type: none"> - Corrective allocation mechanism, Ch. VII, Article 34-43, automated system triggered once the number of applications for international protection for which a Member State is responsible is higher than 150% of a reference number determined by a key based on population (50%) and GDP (50%), Article 34-35 	<ul style="list-style-type: none"> - Early warning mechanism: Commission in cooperation with EASO make recommendations should make recommendation to a Member States if the Commission establishes that the application of Dublin Regulation may be jeopardised due either to a substantiated risk of particular pressure being placed on a Member State's asylum system and/or to problems in the functioning of the asylum system

2020 Proposal	2016 Recast Dublin IV proposal	Dublin Regulation 604/2013
<ul style="list-style-type: none"> - MSs should propose solidarity measures (prioritising relocation of unaccompanied minors) based on a distribution key based on population (50%) and GDP (50%), Article 52, 54 - A Member State proposing solidarity contributions in the form of relocation or return sponsorship may request a deduction of 10% of its share calculated according to the distribution key if over the preceding five years it has examined twice the Union average per capita of applications for international protection, Article 52(5) - Critical mass correction mechanism: in situations of solidarity following search and rescue operations or in situations of pressure or risk of pressure on a Member State's system, capacity building measures shall not lead to a short fall of more than 30% of the total needs in the field of relocation and return sponsorship identified by the Commission. In that circumstance, contributions shall be adjusted so that those Member States indicating capacity building measures are required to cover 50% of their share calculated in accordance with the distribution key through relocation or return sponsorship or a combination of both, Article 53(2) 	<ul style="list-style-type: none"> - A Member State of allocation may decide not to accept the allocated applicants during a twelve months-period. The Member States not taking part in relocation should make a solidarity contribution of EUR 250,000 per each applicant who would have otherwise been allocated to that Member State is made, Article 37 	<ul style="list-style-type: none"> - Member State concerned may draft a preventive action plan and regularly report to the Council and the Commission. If not sufficient, the Member State may be requested to draft a crisis management plan within 3 months and report regularly. The European Parliament and Council may, throughout the early warning process, provide guidance on any solidarity measures deemed appropriate) Article 33

2020 Proposal	2016 Recast Dublin IV proposal	Dublin Regulation 604/2013
<ul style="list-style-type: none"> - Return sponsorship: if return not executed within 8 months, the Member State providing return sponsorship shall transfer the person onto its own territory, Article 55 - Other solidarity contributions: Any Member State may, at any time, in response to a request for solidarity by another Member State, or on its own initiative, make solidarity contributions for the benefit of the Member State concerned and with its agreement. Article 56 - Financial support: Member States should receive a contribution of EUR 10 000 per person relocated (including return sponsorship). The contribution should be increased to EUR 12 000 in case of unaccompanied minors, Article 61 and 17 AMF Regulation 		

Annex, Table 5: Proposal Crisis and Force Majeure Regulation

Proposal Crisis and Force Majeure Regulation (2020)	Proposal Crisis Relocation Mechanism (2015)	Council decisions on provisional measures in the field of international protection to the benefit of Italy and Greece (2015)	Temporary protection Directive (2001)
1. Definition of crisis			
<p>“Situation of Crisis” (Article 1(2)):</p> <ul style="list-style-type: none"> - An exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State’s asylum, reception or return system non-functional and can have serious consequences for the functioning the CEAS or the Common Framework as set out in AMM Regulation. - an imminent risk of such a situation. 	<p>“Crisis Situation” (Article 1(4))</p> <ul style="list-style-type: none"> - “[...] the Member State is confronted with a crisis situation jeopardising the application of the Dublin Regulation due to extreme pressure characterised by a large and disproportionate inflow of third-country nationals or stateless persons, which places significant demands on its asylum system.” - When ascertaining whether there is a crisis situation, the Commission shall establish that the crisis is of such a magnitude as to place extreme pressure even on a well-prepared asylum system which is functioning in line with all relevant aspects of the EU asylum <i>acquis</i>. 	<p>A definition of crisis is not provided.</p> <p>The Decisions apply to:</p> <p>“An emergency situation characterised by a sudden inflow of nationals of third countries” in line with Article 78(3) (Article1).</p> <p>“Among the Member States witnessing situations of considerable pressure and in light of the recent tragic events in the Mediterranean, Italy and Greece in particular have experienced unprecedented flows of migrants, including applicants for international protection who are in clear need of international protection, arriving on their territories, generating</p>	<p>A definition of crisis is not provided.</p> <p>The Regulation covers:</p> <p>“Mass influx of displaced persons from third countries who are unable to return to their country of origin” (Article 1)</p> <p>‘mass influx’ is defined as follows: “arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme” (Article 2(d)).</p>

<p>Proposal Crisis and Force Majeure Regulation (2020)</p>	<p>Proposal Crisis Relocation Mechanism (2015)</p>	<p>Council decisions on provisional measures in the field of international protection to the benefit of Italy and Greece (2015)</p>	<p>Temporary protection Directive (2001)</p>
		<p>a significant pressure on their migration and asylum systems" (Recital 9).</p>	

Proposal Crisis and Force Majeure Regulation (2020)	Proposal Crisis Relocation Mechanism (2015)	Council decisions on provisional measures in the field of international protection to the benefit of Italy and Greece (2015)	Temporary protection Directive (2001)
2. Knowledge sources and actors			
<p>When a Member State considers itself to be in a situation of crisis it has to submit a reasoned request to the Commission demanding the application of the rules on solidarity and/or the derogatory rules of asylum and return border procedures foreseen by this proposal (par 5.1, 5.3 explanatory memorandum (EM))</p> <p>The Commission shall assess the reasoned request of a Member State on the basis of substantiated information, in particular gathered pursuant to the EU mechanism for Preparedness and Management of Crises related to Migration, including from the following sources:</p> <ul style="list-style-type: none"> - Migration Preparedness and Crisis Blueprint - EASO - European Border and Coast Guard Agency - the Migration Management report referred to in the RAMM Proposal. 	<p>The existence of a “situation of crisis” should be determined by the European Commission on the basis of substantiated information, in particular gathered by EASO and Frontex (Article 33.a.1).</p> <p>In making this assessment, the Commission shall, inter alia, take into account the total number of applicants for international protection and of irregular entries of third-country nationals and stateless persons in the six preceding months, the increase in such numbers compared to the same period in the previous year as well as the number of applications per capita in the Member State benefiting from relocation over the previous 18 months compared to the Union average (Article 33a.1(5)).</p>	<p>In line with the procedure laid down in Art 78(3) TFEU, the two decisions were taken by the Council of the EU on a proposal from the Commission.</p> <p>The need for provisional measures to the benefit of Italy and Greece is substantiated with reference to data from Frontex, EASO and Eurostat on irregular border crossings, asylum applications, and recognition rates based on the nationality of applicants over 2015 (Recitals 13 and 14).</p>	<p>The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission (Article 5(1)).</p> <p>The Council Decision shall be based on:</p> <ul style="list-style-type: none"> - an examination of the situation and the scale of the movements of displaced persons; - an assessment of the advisability of establishing temporary protection, taking into account the potential for emergency aid and action on the ground or the inadequacy of such measures; - information received from the Member States, the Commission, UNHCR and other relevant international organisations (Article 5(4))

Proposal Crisis and Force Majeure Regulation (2020)	Proposal Crisis Relocation Mechanism (2015)	Council decisions on provisional measures in the field of international protection to the benefit of Italy and Greece (2015)	Temporary protection Directive (2001)
3. Solidarity mechanism: material scope			
<p>The proposal introduces specific rules on the application, in situations of crisis, of the solidarity mechanism set out in the RAMM proposal, which provides for compulsory measures in the form of relocation or return sponsorship.</p> <p>Unlike solidarity provisions under the RAMM, this proposal does not include capacity building measures, operational support, and cooperation with third countries (EM, p. 14).</p> <p>The Member States participating in a return sponsorship will become responsible or obliged to relocate the person if s/he has not returned within 4 months (instead of 8 months envisaged in the RAMM) (EM, p. 13; Article 2.7).</p>	<p>Compulsory relocation mechanism (Article 33.a).</p> <p>Relocation shall only take place in respect of applicants who have lodged their application in a Member State confronted with a crisis situation and where that Member State would have otherwise been responsible pursuant to Regulation (EU) No 604/2013 (art. 33c(1)).</p> <p>The envisaged rules included the possibility that a Member State may be temporarily unable to take part – for a period of one year - in the relocation mechanism “giving duly justified reasons compatible with the fundamental values of the Union enshrined in Article 2 TEU”. Instead, the Member State could make a financial contribution to the EU budget of an amount of 0,002 % of GDP (Para. 9 of Preamble and Article 33.b).</p>	<p>The first relocation decision (Council Decision (EU) 2015/1523) provided for the relocation from Italy and Greece of 40, 000 persons in clear need of international protection.</p> <p>The second relocation decision (Council Decision (EU) 2015/1601) provided for the mandatory relocation from Italy and Greece of 120,000 applicants in clear need of international protection.</p>	<p>Voluntary relocation based on Member States commitment has set out in a Council Decision (Article25(1)).</p>

Proposal Crisis and Force Majeure Regulation (2020)	Proposal Crisis Relocation Mechanism (2015)	Council decisions on provisional measures in the field of international protection to the benefit of Italy and Greece (2015)	Temporary protection Directive (2001)
3.1. Solidarity mechanism: personal scope			
<p>It covers all asylum applicants, including those subject to the border procedure, irregular migrants, and persons granted immediate protection (Article 2.1, 2.5 and 2.6).</p>	<p>Applicants who are <i>prima facie</i> in clear need of international protection and for which a Member State would be responsible under the EU Dublin Regulation (Article 33.c.1).</p> <p>“individuals belonging to nationalities for which, based on the latest available updated quarterly EU-wide average Eurostat data, the recognition rate is equal to 75% or higher” (Article 33.c.2).</p>	<p>Applicants belonging to a nationality for which the proportion of decisions granting international protection among decisions taken at first instance on applications for international protection is, according to the latest available updated quarterly Union-wide average Eurostat data, 75 % or higher (Article 3(2)).</p>	<p>Persons eligible for temporary protection under the Directive (Article 25).</p>
3.2 Solidarity Mechanism: distribution method			
<p>After establishing the existence of a situation of crisis, the Commission shall convene a Crisis Solidarity Forum to define the solidarity response before adopting an implementing act (EM p. 14).</p>	<p>Relocation of applicants in clear need of international protection should take place on the basis of the formula for a distribution key based on the following parameters.</p> <ul style="list-style-type: none"> - the size of the population (40 % weighting), 	<p>The 1st relocation decision followed an agreement reached by consensus between Member States through a council Resolution adopted on 20 July 2015.</p>	<p>Member States shall indicate – in figures or in general terms – their capacity to receive such persons. This information shall be set out in the Council Decision referred to in Article 5.</p>

<p>Proposal Crisis and Force Majeure Regulation (2020)</p>	<p>Proposal Crisis Relocation Mechanism (2015)</p>	<p>Council decisions on provisional measures in the field of international protection to the benefit of Italy and Greece (2015)</p>	<p>Temporary protection Directive (2001)</p>
<p>Member States would be required to submit a Crisis Solidarity Response Plan within one week from the finalisation of the assessment on the existence of a situation of crisis in the Member State concerned.</p> <p>Following this, the Commission shall adopt the implementing act setting out the solidarity measures for each Member State within one week (EM p. 14).</p> <p>The implementing act shall determine the number of persons to be relocated and/or subject to return sponsorship and determine the distribution of those persons between Member States on the basis of a distribution key based on 50% population and 50% GDP as defined in the RAMM proposal (EM p. 14).</p>	<ul style="list-style-type: none"> - the total of the GDP (40 % weighting) - the average number of asylum applications per one million inhabitants over the period 2010-2014 (10 % weighting, with a 30% cap of the population and GDP effect on the key, to avoid disproportionate effects of that criterion on the overall distribution) - the unemployment rate (10 % weighting, with a 30% cap of the population and GDP effect on the key, to avoid disproportionate effects of that criterion on the overall distribution) (Recital 8). 	<p>The 2nd Relocation decision provided for mandatory relocation between Member States on the basis of a distribution key considering the following parameters:</p> <ul style="list-style-type: none"> - the size of the population (40 % weighting) - the total of the GDP (40 % weighting), - the average number of asylum applications per one million inhabitants over the period 2010-2014 (10 % weighting, with a 30% cap of the population and GDP effect on the key). - the unemployment rate (10 % weighting, with a 30% cap of the population and GDP effect on the key). 	<p>After that Decision has been adopted, the Member States may indicate additional reception capacity by notifying the Council and the Commission.</p> <p>When the number of those who are eligible for temporary protection following a sudden and massive influx exceeds the reception capacity referred to in paragraph 1, the Council shall, as a matter of urgency, examine the situation and take appropriate action, including recommending additional support for Member States affected.</p>

Proposal Crisis and Force Majeure Regulation (2020)	Proposal Crisis Relocation Mechanism (2015)	Council decisions on provisional measures in the field of international protection to the benefit of Italy and Greece (2015)	Temporary protection Directive (2001)
4. Immediate Protection/Temporary Protection Regime			
4.1. Scope of application			
<p>Displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin (Article 10(1)).</p>	<p>Not applicable</p>	<p>Not applicable</p>	<p>‘Displaced persons’ means third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:</p> <ul style="list-style-type: none"> - persons who have fled areas of armed conflict or endemic violence; - persons at serious risk of, or who have been the victims of, systematic or generalised

Proposal Crisis and Force Majeure Regulation (2020)	Proposal Crisis Relocation Mechanism (2015)	Council decisions on provisional measures in the field of international protection to the benefit of Italy and Greece (2015)	Temporary protection Directive (2001)
			violations of their human rights (Article 2(c))
4.2 Procedure for triggering protection			
<p>In a crisis situation as referred to in Article 1(2)(a) of this Proposal, and on the basis of an implementing act adopted by the Commission, Member States may suspend the examination of applications for international protection.</p> <p>The Commission implementing act should:</p> <ul style="list-style-type: none"> - establish that there is a situation of crisis on the basis of the elements referred to in Article 3; - establish that there is a need to suspend the examination of applications for international protection; - define the specific country of origin, or a part of a specific country of origin, in 			<p>The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission.</p> <p>The Decision shall include at least:</p> <ul style="list-style-type: none"> - description of the specific groups of persons to whom the temporary protection applies; - the date on which the temporary protection will take effect; - information received from Member States on their reception capacity; - information from the Commission, UNHCR and other relevant

Proposal Crisis and Force Majeure Regulation (2020)	Proposal Crisis Relocation Mechanism (2015)	Council decisions on provisional measures in the field of international protection to the benefit of Italy and Greece (2015)	Temporary protection Directive (2001)
<p>respect of the persons beneficiaries of immediate protection;</p> <p>- establish the date from which this Article shall be applied and set out the time period during which applications for international protection of displaced person may be suspended and immediate protection status shall be granted (Article 10(1)(4)).</p>			<p>international organisations (Article 5(3)).</p>
<p>4.3. Duration</p>			
<p>Member States shall resume the examination of the applications for international protection that have been suspended pursuant to paragraph 1 after a maximum of one year (Article 10(3)).</p>			<p>The duration of temporary protection shall be 1 year. it may be extended automatically by six monthly periods for a maximum of one year (Article 4).</p> <p>Where reasons for temporary protection persist, the Council may decide by qualified majority, on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council, to extend</p>

Proposal Crisis and Force Majeure Regulation (2020)	Proposal Crisis Relocation Mechanism (2015)	Council decisions on provisional measures in the field of international protection to the benefit of Italy and Greece (2015)	Temporary protection Directive (2001)
			<p>that temporary protection by up to one year (Article 4(2))</p> <p>Temporary protection shall come to an end at any time, by Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council (Article 6(b)).</p>
<p>4.3 Rights granted to beneficiaries</p>			
<p>Member States shall ensure that beneficiaries of immediate protection have effective access to all the rights laid down in the proposed Qualification Regulation applicable to beneficiaries of subsidiary protection (Article 10(2)).</p>			<p>Beneficiaries of temporary protection are granted the following rights:</p> <p>Residence permits; employment (employed or self-employed activities); educational opportunities, vocational trainings in the workplace; accommodation and medical assistance; education</p>

Proposal Crisis and Force Majeure Regulation (2020)	Proposal Crisis Relocation Mechanism (2015)	Council decisions on provisional measures in the field of international protection to the benefit of Italy and Greece (2015)	Temporary protection Directive (2001)
			opportunities for minors (under 18); family unity; legal guardianship of unaccompanied minors (Article 8-16).

ANNEX 3. METHODOLOGY NOTE ON MAPPING NATIONAL AUTHORITIES IN THE AREAS OF BORDERS, ASYLUM AND MIGRATION (CHAPTER 8)

The visualisations or graphs related to the mapping of national authorities responsible for asylum and returns (Figures 6 and 7, chapter 8) are based on two primary sources of data; namely the annual National Reports published by the Asylum Information Database (AIDA) of ECRE (European Council on Refugees and Exiles),⁶⁷⁴ and the 2016 study of the European Migration Network (EMN) on the return of rejected asylum seekers (hereinafter: 2016 EMN study), including country-specific EMN national reports where available.⁶⁷⁵ Information on Member States' authorities responsible for assessing the country responsible in the context of the Dublin Regulation⁶⁷⁶ is based on AIDA national reports and information provided to the EU by the Member States (published in the Official Journal of the EU; hereinafter: Member States notification on Dublin authorities).⁶⁷⁷

The AIDA national reports provide information on the authorities responsible for refugee status determination and Dublin assessment. The 2016 EMN study is the principal source of information on the authority responsible for adopting return decisions. Both the AIDA national reports and the 2016 EMN study were further used to complement where information on the responsible authority in a specific Member State is not available from the other study. Where neither the AIDA national reports nor the 2016 EMN study are available, alternative sources of information were used (see Table below). A list of Frontex national contact points (NCPs) was obtained from the Frontex website.⁶⁷⁸ A request for information was formally sent to EASO asking for disclosure of the national contact points of the Agency.⁶⁷⁹

The analysis of the collected information and representation thereof in graphical format uses the following definitions of specific terms:

- **Asylum authority** is understood as a *distinct* and professionalised entity established for the purpose of performing tasks *solely* in relation to decisions related to asylum seekers, refugees, and other forms of international protection.

⁶⁷⁴ See the updated national reports here: <https://asylumineurope.org/reports/>. All national reports consulted concern annual reports for 2020 (published in 2021), with the exception of Germany (2019 update, published in 2020).

⁶⁷⁵ https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-studies-00_synthesis_report_rejected_asylum_seekers_2016.pdf. For the national reports feeding into the EMN study, see the website of the European Migration Network (https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/reports/studies_en).

⁶⁷⁶ See Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

⁶⁷⁷ See Notices from Member States, Authorities responsible for fulfilling the obligations arising under Regulation (EU) No 604/2013, OJ C 55, 14.2.2015, p. 5-9.

⁶⁷⁸ <https://frontex.europa.eu/we-build/other-partners-and-projects/national-authorities/a>.

⁶⁷⁹ The EASO written email communication received on 27 July 2021 stated that “we unfortunately cannot provide you with a list of our NCPs, as by now we also have many different networks and accordingly NCPs for different themes. Hence, it would be better and easier to request the right contacts via the Permanent Representations.”

- **Asylum decision** is used as entailing international protection, including refugee status, subsidiary, and other forms of complementary or humanitarian protection. The analysis in this study interprets the use of the “refugee status determination” in AIDA country reports broadly as entailing the status determination procedure in the Member States encompassing asylum/refugee status, subsidiary protection, and other forms of international protection.
- **Migration authority** is used as encompassing distinct entities in the Member States tasked with issues related to migration enforcement. Where the information available does not allow a clear distinction between a Member States’ asylum and migration authorities, this will be considered as a *migration* authority (e.g., the Immigration and Naturalisation Service (IND) in NL).
- **Police and border guard authorities** are interpreted in this study as governmental entities whose *primary* tasks are law enforcement, the policing of borders and/or the enforcement of return decisions. Where a Member States’ authority is tasked with a combination of responsibilities, this authority is classified as based on its (perceived) *principal* or most prominent tasks (e.g., the Immigration and Borders Service (SEF) in Portugal is classified as a migration authority, despite having border surveillance in its competences; or the Estonian Police and Border Guard Board is classified as police, despite having border surveillance and asylum and migration affairs in its portfolio).

Table 1: Sources used for Mapping of Composite Field of National Authorities

Member State	Primary sources used	Complementary sources used
Austria	<ul style="list-style-type: none"> • 2020 AIDA report on Austria • 2016 EMN national report on Austria 	<ul style="list-style-type: none"> • MS notification on Dublin authorities
Belgium	<ul style="list-style-type: none"> • 2020 AIDA report on Belgium • 2016 EMN national report on Belgium⁶⁸⁰ 	<ul style="list-style-type: none"> • MS notification on Dublin authorities
Bulgaria	<ul style="list-style-type: none"> • 2020 AIDA report on Bulgaria • 2016 EMN national report on Bulgaria 	<ul style="list-style-type: none"> • MS notification on Dublin authorities
Croatia	<ul style="list-style-type: none"> • 2020 AIDA report on Croatia • 2016 EMN national report on Croatia 	<ul style="list-style-type: none"> • MS notification on Dublin authorities
Cyprus	<ul style="list-style-type: none"> • 2020 AIDA report on Cyprus 	<ul style="list-style-type: none"> • MS notification on Dublin authorities • EASO (2020), "Operating Plan Agreed by EASO and the Republic of Cyprus";⁶⁸¹

⁶⁸⁰ <https://emnbelgium.be/publication/return-rejected-asylum-seekers-belgium-and-eu-challenges-and-good-practices-emn>.

⁶⁸¹ https://easo.europa.eu/sites/default/files/CY_OP2021_for_signature.pdf.

Member State	Primary sources used	Complementary sources used
Czech Republic	<ul style="list-style-type: none"> 2016 EMN national report on Czech Republic 	<ul style="list-style-type: none"> MS notification on Dublin authorities EDAL Country Overview on Czech Republic⁶⁸²
Denmark	<ul style="list-style-type: none"> n/a 	<ul style="list-style-type: none"> MS notification on Dublin authorities Website of Danish Immigration Agency⁶⁸³ Website of Danish Refugee Council⁶⁸⁴
Estonia	<ul style="list-style-type: none"> 2016 EMN national report on Estonia 	<ul style="list-style-type: none"> MS notification on Dublin authorities EMN 2019 Annual Report on Estonia⁶⁸⁵
Finland	<ul style="list-style-type: none"> 2016 EMN national report on Finland 	<ul style="list-style-type: none"> MS notification on Dublin authorities Website of the Finnish Immigration Service⁶⁸⁶
France	<ul style="list-style-type: none"> 2020 AIDA report on France 	<ul style="list-style-type: none"> MS notification on Dublin authorities Website of Le Gisti, "Applying for asylum in France" page⁶⁸⁷
Germany	<ul style="list-style-type: none"> 2019 AIDA report on Germany 2016 EMN national report on Germany 	<ul style="list-style-type: none"> MS notification on Dublin authorities
Greece	<ul style="list-style-type: none"> 2020 AIDA report on Greece 2016 EMN comparative report (on return of rejected asylum seekers) 	<ul style="list-style-type: none"> MS notification on Dublin authorities
Hungary	<ul style="list-style-type: none"> 2020 AIDA report on Hungary 2016 EMN national report on Hungary 	<ul style="list-style-type: none"> MS notification on Dublin authorities
Ireland	<ul style="list-style-type: none"> 2020 AIDA report on Ireland 2016 EMN national report on Ireland 	<ul style="list-style-type: none"> MS notification on Dublin authorities
Italy	<ul style="list-style-type: none"> 2020 AIDA report on Italy 	<ul style="list-style-type: none"> MS notification on Dublin authorities Inquiry with Italian expert
Latvia	<ul style="list-style-type: none"> 2016 EMN national report on Latvia 	<ul style="list-style-type: none"> MS notification on Dublin authorities UNHCR submission to the 2nd United Nations Universal Period Review on Latvia⁶⁸⁸
Lithuania	<ul style="list-style-type: none"> 2016 EMN national report on Lithuania 	<ul style="list-style-type: none"> MS notification on Dublin authorities Website of the Lithuanian Migration Department⁶⁸⁹

⁶⁸² <https://www.asylumlawdatabase.eu/en/content/country-profile-czech-republic>.

⁶⁸³ <https://www.nyidanmark.dk/en-GB/You-are-waiting-for-an-answer/Asylum/Processing-of-an-asylum-case>.

⁶⁸⁴ <https://drc.ngo/our-work/what-we-do/asylum-and-repatriation/the-danish-asylum-system/actors-in-the-danish-asylum-system/>.

⁶⁸⁵ <https://www.emn.ee/wp-content/uploads/2020/05/arm2019-part-ii-ee-final.pdf>.

⁶⁸⁶ <https://migri.fi/en/asylum-in-finland>.

⁶⁸⁷ www.gisti.org/asylum-in-france.

⁶⁸⁸ <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=2430&file=EnglishTranslation>.

⁶⁸⁹ <https://www.migracija.lt/en/noriu-gauti-prieglobst%C4%AF-lr>.

Member State	Primary sources used	Complementary sources used
Luxembourg	<ul style="list-style-type: none"> 2016 EMN national report on Luxembourg 	<ul style="list-style-type: none"> MS notification on Dublin authorities Website of the Grand-Duchy of Luxembourg (guichet.lu)⁶⁹⁰
Malta	<ul style="list-style-type: none"> 2020 AIDA report on Malta 2016 EMN national report on Malta 	<ul style="list-style-type: none"> MS notification on Dublin authorities
Netherlands	<ul style="list-style-type: none"> 2020 AIDA report on Netherlands 2016 EMN national report on Netherlands 	<ul style="list-style-type: none"> MS notification on Dublin authorities
Poland	<ul style="list-style-type: none"> 2020 AIDA report on Poland 	<ul style="list-style-type: none"> MS notification on Dublin authorities Website of the Polish Office for Foreigners⁶⁹¹
Portugal	<ul style="list-style-type: none"> 2020 AIDA report on Portugal 	<ul style="list-style-type: none"> MS notification on Dublin authorities Inquiry with Portuguese expert
Romania	<ul style="list-style-type: none"> 2020 AIDA report on Romania 	<ul style="list-style-type: none"> MS notification on Dublin authorities Inquiry with Romanian expert
Slovakia	<ul style="list-style-type: none"> 2016 EMN comparative report (on return of rejected asylum seekers) 	<ul style="list-style-type: none"> MS notification on Dublin authorities
Slovenia	<ul style="list-style-type: none"> 2020 AIDA report on Slovenia 2016 EMN national report on Slovenia 	<ul style="list-style-type: none"> MS notification on Dublin authorities
Spain	<ul style="list-style-type: none"> 2020 AIDA report on Spain 2016 EMN national report on Spain⁶⁹² 	<ul style="list-style-type: none"> MS notification on Dublin authorities 2017 EMN report on the effective of return of TCN in the MS, national report on Spain⁶⁹³
Sweden	<ul style="list-style-type: none"> 2020 AIDA report on Sweden 2016 EMN national report on Sweden 	<ul style="list-style-type: none"> MS notification on Dublin authorities

Table 2: Mapping of Composite Field of National Authorities

	Dublin (responsibility assessment)	Asylum decision	Return decision
Austria	Federal Agency for Immigration and Asylum	Federal Agency for Immigration and Asylum	Federal Agency for Immigration and Asylum
Belgium	Immigration Office	Commissioner General for Refugees and Stateless Persons	Immigration Office
Bulgaria	State Agency for Refugees	State Agency for Refugees	Migration Directorate (Mol)

⁶⁹⁰ <https://guichet.public.lu/en/citoyens/immigration/cas-specifiques/protection-internationale/demande-protection-internationale.html>.

⁶⁹¹ See <https://udsc.gov.pl/en/cudzoziemcy/obywatele-panstw-trzecich/zobowiazanie-do-powrotu/przypadki-w-ktorych-wydawana-jest-decyzja-o-zobowiazaniu-cudzoziemca-do-powrotu/> and <https://udsc.gov.pl/en/cudzoziemcy/obywatele-panstw-trzecich/zobowiazanie-do-powrotu/organ-wlasciwy-do-wydania-decyzji/>.

⁶⁹² https://extranjeros.inclusion.gob.es/ficheros/redeuropeamigracion/estudios_monograficos/ficheros/2015_2016/EN-Rejected_Asymlum_Seekers_final_30032016.pdf.

⁶⁹³ https://ec.europa.eu/home-affairs/sites/default/files/26_spain_effectiveness_of_return_en.pdf.

Croatia	Department for Dublin procedure (Service for International Protection, Mol)	Department for International Protection Procedure (Service for International Protection, Mol)	Asylum Department (Mol)
Cyprus	Asylum Service (Mol)	Asylum Service (Mol)	Civil Registry and Migration Department (Mol)
Czech Republic	Department for Asylum and Migration Policy (Mol)	Department for Asylum and Migration Policy (Mol)	Foreign Police
Denmark	Danish Immigration Agency	Danish Immigration Agency	Danish Immigration Agency & Danish Return Agency
Estonia	Police and Border Guard Board	Police and Border Guard Board	Police and Border Guard Board
Finland	Immigration Service	Immigration Service	Immigration Service
France	Prefecture	Office for the Protection of Refugees and Stateless Persons	Prefecture
Germany	Federal Office for Migration and Refugees	Federal Office for Migration and Refugees	Federal Office for Migration and Refugees
Greece	Asylum Service	Asylum Service	Hellenic Police
Hungary	Dublin Coordination Unit, National Directorate-General for Aliens Policing	National Directorate-General for Aliens Policing	National Directorate-General for Aliens Policing
Ireland	International Protection Office	International Protection Office Minister for Justice and Equality	Minister for Justice and Equality
Italy	Dublin Unit, Ministry of Interior	Territorial Commission(s) for the Recognition of International Protection	Prefecture

Latvia	Asylum Division, Office of Citizenship and Migration Affairs	Asylum Affairs Division, Office of Citizenship and Migration Affairs	Persons Status Control Division, Office of Citizenship and Migration Affairs
Lithuania	Migration Department	Migration Department	Migration Department (Mol)
Luxembourg	Refugee Service (Directorate of Immigration, Ministry of Foreign and European Affairs)	Refugee Service (Directorate of Immigration, Ministry of Foreign and European Affairs)	Refugee Service (Directorate of Immigration, Ministry of Foreign and European Affairs)
Malta	Dublin Unit, International Protection Agency	International Protection Agency	Principal Immigration Officer
Netherlands	Immigration and Naturalisation Service	Immigration and Naturalisation Service	Immigration and Naturalisation Service
Poland	Head of Office for Foreigners	Head of Office for Foreigners	Border Guard
Portugal	Asylum and Refugee Department (Immigration and Borders Service)	Asylum and Refugee Department (Immigration and Borders Service) Ministry of Home Affairs	Immigration and Borders Service
Romania	General Inspectorate for Immigration – Directorate for Asylum and Integration	General Inspectorate for Immigration – Directorate for Asylum and Integration	General Inspectorate for Immigration - Directorate for Migration
Slovakia	Migration Office (Mol) (Dublin Centre)	Migration Office (Mol)	Bureau of Border and Alien Police
Slovenia	Migration directorate	Migration directorate	Police
Spain	Office of Asylum and Refuge	Office of Asylum and Refuge Inter-Ministerial Asylum and Refugee Commission	Government Delegation
Sweden	Migration Agency	Migration Agency	Migration Agency

Source: Authors' own elaboration.

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs on request of the Parliament's Committee on Civil Liberties and Justice, aims to provide a detailed mapping and analysis of the central legal changes and issues characterising the five main legislative proposals accompanying the Pact on Migration and Asylum, presented by the Commission in September 2020. The legislative instruments under consideration include a new Screening Regulation, an amended proposal for an Asylum Procedures Regulation, an amended proposal revising the Eurodac Regulation, a new Asylum and Migration Management Regulation, and a new Crisis and *Force Majeure* Regulation. As a second step, the study provides a critical assessment of the five proposals as to their legal coherence, fundamental rights compliance, and application of the principle of solidarity and fair sharing of responsibility enshrined in Article 80 TFEU.
