



NEW PACT ON MIGRATION AND ASYLUM: EUROPEAN PARLIAMENT CONCEDES TO COUNCIL POSITION IN A DEVASTATING BLOW TO THE RIGHT TO ASYLUM

Ahead of the initial 7th December ‘jumbo trilogue’ on the EU’s New Pact on Migration and Asylum, [nineteen human rights organisations](#) came together with aid workers and survivors of human rights abuses to condemn the system envisioned for people on the move. No real steps were taken on the negotiations that day, instead discussions continued over the 18th and 19th December. This time, [over 50 civil society organisations signed an open letter](#) to the co-legislators urging them to reconsider the deal. However, as negotiations have now come to a close it is evident that, in the face of overwhelming pressure from the Council and Commission, the Parliament conceded on all key points. It was clear that [Member States were unwilling to move on their position](#), and so the outcome is the 2020 Commission proposal, worsened by Council amendments. This is a devastating blow to the right to seek asylum in the EU.

Screening Regulation:

Entry into force: Unknown

This file envisions a 7 day procedure that will *de facto* detain new arrivals to screen them and categorise them into either regular or accelerated border procedures for the processing of their claims. The Rapporteur had been holding strong on the Parliament position and has achieved some key guarantees such as the clause that medical and vulnerability assessments must be carried out by qualified medical personnel. There was a further push to ensure applicants would have a copy of the screening form (with security-related information redacted) so they could challenge any incorrect information included - this is key as the information gathered will play a salient role in deciding which procedure the applicant is funnelled into. In the end, there was a concession over the wording and it was agreed on that applicants will have “access to the information on the screening form” - this could be interpreted in many ways by Member States leaving individuals with inadequate access to the information.

It is not yet entirely clear what has finally been agreed on the more contentious articles of the text, but the information we have so far suggests that the legal fiction of non-entry will be retained - meaning that anybody undergoing screening in a dedicated centre will not be considered legally to be on the territory of the Member States. As individuals must remain in these centres at the disposal of authorities, they will be *de facto* detained. However the only safeguards around detention in the final text are a general reference to “the relevant rules on detention” set out in the Returns Directive and a non-binding recital on the use of detention as a measure of last resort. On the mechanism for monitoring screening procedures, the Parliament most notably lost the fight to include border surveillance activities in the scope of the mechanism. Furthermore, the inclusion of NGOs in the monitoring activities has been retained only as a ‘may’ clause. When it comes to concerns around the digital rights of people on the move when accessing databases for ‘security checks’ as part of the screening procedures, further concessions were made. The Council insisted and managed to obtain it’s position that once there is a hit relating to a ‘security threat’, screening authorities will have



direct access to all data on the person in all databases - both criminal and migration related - which is of serious concern in terms of the right to privacy and the principle of purpose limitation.

One of the final, most fought for topics on the Parliament side was the deletion of Article 5 - in territory screening - which has been widely [criticised as normalising racial profiling](#). Unfortunately the provision remains in the text with no safeguards against said racial profiling. Pending confirmation with the Council it seems the Parliament has managed to obtain some safeguards such as a shorter duration - of three days - and the need to conduct health and vulnerability checks. However, exceptions for unaccompanied minors and families with children were lost.

Asylum Procedures Regulation (APR):

Entry into force: Unknown

This file lays out the system by which asylum seekers will have their claims assessed. After going through an initial screening procedure, people will be funnelled either into the 'normal border procedure' or 'accelerated border procedures'. Under the latter, claims will be assessed within 12 weeks with the potential for individuals to be returned directly back to 'safe third countries' or relocated into detention sites in Member States for the purpose of return to their country of origin. Whilst the original Commission and Parliament positions maintained these border procedures would be optional and wouldn't apply to minors under the age of 12 and their families, in the final agreement the border procedures will be obligatory for all Member States and there will be no exemptions for any family with minors. The only safeguard envisioned is that families with minors will have an assessment of their claims prioritised. The exclusion of unaccompanied minors from border procedures is also limited, as the Council succeeded in including an exception for unaccompanied children who represent a security risk, without clarifying how this risk should be characterised. The role of the European Union Asylum Agency (EUAA) in monitoring reception conditions when it comes to families and minors in the border procedure was not yet agreed on in the final talks, but the Council has accepted to have a monitoring mechanism in the border procedure.

No legal representation is envisioned for applicants in the border procedure, this safeguard has been watered down to include only legal advice or counselling and will only be available in the administrative stage of the procedure. Furthermore, there will be no suspensive effect of appeals against the majority of decisions taken during the asylum procedures - only when they are against inadmissibility decisions based on the 'safe third country' concept, or for unaccompanied minors in the border procedure.

In order to expedite returns to 'safe third countries', both an EU list and national lists of such countries are envisioned. Whilst currently only 6 of 27 EU Member States use the 'safe third country' concept, this will see the practice proliferate in order to justify speedy returns out of the bloc. Applications will be deemed inadmissible if the person has a connection with a 'safe third country', the individual can then be sent to the border procedure and funnelled into a process that streamlines them into return mechanisms. The only win for the Parliament is that the Council has abandoned its push for a clause that allows for individuals



to be returned to countries not on the list as long as the applicant consents. Overall, the notion of 'effective protection' in the 'safe third countries' is limited with the definition referring only to access to healthcare and education but not to the labour market and only "under the conditions generally provided in the third country". Furthermore, worrying geographical limitations have been introduced - one part of the territory of a country can be considered safe even when the country as a whole cannot.

Regulation on Asylum and Migration Management (RAMM):

Entry into force: 24 months

This file defines which Member State is responsible to assess an individual claim for international protection, and deals with the issue of solidarity in relation to 'migration management' across the EU bloc. Marketed as an overhaul of the failing Dublin system, the final proposal offers no solutions and locks in extant issues. The country of first arrival will be responsible for most of the claims, other countries will have more time to send back asylum seekers, and there will be an easier procedure that does not require the agreement of the first country anymore. Contrary to what was established by the European Court of Justice, children could also be sent back to where they first registered. In relation to solidarity between Member States and the 'equal distribution' of applicants, there are three different forms of solidarity that hold equal value - relocating persons, sending funding to frontline Member States, or sending funding to third countries. This funding could entail contributions to reception and asylum systems and could easily be funnelled into financing fences, walls, and prison-like structures in the frontline Member States through the Border Management and Visa Instrument (BMVI). For third countries, the funding could also go to border management activities with the only safeguard being that it should be limited to Asylum, Migration and Integration Fund (AMIF) projects. There will be no mandatory relocation for individuals disembarked after SAR operations in the frontline Member States which doesn't go towards the envisioned ideal of 'fair and equal distributions' of applicants. Indeed, the Commission can make recommendations to the Member States about what pledges they should offer in terms of relocations or funding, but the Member States are not bound by these recommendations and they will not be made available to the public to scrutinise.

For those under RAMM procedures there is no legal representation provided for, only legal counselling as in APR. Furthermore, siblings will not count as family members, which severely limits the possibilities for family reunion and is contradictory to the need to safeguard family unity. The Council pushed back on options to reunite children with family members that are legally residing in the European Union, in the final agreement this will be limited to beneficiaries of international protection, holders of long-term residence permits, and individuals who have become a citizen after being a beneficiary of international protection. The only retentions from the Parliament position is that the Council's clause for 'relocations for returns' as a form of solidarity has been deleted and anybody arriving to a frontline Member State with a diploma in another Member State can be relocated there.

Eurodac Regulation:

Entry into force: Unknown



The Eurodac recast is the file closest to conclusion. The scope of the legislation will include beneficiaries of temporary protection and children from the age of 6 years old - all of whom will have to comply with having their biometric data collected. Under the GDPR, children under 16 years old are unable to consent to the processing of their personal data. Furthermore, access to law enforcement authorities has been expanded, and the collection of photographic facial data of people entering Member States has also been agreed. Both of these provisions move further towards the agenda of aligning movement with criminality, by allowing for the mass surveillance of people on the move in a disproportionate manner and [violating their data protection rights](#).

The Council also secured the addition of a wide range of 'security flags' into the EURODAC database during the screening process. New categories of data and persons such as those apprehended during irregular crossing, 'irregular migrants' or those engaging in secondary movements could also be subject to these security flags in the databases. This is all towards the aim of securitising migration and increasing the overlap between criminal and migration databases in the name of the ['interoperability framework'](#), something that will be further cemented with the [upcoming Europol Regulation recast](#).

Crisis Regulation:

Entry into force: Unknown

The Crisis bill deals with moments of 'crisis' within the EU, such as an exceptional or unexpected "mass arrival of people" at certain border locations. Three different 'crisis' scenarios were accepted: force majeure, mass arrivals, and instrumentalisation. Member States will be at the core of the governance structure for these situations, however there are still no mandatory relocations from the impacted Member State to others in times of 'crisis'. In terms of derogations, as foreseen under APR, individuals from a country with a recognition rate below 20% can be directly admitted to border procedures. In 'crisis' situations, this will be expanded. In situations of force majeure the threshold doesn't change but in 'mass influx' it expands to 50% and in situations of instrumentalisation 100% of people will go into the border procedure. Again, no exemptions to the border procedure will be made for families with children or vulnerable persons.

Most concerning is the last-minute inclusion of 'situations of instrumentalisation' in the final agreement. Despite widespread condemnation from a centre-left coalition of political groups (Renew, S&D, the Greens and the Left) on the Instrumentalisation Regulation, concessions have been made to include the concept of 'instrumentalisation' in the Crisis Regulation, circumventing the Parliament's rejection. The definition of 'instrumentalisation' is sufficiently broad enough to entail broad derogations in a range of situations:

"a situation of instrumentalisation where a third country or hostile non-state actor encourages or facilitates the movement of third country nationals and stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security."



As per the Council mandate, it includes hostile non-state actors as possible agents of 'instrumentalisation' and NGOs are only protected from this when they can prove their actions are not intended to destabilise the Member State. This could have dangerous repercussions for the criminalisation of solidarity.

What can we do?

Before Adoption:

The deal reached on December 19th is not the end. It remains a political understanding and has yet to be formally adopted. Further technical negotiations are likely to be necessary in early 2024. Notably, the concessions made by the Parliament go way beyond its original mandate on the proposals.

While Members of the European Parliament still retain the option to oppose the agreement in the final vote, a substantial campaign is essential to engage those not directly involved in migration-related matters. The aim is to raise awareness among both MEPs and their constituents regarding the true implications of this agreement. This undertaking requires collaboration not only at the EU level but also demands active participation from civil society and the media at the national level.

It is crucial to underscore that the Parliament has seemingly played into the Council's strategy and some groups have filled the role with more ease than others. Whilst EPP and Renew groups have been siding with the Council position for some time, the final decision makers - ensuring that the Parliament would have enough votes to pass the agreement in the LIBE Committee early next year - were S&D who folded at the very end of negotiations. There is still a pressing need to try and encourage MEPs to vote against the agreement, emphasising the importance of upholding democratic principles and asserting the Parliament's rightful role to reject a Pact which will lead to widespread fundamental rights violations. The Parliament's original position, according to its mandate, is almost nowhere to be seen in the final version which calls their role as 'co-legislators' into question, with it being evident they are forced to follow the Council line.

After Adoption:

Litigation: Challenging the most problematic concept, such as the 'legal fiction' of non-entry, as well as proportionality of detention and de facto detention. Sustained litigation against cases of pushbacks remains of vital importance (see the [BVMN database of legal actions](#)).

Implementation: Mapping specific areas where Member States could implement EU law in a more protective way, or go above the minimum standards, and advocating for them to do so at the national level.



Border Violence Monitoring Network

Monitoring: Especially areas where it is very likely there will be violations due to foreseen impracticalities in locations where the Pact has been piloted, for instance the duration and conditions of the screening and border procedures e.g. the screening is set to last 7 days maximum but it currently lasts 1.5 months in Samos. Monitoring can help bring evidence for litigation when even these bare minimum safeguards are being breached.