



# WHOSE PACT?

## THE COGNITIVE DIMENSIONS OF THE NEW EU PACT ON MIGRATION AND ASYLUM

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Sergio Carrera

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# Whose Pact?

## The Cognitive Dimensions of the New EU Pact on Migration and Asylum

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### Abstract

This Policy Insight examines the new Pact on Migration and Asylum in light of the principles and commitments enshrined in the United Nations Global Compact on Refugees (UN GCR) and the EU Treaties. It finds that from a legal viewpoint the 'Pact' is not really a Pact at all, if understood as an agreement concluded between relevant EU institutional parties. Rather, it is the European Commission's policy guide for the duration of the current 9th legislature.

The analysis shows that the Pact has intergovernmental aspects, in both name and fundamentals. It does not pursue a genuine Migration and Asylum Union. The Pact encourages an artificial need for consensus building or de facto unanimity among all EU member states' governments in fields where the EU Treaties call for qualified majority voting (QMV) with the European Parliament as co-legislator. The Pact does not abolish the first irregular entry rule characterising the EU Dublin Regulation. It adopts a notion of interstate solidarity that leads to asymmetric responsibilities, where member states are given the flexibility to evade participating in the relocation of asylum seekers. The Pact also runs the risk of catapulting some contested member states practices' and priorities about localisation, speed and de-territorialisation into EU policy.

This Policy Insight argues that the Pact's priority of setting up an independent monitoring mechanism of border procedures' compliance with fundamental rights is a welcome step towards the better safeguarding of the rule of law. The EU inter-institutional negotiations on the Pact's initiatives should be timely and robust in enforcing member states' obligations under the current EU legal standards relating to asylum and borders, namely the prevention of detention and expedited expulsions, and the effective access by all individuals to dignified treatment and effective remedies. Trust and legitimacy of EU asylum and migration policy can only follow if international (human rights and refugee protection) commitments and EU Treaty principles are put first.



The ASILE project studies the interactions between emerging international protection systems and the United Nations Global Compact for Refugees (UN GCR), with particular focus on the EU's role. It examines the characteristics of international and country-specific asylum governance instruments and arrangements, and their compatibility with international and regional human rights and refugee laws.

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Sergio Carrera is Senior Research Fellow and Head of the Justice and Home Affairs Programme at CEPS, Part-Time Professor at the Migration Policy Centre (MPC), European University Institute (EUI) and Visiting Professor at PSIA (Sciences Po). The author would like to express his gratitude to Professors Gregor Noll, Jens Vedsted-Hansen and Thomas Spijkerboer for their comments on previous drafts of this Paper.

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## Introduction

This Policy Insight examines the [new EU Pact on Migration and Asylum](#) (hereinafter the Pact), published on 23 September 2020, as conditioned by the [United Nations Global Compact on Refugees](#) (UN GCR) and the EU Treaties. It is the first contribution to a Forum organised in the context of the H2020 Project ASILE (Global Asylum Governance and the EU's Role).<sup>1</sup>

The analysis pays attention to the cognitive dimensions of the Pact, and how they affect trust and legitimation of EU migration and asylum policies. By 'cognitive dimensions' this Policy Insight means the ensemble of cognitive work that needs to be done to put into effect the core priority underlying the Pact. This comprises "establishing status swiftly on arrival" at Schengen external borders and categorising individuals either as "non-returnable refugees and other beneficiaries of international protection", or as "expellable irregular immigrants". Accordingly, individuals would be either immediately refused entry or transferred to asylum or return procedures.

The ASILE Forum examines the organisational, procedural and evidentiary preconditions for making the distinction between 'irregular immigrants' and 'refugees and other beneficiaries of international protection' cognisable for implementing authorities as laid out by the Pact. It assesses the implications of the Pact's dualistic understanding of individuals from the perspective of refugee protection, human rights and the rule of law. The Forum engages the international experiences of many world regions in an attempt to draw specificities, commonalities and lessons learned when examining the Pact. It ultimately explores the question: will the Pact reinforce trust and legitimacy of EU policies?

### 1. Whose Pact? *Intergovernmentalising* EU asylum and migration policies

The idea of the Pact, as originally advanced by [Commission President von der Leyen](#) at her Opening Statement in July 2019, is not new. It originated in a 2008 proposal advanced by the French Presidency of the EU for a "[European Pact on Immigration and Asylum](#)". This earlier 'Pact' was criticised as a failed attempt by one member state to '[renationalise](#)' policies falling under clear EU competence and scrutiny in the Treaties, and catapult some domestically contested priorities into common EU policy agendas through an intergovernmental arrangement.

A prior question that can be asked is what exactly is a pact, and between whom is it concluded? A pact implies an agreement or an official promise (or engagement) between two or several parties. It does not always qualify as a treaty or international agreement. The terminology of a pact may therefore lead to confusion, and it is not entirely clear *to whom* the pact in question actually belongs, and between whom it has been concluded or agreed upon. The Pact on Migration and Asylum does not, in fact, qualify as a pact.

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<sup>1</sup> For more information on the ASILE Project and the Forum see <https://www.asileproject.eu>.

To be clear, the Pact envisages the European Commission policy agenda aimed at setting up a “Common European Framework for Migration and Asylum Management” during the (current) 9<sup>th</sup> EU legislature. The Commission alone is the owner of this Pact. Moreover, while the Commission has carried out long consultations and informal exchanges with EU member states and other EU actors, this does not formally mean that the Pact has been concluded or agreed in any way or form by any of these [national governments](#) or any other EU institutional actor.

In fact, one may wonder if the EU actually needs a pact at this advanced stage of European integration. The EU Treaties are clear about the fact that inter-institutional decision-making rules among EU member states and the European Parliament come into effect once the Commission officially presents or publishes any legal acts. This also applies in full to migration, asylum and border policies.

One of the expressly stated objectives of the Pact is promoting and reinforcing “mutual trust” through asylum policies “acceptable to *all* EU Member States”. It says that it has been “shaped by collective learning” from the inter-institutional debates during the previous Juncker Commission, particularly the failing Commission’s 2016 proposals to reform the Common European Asylum System (CEAS) and the [EU Dublin Regulation](#). However, if there is any lesson to be learned from the outputs of inter-institutional negotiations over the Commission’s package of 2016 legislative proposals to reform the EU Dublin Regulation, it is that allowing a decision-making logic of consensus or *de facto* unanimity among EU member states does not work at all.

Previous CEPS research has shown that the 8<sup>th</sup> legislature corresponding with the Juncker Commission was characterised by [intergovernmental and nationalistic logics](#) “in the name of the 2015 European refugee crisis”. The European Council and EU member states’ ministries of interior – some of which were in the hands of radical right-wing parties – played a central role in re-injecting intergovernmentalism and ‘flexible’ patterns of cooperation in communitarised policies. They were the ones mainly responsible for blocking the much-needed legislative reform of the EU Dublin Regulation.

This was despite the existence of a broad understanding and overwhelming amount of evidence that the first irregular entry rule for distributing responsibility for assessing asylum application carried profound deficits and should be abandoned, and the [European Parliament](#) calling for much-needed asylum reform based on equal solidarity. [CEPS research](#) concluded that this logic was in clear violation of the QMV – and not the unanimity rule – applicable under the ordinary legislative procedure under the EU Treaties.

The Pact runs the risk of resurrecting the artificial need to build consensus among EU member states – even in advance of the presentation of the actual legislative proposals. This is both risky and counterproductive in policy domains where one could expect the Commission to pursue a genuine Migration and Asylum [Union](#).

The 2009 Lisbon Treaty aimed quite deliberately to change previous intergovernmental modes of cooperation in Justice and Home Affairs (JHA). As a key condition for ‘merited or deserving

trust', the Treaties require that common EU policies on borders, asylum and migration must be negotiated among *all* European institutions, not only among member states. The 'Lisbonisation' of JHA meant recognising the European Parliament as a full co-legislator and co-owner in these policy areas, and unlocking judicial control held by the Luxembourg Court.

A consensus-building strategy makes no sense in light of EU Treaties. Intergovernmentalising EU policy-making in these domains is illegal and at odds with the inter-institutional balance and loyal cooperation foreseen in the Treaties. Furthermore, the methodology applied in the Pact has resulted in a number of 'early concessions' to some EU ministries of interior before the actual publication and start of inter-institutional negotiations of the accompanying legislative proposals. The risk here is that currently applicable and debatable national policies will be reshaped into 'EU' ones.

A case in point is the priority given to fast screening procedures at EU external borders, or the call for mandatory border procedures and safe-country notions. Some northern EU governments have advocated these ideas, which are now even stated in the [Programme for Germany's Presidency of the Council of the European Union](#). One of the key innovations of the Pact has been for some member states to 'transplant' some of their own national priorities to the EU level, and in the Commission's most important policy agenda document in these areas.

However, little consideration has been given to the actual transferability of such 'models' to EU external land and sea borders in southern and central-east EU member states in the Schengen Area. In particular, what is considered by some as a 'best practice' in some northern European countries may well become a 'worst practice' when travelling to other EU member states and facing their local realities.

The current picture in the EU is that several governments are already implementing containment policies that are incompatible with existing EU asylum law and the EU Charter of Fundamental Rights. These include for instance expedited expulsions, accelerated determination procedures, expansive uses of detention and not rescuing and disembarking boats at sea. Some member states' governments may see this Pact as indirectly bringing supranational legitimacy to some of their national policies that have been criticised for leading to rule of law and human violations. This could enable them to trump effective access to justice and violate the right to seek asylum and the prohibition of collective expulsions in the EU.

The Pact's proposal to set up a [joint pilot project](#) on a 'migration management centre' at the EU hotspot in Moria, Lesbos (Greece) is one example. This was recently burned down after [protests in the camp](#). The [Council of Europe Commissioner for Human Rights](#) stated that the response to the protests should not lead to "more and longer detention" of the people. However, the joint pilot project ([Task Force](#)) should not legitimise in any form the Greek government's policy priority on detention and expulsions. It could set a worrying precedent of European Commission's support of detention camps inside the EU.

## 2. Localisation, speed and de-territorialisation

The Pact emphasises the external borders of southern and central/eastern EU member states. It states that “The external border is where the EU needs to close the gaps between external border controls and return procedures”. It pursues the [idea](#) of mandatory pre-border screening so that “entry is not authorised to third-country nationals unless they are explicitly authorised entry”, and therefore that an application for asylum does not unlock “an automatic right to enter the EU”.

The Pact advocates a model that emphasises an accelerated decision as to whether an individual has access to the right to seek asylum at specific border crossing points identified by EU member states. It pays special attention to third-country nationals who cross Schengen external borders at specific border crossing points, those entering in unauthorised ways (not fulfilling entry conditions in the [Schengen Borders Code](#)), as well as those who are disembarked after search and rescue (SAR) operations, including asylum seekers.

This model finds expression in the newly amended [Proposal for an Asylum Procedures Regulation](#) COM(2020) 611 final – which applies to both asylum and return rules on border procedures, and another [Proposal for a Regulation on screening at the external borders](#) COM(2020) 612 final. During the envisaged ‘screening’ process, which is expected to be concluded within five days from apprehension in the external border area, disembarkation or presentation at border crossing points, individuals concerned are deemed as non-authorised to enter the member state’s territory.

During this time, third-country nationals are obliged to remain in “the designated facilities during the screening”, which according to these proposals should be in principle at or in proximity to the external borders or transit zones. This therefore entails detention as a clear possibility. Moreover, this period can be extended to 12 weeks in cases where individuals appeal against a decision rejecting an application for international protection. It can further extended depending on the time needed to prepare return or implement the expulsion process envisaged in the [EU Returns Directive](#), which has been under inter-institutional negotiations since 2018.

In light of the ‘cognitive dimensions’ of these two proposals, after mandatory pre-border screening procedures, individuals are expected to be either immediately refused entry into EU territory or be channelled into asylum or return procedures. The screening is supposed to cover identification, security checks (against EU databases such as the Schengen Information System II and their [Interoperability](#)) as well as registration of biometric data (fingerprints and facial recognition) in a [new version of the Eurodac database](#). It also includes health checks consisting of a preliminary medical examination “with a view to identifying any needs for immediate care or isolation on public health grounds”.

The Pact places EU agencies such as Frontex (European Border and Coast Guard) and the European Asylum Support Office (EASO) in the crucial role of operationally assisting member states in the practical implementation of these initiatives. Their increasing involvement on the

ground and their inputs in border procedures, however, raises a number of unresolved legal dilemmas related to the accountability and [the lack of an independent monitoring mechanism](#) of their activities and decisions. A clear hierarchy (line of command) between national border and asylum authorities and Frontex and EASO is also lacking.

To function, the pre-entry screening procedures would presuppose that the cognitive resources of the territorially distributed system are moved to the external borders. It is concerning, though, that EU member states' border-crossing points are often framed as 'transit zones' or even as 'non-territory' in an unsuccessful attempt to reduce or limit their legal responsibilities and side-line constitutional and international rule of law.

This provokes the question as to whether a person in a liminal situation with a dearth of resources and reduced oversight is owed international protection and access to justice. The Pact's model – and its suggested 'principle of integrated policymaking' – risks blurring international protection and migration management by giving preference to the latter and engaging in the securitisation of refugees and people seeking international protection.

*Speed* is prioritised along with *localisation*, and comprises and calls for swift pre-entry compulsory screening of individuals who irregularly cross the external border outside designated border points and do not fulfil the conditions of entry. Crucially, pending the results of screening procedures, the person is presumed not to have legally entered into member states' territory. In this way, the proposed policies can be expected to encourage *de-territorialisation*, i.e. EU member states unlawfully reframing specific parts of their borders as 'non-territory'.

According to the Pact, "the particular needs of the vulnerable require special arrangements, and the border procedure would only apply where this is the case." The [Proposal for a Regulation on screening at the external borders](#) COM(2020) 612 final (Article 9) foresees the application of "vulnerability assessments" and highlights that those considered as vulnerable "shall receive timely and adequate support in view of their physical and mental health. This, however, allows potential for the foreseen screening procedures to impact individuals' rights and agency. Little or no consideration is given to how these very policies, and the blurring between asylum and expulsions, actually co-create or are co-constitutive of the irregularity of entries and [onward mobilities](#) that its proposals seek to address.

Despite formalistic statements that these proposals generally comply with fundamental rights, border procedures are characterised by reduced procedural safeguards leading to [arbitrariness and discrimination](#). They can also be expected to justify the illicit use of systematic deprivation of liberty of individuals at the borders or in-territory detention facilities.

Another problematic aspect is that the envisaged border procedure will deem an asylum claim inadmissible when the applicants come from countries with a low recognition rate (20% or lower according to a Union-wide average based on Eurostat data) – according to a new Article 40 of the Asylum Procedures Regulation. This is in violation of the inherently individual nature of any application for international protection. It also disregards the major differences among EU Member States regarding recognition rates.



The newly amended [Proposal for an Asylum Procedures Regulation](#) COM(2020) 611 final builds on the results of inter-institutional negotiations on a previously recast Proposal published in [2016](#), which aimed to harmonise member states' rules on the use of controversial safe country notions. This pursues the problematic idea to oblige all member states to use 'safe third country' notions that would require them to expel legitimate asylum seekers to countries outside the EU where their safety is not always guaranteed. A [joint letter](#) issued by several NGOs on the Pact states that safe-country notions carry inherent risks for effective access to international protection and "contribute to containment of refugees in other regions and jeopardise efforts for a more balanced sharing of responsibility for people who are displaced globally."

The Pact's focus on localisation, speed and de-territorialisation seems to be inspired by current policies and ideas pursued by [some northern European countries](#). A key question is the extent to which these ideas can realistically be expected to be safely transferred to member states holding the EU external land and sea borders in southern and central/eastern Europe. This is crucial in light of the increasing [body of evidence](#) of human rights and rule of law violations from governments' policies on [pushbacks, hot returns, detention and expedited expulsions](#).

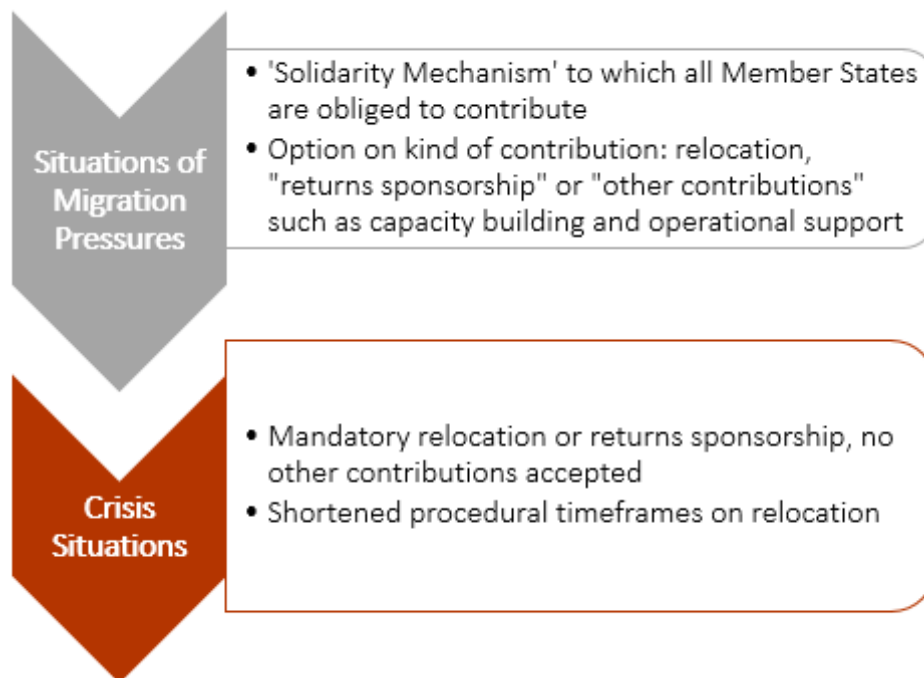
### 3. A European asylum system *à la carte*: asymmetric solidarity

The word 'flexibility' appears in several passages of the Pact. It relates to the reform of the [EU Dublin Regulation](#), which currently outlines the rules for the sharing of responsibilities between EU member states in assessing asylum applications in the Schengen area. While the Pact states that "solidarity is not optional", it advances a package of proposals implementing the concept of "mandatory flexible solidarity" among EU member states in the field of asylum and returns. It proposes reforming the EU Dublin Regulation in the shape of [a new Asylum and Migration Management Regulation](#) COM(2020) 610 final, which introduces a new 'solidarity mechanism'.

During the [2020 State of the Union](#) debate President von der Leyen expressly stated that "We will abolish the Dublin System." However, the devil is in the details. The reform still keeps as a rule the much-debated first irregular entry criterion for determining responsibility among EU member states, which will now also include people subject to SAR at sea. Among the envisaged set of criteria for determining the member state responsible for examining an asylum application (which includes family links and specific provisions for unaccompanied minors), [Article 21](#) still envisages the irregular entry criterion. This means that the old 'Dublin rationale' for distributing responsibility remains under the new system, with the exception of relocated applicants.

As Graph 1 below illustrates, the proposed 'Common Framework' includes a *two-layered interstate solidarity model* ranging from what the Pact calls 'situations of migration pressures' to those labelled as 'crisis situations'. Both concepts (migration pressures and crisis) leave ample discretion in the hands of the Commission and EU Agencies.

Graph 1. Two-layered interstate solidarity



Source: Author's own elaboration.

In situations characterised as 'migration pressures' or subject to disembarkations at sea, the foreseen solidarity mechanism in Article 45 of the Proposal obliges all Member States to participate in 'solidarity contributions'. However, member states are given the choice of *how* they do this. They may freely decide to participate in relocations of applicants for international protection. These member states would contribute according to a share based on pre-identified criteria (chiefly 50% population and 50% GDP) as stipulated in Article 54 and Annex III of the Proposal. The Proposal also envisages specific provisions related to the setting up of 'solidarity pools' in the context of SAR operations (Article 49).

The member state could instead decide to contribute with 'other measures to facilitate returns' of irregular immigrants. These are called 'return sponsorships' in Article 55 of the Proposal. This would include supporting the EU member state facing 'migration pressures' on policy dialogues with relevant non-EU governments in the verification of individuals' identity and their readmission. The Pact envisages that those member states committing to provide return sponsorships will be obliged to relocate individuals concerned to their territories if they are not expelled within a period of eight months. Article 56 of the proposal offers a third option for member states to refuse relocation or return sponsorships, but contribute instead through capacity building and operational support.

The second type of *interstate solidarity model* corresponds with cases labelled as 'crisis situations' or as force majeure, as outlined in the [Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum](#) COM(2020) 613 final, which accompanies a [Recommendation on an EU mechanism for Preparedness and](#)

[Management of Crises related to Migration \(Migration Preparedness and Crisis Blueprint\)](#). Here the Pact envisages mandatory relocation of applicants under international protection or return sponsorships. In such cases, member states would not be allowed to participate through capacity building and operational support. According to the Pact a crisis would not only include “mass arrivals of irregular migrants, but also a political crisis or a crisis sparked by force majeure such as the pandemic”. One is first left to wonder what a “political crisis” actually is.

Crisis situations’ cases propose a “crisis migration management procedure covering both asylum and return”, which leaves EU member states too much room for manoeuvre for lowering down or derogating protection standards as follows: first, taking decisions on the merits of the application during border procedures; second, extending the length of pre-entry border screening (Article 4 of the Proposal); third, further expanding the use of detention; fourth, applying a non-automatic suspensive effect of appeals of returns; and fifth, carrying out expulsions “to any third country where the person has transited, departed or has any other particular tie”. Yet the proposal allows member states to grant immediate protection status without the need for examining international protection applications in Article 10. This provision would apply 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”.

In her [State of the Union](#) address, President von der Leyen underlined the Commission’s expectation that *all* member states would step up to their common responsibilities. As explained above, however, the Pact promotes *differentiation*. It pursues a notion of solidarity that allows member states’ ministries of interior to free-ride or ‘opt out’ of delivering the right to seek asylum in the EU. Yet, why should it be acceptable that only a handful of member states take responsibility for relocation and the fundamental right to asylum, when others don’t? And why give that option to some EU governments, such as Hungary and Poland, which are currently under Article 7 TEU procedures for engaging in systematic threats to the rule of law and institutionalised forms of discrimination and xenophobia towards refugees?

The Pact’s inclusion of expulsions within the EU notion of solidarity reveals an interstate or intergovernmental understanding of EU responsibility sharing in the CEAS, where the individual’s protections and rights are left at the periphery. It also problematically expands the scope of the Lisbon Treaty principle of solidarity and the fair sharing of responsibility for expulsions, including third-country cooperation and readmission policy (See Section 4 below).

The Pact’s notion of solidarity pays no attention to *solidarity towards individuals*, including undocumented migrants and applicants for and beneficiaries of international protection. It is regrettable that the individuals’ own legitimate reasons to stay or go are not taken into consideration in the context of relocation or return sponsorships. This is particularly worrying in the context of return sponsorships, where individuals could be caught in a game of ‘ping-pong’ and be forced to travel to member states where they don’t want to go. Moreover, the Pact should have made it clear that member states are [not free to choose](#) or select applicants

based on criteria such as nationality, ethnic origin or religion, ‘integration potential’ or even recognition rates, as these clearly amount to discrimination prohibited under EU law.

Flexibility is clearly not a panacea. There are several lessons to be learned from the recent experiences of “[relocation and disembarkation arrangements](#)” implemented in the Mediterranean during 2018 and 2019. They have left too much room for manoeuvre in the hands of EU member states, putting the Commission in a weak coordination and dubious diplomatic role that goes well beyond its competences as ‘guarantor of the Treaties’. They also lack any meaningful tools to ensure their enforcement and the full compliance with existing EU asylum and border legal standards in the various phases that comprise their practical implementation.

Flexible solidarity is one expression of [intergovernmentalism](#). It leads to fragmentation in European cooperation on an issue that lies at the very core of the EU’s foundations, and where *common* action is essential. The enjoyment of equal rights and benefits stemming from membership in the EU carry similarly equal responsibilities. Flexibility can be seen as ‘less EU’ and it weakens the possibilities for the EU to fully accomplish a harmonised immigration and asylum policy that is consistent, ‘common’ and integrated.

The Luxembourg Court has provided few hints as to the scope of the EU principle of solidarity in asylum policy. In its judgment of 2 April 2020 (Cases C 715/17, C718/17 and C719/17) *European Commission v Poland, Hungary and Czech Republic*, the Court found that these governments had violated their obligations to implement and participate in the Relocation Decisions 2015/1523 and 2015/1601. It also held that any practical issues must be resolved in the spirit of cooperation and mutual trust between the authorities of the member states that are beneficiaries of relocation and those of the member state of relocation. The Court concluded that the responsibility towards 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.”

#### 4. Externalisation

When it comes to prioritising expulsions orders, the Pact relies heavily on international cooperation instruments focused on ‘externalisation’, i.e. placing migration management at the heart of the EU’s external relations. These instruments take the shape of what the Pact calls ‘Migration Partnerships’, which are non-legally binding arrangements or ‘deals’ (not qualifying as international agreements) with non-EU countries. Examples are [the EU-Turkey Statement](#) or [third country readmission arrangements](#) with African countries such as Ethiopia, Ghana, Niger or Nigeria. They often come along with crisis-led funding instruments (EU trust funds), and give clear priority to expulsions, border management, countering human smuggling, and the facilitation of readmissions and returns.

According to the Pact, “[readmission](#) must be an indispensable element of international partnerships”. The importance given to readmission in the Pact is also reflected in Article 7 of the Proposal for [a new Asylum and Migration Management Regulation](#) COM(2020) 610. The focus on readmission means that EU Migration Partnerships can be better understood as [Insecurity Partnerships](#). These are premised on the Pact’s readmission priority, which is closely related to visa facilitation/liberalisation-conditionality, development cooperation, trade policies and investments. The Pact foresees the possibility of applying restrictive visa measures to nationals of countries not cooperating on readmission.

In a welcome step, the Pact confirms the EU’s commitment at the [UN Global Refugee Forum of December 2019](#) “to providing life-saving support to millions of refugees and displaced people, as well as fostering sustainable development-oriented solutions”. However, it then emphasises that development cooperation “will continue to be a key feature in EU engagement with countries, including on migration issues”. Such an EU-centric approach contradicts the UN GCR objective for development assistance to ensure a true “spirit of partnership, the primacy of country leadership and ownership”.

Furthermore, and based on examples such as the [EU-Jordan Compact](#), the Pact pursues a ‘root causes approach’ aimed at using trade and investment policies at the service of containment, or as deterrence tools for preventing refugees from reaching the EU. More attention needs to be paid to how these initiatives affect or change the distribution of the overall workload or the tasks involved in implementing the cognitive dimensions of the Pact by third countries while upholding human rights and the rule of law in international relations.

All this reveals a thematic intersectionality in EU external migration policies and a continued focus on migration management. The Pact gives no consideration to the lessons learned from the ineffectiveness of past ‘Partnerships’ and EU’s readmission priority. It pays no attention to their negative impacts on African countries’ regional integration processes on free movement and [regional human rights’ systems](#). The attempt to transfer and implement EU migration management and crime-control concepts and projects often do not match up to local socio-economic realities in relevant non-EU countries. They generally lead to harmful effects, including the nurturing of insecurity, illiberal agendas, and economic inequalities and human rights’ violations.

The Pact explicitly refers to the UN Global Compact on Refugees from its [Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways C\(2020\) 6467](#), which names the Global Refugee Forum and UNHCR’s three-year strategy (2019-2021) on resettlement and complementary pathways. It calls on EU member states to “take a global leadership role on resettlement” and “counter the current trend of a [decreasing number of resettling countries](#) globally and a sharp drop in resettlement pledges”. It also calls on member states to participate in the European Asylum Support Office (EASO) Resettlement and Humanitarian Admission Network, which blurs its relationship with the global role played by UNHCR in this same domain.

In addition to resettlement, the Recommendation includes a call to develop “other forms of legal pathways to Europe for vulnerable people in need of international protection”, such as “humanitarian admission models” (including through study and work-related schemes), ‘Talent Partnerships’ and community and private sponsorships. While all these instruments are officially presented in the context of ‘mobility’, some of these constitute examples of a [‘contained mobility approach’](#). These combine containment aspects, e.g. non-admission and non-arrival policies, with others on mobility that present selective, discriminatory and restrictive features.

By way of illustration, key challenges in the design and implementation of resettlement and other humanitarian admission programmes include the obligation to ensure the integrity, certainty and non-discriminatory nature of their selection and eligibility procedures. According to [UNHCR](#), resettlement is “a tool to provide protection and a durable solution to refugees rather than a migration management tool”, and it is not “an [alternative](#) to providing access to territory to asylum seekers”. However, the 2016 Commission proposal on a Union Resettlement Framework [has been criticised](#) for including (among the factors for choosing priority countries for resettlement) their cooperation on readmission and their use of safe-country notions.

## 5. Refugee protection, human rights and the rule of law

The UN GCR is “grounded on the international refugee protection regime” and “is guided by relevant international human rights instruments”. The dual understanding of individuals as either ‘non-returnable refugees’ or ‘expellable irregular immigrants’ carries major implications for refugee protection and human rights more generally. It artificially relabels people with legitimate claims of international protection as irregular immigrants or expellable asylum seekers. The Pact’s priorities of localisation, speed and externalisation lay bare central questions of legal responsibility and accountability by state authorities and other implementing actors (including EU Agencies like Frontex and EASO) in cases of human rights’ violations.

Flexibility does not apply with respect to safeguarding international refugee law and human rights. All member states abide by a commitment to effectively respect and protect the fundamental rights of [all immigrants](#), irrespective of their administrative status and means of arrival. Similarly, non-EU governments are subject to the scrutiny of regional human rights’ systems. The dualistic framing of people pursued by the Pact poses challenges to [the very essence of the rule of law](#), including the unnegotiable duty to avoid arbitrariness by state authorities, and to ensure human dignity and access to justice for *everyone*.

Moreover, contrary to the de-territorialisation strategy characterising the Pact’s pre-border screening procedures, the obligation to comply with international refugee law and human rights is not limited to what is legally framed as ‘territory’. Responsibility and liability for rights violations actually follow any actions or inactions by member states and EU Agencies [irrespective of where they happen](#) as they are captured by *de facto* or *de jure* control notions, and fall within the scope of EU law.

The Pact's [Proposal for a Regulation on screening at the external borders](#) COM(2020) 612 final, in Article 7, provides for the obligation by EU member states to set up "an independent monitoring mechanism". This mechanism aims to safeguard fundamental rights "in relation to the screening, as well as the respect of the applicable national rules in the case of detention and compliance with the principle of non-refoulement". The Proposal calls on member states to ensure that individual complaints are dealt with "effectively and without undue delay."

The proposal for a fundamental rights' mechanism is most welcome in light of the many barriers to effective remedies and justice that individuals face in the context of border management procedures. Previous [CEPS research](#) has underlined that any such complaint mechanism can only be meaningful if its effectiveness and independence from national authorities and relevant EU agencies (e.g. Frontex) is fully guaranteed.

The proposal correctly emphasises the need to guarantee the independence of such a mechanism, and to ensure a key role by the EU Fundamental Rights Agency (FRA) to support and provide guidance to member states in its establishment. To this end, such a 'Border Monitor' should also envisage a key role for the European Ombudsman, and its network of national ombudspersons as well as national Data Protection Authorities (DPAs). It should also make sure that individuals have effective access to legal aid and civil society actors and human rights defenders, which [should not be criminalised](#) in the provision of humanitarian assistance and SAR activities, as well as in their role as fundamental rights watchdogs and [social trust](#) in democratic societies.

## 6. Conclusions

The new Pact on Migration and Asylum 'sets the tone' of the European Commission's policy priorities on migration, borders and asylum during the EU's 9<sup>th</sup> legislature. The Pact gives priority to member states' agendas in an area where the EU already benefits from legal competence under the EU Treaties, where there are solid common EU legal standards, and where QMV and the co-legislator role by the European Parliament strictly applies.

The Pact does not pursue a genuine Migration and Asylum Union. It runs the risk of pursuing intergovernmentalism, of establishing a European asylum system of *asymmetric interstate solidarity* and legitimising member states' policies focused on speed, localisation and externalisation. EU member states should be held accountable to their legal responsibilities, including current CEAS and Schengen Borders Code standards. *Solidarity towards individuals* and the upholding of everyone's rights needs to be placed at the heart of EU policies.

Inter-institutional negotiations will follow the legislative proposals that the Pact comprises. These should focus on trust-enhancing initiatives that prioritise effective EU enforcement, independent monitoring and evaluation of member states and EU agencies' compliance with international and EU human rights and rule of law standards, in full compliance with the EU Treaties and the UN Global Compact on Refugees. These are the essential preconditions to facilitate trust and legitimacy of EU migration and asylum policies.



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