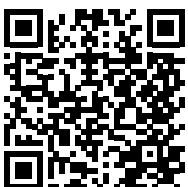


# THE NEW SCREENING AND BORDER PROCEDURES: TOWARDS A SEAMLESS MIGRATION PROCESS?

*Evangelia (Lilian) Tsourdi*



A large orange circle contains a word cloud of migration-related terms. The most prominent words are 'screening', 'EU', 'border', 'application', and 'protection'. Other visible words include 'decision', 'safe', 'procedure', 'third country', 'stateless', 'documents', 'assistance', 'checks', 'rights', 'unaccompanied minors', 'return', 'monitoring', 'legal', 'data', 'access', 'identity', 'Council', 'interview', 'asylum', 'information', 'time', 'origin', 'Commission', 'remain', 'security', 'territory', 'examination', and 'assessment'.



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# **EXECUTIVE SUMMARY**

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# EXECUTIVE SUMMARY

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

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

inadequate material conditions, among others. More broadly, efficiency may be prioritised over the quality of processing.

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

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# INTRODUCTION

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# INTRODUCTION

This policy study focuses on screening, border asylum processing, and border return procedures following the newly adopted reforms introduced by the New Pact on Migration and Asylum. These three stages are part of the Pact's revamped procedural set-up, which is meant to streamline, simplify, and harmonise procedural arrangements in the reformed Common European Asylum System (CEAS). They are governed respectively by the new Screening Regulation,<sup>1</sup> the Asylum Procedures Regulation (APR),<sup>2</sup> and Border Return Procedure Regulation (BRPR).<sup>3</sup> They are also supported by EURODAC, a database containing biometric data of applicants for international protection and persons apprehended in connection with an irregular crossing of the external borders of member states.<sup>4</sup>

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

to an appropriate procedure through its so-called Ten Point Plan.

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

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

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# **1. THE MAIN CHARACTERISTICS OF THE NEW THREE-STAGE BORDER PROCESS**

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# 1. THE MAIN CHARACTERISTICS OF THE NEW THREE-STAGE BORDER PROCESS

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

Against this background, this section presents an overview of the three-step seamless migration process the New Pact aims to set in place, highlighting the importance of legal and operational issues such as the content of the process, the individuals it applies to, the location where it takes place, and the time limits for its completion.

Screening is the first step in the new process and entails preliminary health and vulnerability checks, identity verification, registration of biometric data, and a security check. It also foresees filling out a screening form, and the referral to the appropriate procedures, such as for asylum or return. It can also lead to a refusal of entry, but only if the individual screened has not requested international protection and there are no further protection-related elements (e.g. processes related to the assessment of the best interests of unaccompanied minors).

Screening can occur at the EU's external borders, or within the territory. At the external borders,

screening applies to three categories of non-EU nationals who do not fulfil the entry conditions under the Schengen Borders Code:

- i) those apprehended in connection with an unauthorised crossing of the external border of a member state;
- ii) those disembarked following search and rescue (SAR) operations at sea; and
- iii) those seeking international protection at a border crossing point without fulfilling the entry conditions.

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

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

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

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

- i) if an asylum application is made at an external border crossing point or in a transit zone;
- ii) following apprehension in connection with an unauthorised crossing of the external border;
- iii) after disembarkation following a SAR at sea operation; or,
- iv) in the context of a relocation.

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

Border procedures instead become *mandatory* where asylum applicants:

- i) are considered to have intentionally misled the authorities by presenting false information or destroyed documents;
- ii) pose a danger to national security or public order;
- iii) are from countries of origin with low recognition rates at first instance, understood by the APR as countries that have a recognition rate of 20 % or lower, according to the latest available yearly Union-wide average Eurostat data, unless there has been a significant change of circumstances, or the applicant comes from a group for which this recognition rate is not representative (for example LGBTQI+ applicants).

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

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

the 'Safe Third Country' clause applies (see Box 1). By contrast, a decision on the merits involves ascertaining the protection elements of the claim.

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

#### **BOX 1: THE SAFE THIRD COUNTRY CONCEPT**

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

Finally, the Pact establishes border return procedures when an application is rejected following an asylum border procedure. Those subjected to a border return procedure are also not authorised to enter the territory.<sup>10</sup> The hope is that a seamless link between asylum and return within the framework of a border procedure will render returns more efficient and raise the current return rates. In reality, return outcomes hinge on a number of factors, such as the cooperation of the countries of origin, or the practical feasibility of return (referring to issues beyond the respect of the principle of non-refoulement). The EU will not be able to address these issues simply through a redesigned type of procedural set-up, as established by the APR and other new instruments.

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

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

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## **2. IMPLEMENTING THE NEW PROCEDURAL SET-UP: CHALLENGES AND IMPLICATIONS**

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## 2. IMPLEMENTING THE NEW PROCEDURAL SET-UP: CHALLENGES AND IMPLICATIONS

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

### 2.1 Adequate capacity: enhancing responsibilities for member states at the external borders

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

Adequate capacity refers to the number of persons who must go through the asylum border procedure and return border procedure at any given moment. The APR establishes the overall EU adequate capacity at 30,000 places. In simple terms, this means that throughout the EU, capacity to

examine 30,000 asylum applications in the border procedure at all times should be maintained. This overall capacity estimate applies across the different member states.

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

#### BOX 2: CALCULATING ADEQUATE CAPACITY

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

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$$\text{irregular crossings} + \text{SAR arrivals} + \text{refusals of entry in the Union during the previous 3 years}$$

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

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

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

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

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

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

The mechanism's functioning also carries the potential risk of putting pressure on national authorities to speed up the processing time and 'release'

capacities that are ascertained on an inflow/outflow basis. This could amplify the prospect of procedural guarantees that fall short of fundamental rights standards. Relatedly, considering additional needs and responsibilities that member states would face as part of the reforms, the current experience with processing at the border illustrates that the envisaged time limits may be especially ambitious.

## **2.2 Financing the new processes: an effective counterweight to enhanced responsibilities?**

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

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

The AMIF stipulates that the EU and member states should direct 20% of the funds allocated under the Facility to enhance solidarity and fair sharing of responsibility between the member states. The APR also refers to further amounts made available following the EU Multiannual Financial Framework (MFF) mid-term review.<sup>16</sup> Through the mid-term review, the Commission secured an increase to migration and border management budget of two billion euros. This is also aimed at the implementation of the border process and New Pact reforms. Once the Solidarity Pool under the Asylum and Migration Management Regulation (AMMR) begins to operate, it will make available further amounts (see Box 2).



### **BOX 3: THE SOLIDARITY POOL AND ITS LINKS WITH BORDER PROCEDURES**

The Solidarity Pool introduced by the AMMR includes financial contributions in the form of transfers to the EU budget as externally assigned revenues to the benefit of eligible member states.<sup>17</sup> The additional amounts under the Pool will only materialise after around three years following the entry into force of the Pact reforms. However, it will take two years before the AMMR enters into application, after which the EU institutions and member states will need to activate the first annual solidarity cycle. The progressive increase of the maximum yearly number of applications examined under border procedures reflects this time lag, until financing via the Solidarity Pool becomes available.

### **2.3 Vulnerability and border processing: an identification with limited consequences?**

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

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

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

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

### **2.4 Deprivation of liberty in border procedures: generalising the exceptional?**

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

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

Both the APR and the BRPR specify, however, that where applicants are deprived of their liberty, the principles and safeguards outlined in the RCD and

the Return Directive apply. These instruments make the deprivation of liberty subject to the principles of necessity and proportionality, emphasising the need for an individual assessment of each case.

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

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

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

When it comes to the new rules, the difficulty could derive from the fact that the difference between restriction on freedom of movement and deprivation of liberty is one of degree, and not nature or substance. According to settled case law, determining whether someone is deprived of their liberty depends on their concrete situation and factors like the type, duration, effects, and implementation of the measure.<sup>21</sup> Thus, in several cases, an individual

examination of the execution of each national regime will be necessary to conclude if it actually amounts to deprivation of liberty, regardless of what the official national designation for the scheme might be.

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

## **2.5 Right to an effective remedy and legal aid: effective to uphold the prohibition of *refoulement*?**

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

To begin with, the Pact instruments do not foresee the right to an effective remedy for the screening stage. Instead, the Screening Regulation allows for administrative and judicial review of the information provided on the screening form during any asylum or return procedure that may ensue. Any inconsistencies identified by the person should be noted on the screening form. This means that elements that could influence the outcome of asylum or return processes, such as incorrect identification of nationality, cannot be challenged and corrected promptly. In addition, the actors



conducting the registration could differ from those assessing the claims. It could thus prove difficult in practice to challenge this initial assessment of one administrative authority before another that has no jurisdiction to conduct such checks or supervision. Therefore, the issue might remain pending until it reaches the second stage, that is, a judicial or other independent authority.

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

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

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

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

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

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

## **2.6 Monitoring of fundamental rights compliance under the new system: meaningful evolution?**

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

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

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

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

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

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

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# **3. CONCLUSION AND FORWARD-LOOKING REFLECTIONS**

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# 3. CONCLUSION AND FORWARD-LOOKING REFLECTIONS

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

## Reflections on adequate capacity and funding:

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

- ▶ EU agencies, international organisations, and civil society should promote standards, generate actionable recommendations, guidelines, and share best practices concerning the development of adequate capacity during the two-year period leading up to the application of the seamless migration process.
- ▶ Member states should activate funding possibilities under the current financial instruments, i.e. the AMIF and the BMVI, under both national programme components and the funds' Thematic Facilities, to develop their national adequate capacity, and identify potential operationalisation gaps in advance.
- ▶ The European Commission should ensure that the national programmes and the Thematic Facilities continue to cover all aspects of national asylum systems and are not disproportionately geared to border procedures to the detriment of other aspects and objectives.
- ▶ Civil society organisations that are involved at national level in the design, operationalisation, and control of EU funding should, through the partnership principle, undertake concrete actions to ensure both the development of adequate capacities at the national level, and the equitable spread of EU funding towards different priorities.
- ▶ The Commission should ensure that the regulations are applied in a rights-sensitive manner. This also means that, in following up a notification of exhaustion of adequate capacity on an inflow/outflow basis, the Commission should not prioritise efficiency considerations over the quality of processing, merely in order to restore the inflow.

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

### Reflections on vulnerability and related rights:

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

- ▶ Member states should effectively plan the provision in border processing facilities of specialised services that are necessary to meet the special procedural guarantees and the reception needs of vulnerable applicants. Among others, these include medical and psychological assistance.
- ▶ Member states should determine what type of special arrangements are necessary to maintain family unity and protect children's rights.
- ▶ Concrete mechanisms should be established so that individual applicants can denounce the failure to meet their procedural or reception needs, and clear procedures should be in place to ensure appropriate follow-ups and response times.
- ▶ EU and national level monitoring should ensure that special (reception) needs are being met.

Information gathered from various sources, including civil society, should inform the content and outcome of the monitoring.

### Reflections on deprivation of liberty and restrictions to freedom of movement:

Subjecting individuals to screening or border processes does not justify indiscriminate deprivation of liberty for mere administrative convenience. Nonetheless, the concern is that, once the new rules become applicable, expediency might override EU standards in practice. Against this backdrop, the following considerations arise:

- ▶ Deprivation of liberty should not become an automatic or generally applicable measure. Instead, national administrations should reflect on how to operationalise individualised assessments, i.e. how to practically differentiate between profiles and individual cases in border processing.
- ▶ Where restrictions to freedom of movement, such as designated residence, are applied, relevant schemes should be designed and operationalised in a way that ensures their non-custodial nature, i.e., that the regime and conditions do not amount in practice to deprivation of liberty in the designated residences or accommodation centres.
- ▶ Alternatives to immigration detention that are fitting for a border processing context should be identified, developed, and put into practice.
- ▶ Deprivation of liberty of vulnerable migrants and asylum seekers should only be applied on an exceptional basis, where it is necessary and proportionate, also considering the individual circumstances of the person concerned. When deprived of their liberty, the vulnerable persons affected should have access to the full array of special procedural safeguards and reception guarantees that are foreseen for the specific groups under the applicable law.

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

### Reflections on the right to an effective remedy and legal aid:

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

- ▶ Member states should operationalise within-territory screening in a rights-compliant manner. They should also reflect on potential remedies against racial profiling in this setting.
- ▶ Specific attention should be paid to practical ways in which any incorrect information contained in the initial screening form could be meaningfully challenged in the asylum and return processing stages. Mechanisms to challenge the information included should already be available at first instance processing, not only at the appeals stage.
- ▶ To ensure the practical application of relevant rights and guarantees at the appeals stage, member states should explore assistance from EU agencies, as well as further involvement of international and civil society organisations.
- ▶ The instruments significantly expand the categories of applicants who will not have access to an appeal with an automatic suspensive effect, especially groups that may be subjected to

non-mandatory border procedures (e.g. all disembarked migrants). Sufficient training of relevant judicial or appeals authorities should take place to ensure the effective respect of the non-refoulement principle in such cases, while deciding on the suspensive effect of those appeals.

### Reflections on monitoring of fundamental rights compliance:

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

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



# ENDNOTES

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- 10 The BRPR provides specific rules on the return border procedure in situations of crisis. See, as part of this series, the policy study by Alberto Horst Neidhardt.
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This policy study focuses on screening, border asylum processing, and border return procedures following the newly adopted reforms introduced by the New Pact on Migration and Asylum. These three stages are part of the Pact's revamped procedural set-up, which is meant to streamline, simplify, and harmonise procedural arrangements in the reformed Common European Asylum System (CEAS).

Creating a seamless border migration process can be beneficial, especially in light of mixed migration flows and irregular arrivals. At the same time, challenges may arise due to short processing time and inadequate material conditions, while efficiency may also more broadly be prioritised over the quality of processing. The deprivation of liberty and restrictions to freedom of movement are further points this study dedicates particular attention to.

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

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