

The EU Pact on Migration and Asylum: context, challenges and limitations

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Theme

The EU Pact on Migration and Asylum seeks to regulate, harmonise and coordinate Member States' management of irregular arrivals.

Summary

After four years of negotiations, [the Pact on Migration and Asylum](#) has been endorsed by [the institutions of the EU](#). Its goal is to reduce the conflict that has repeatedly beset EU Member States since the so-called 'refugee crisis' of 2015, both by dint of a much more homogeneous and predictable management system and through the creation of solidarity mechanisms for sharing the burden of asylum claims between [Member States](#). However, the complexity of the pact, the opposition of some Member States and its reliance on agreements with third-party countries bode ill for its implementation.

Analysis

On 10 April 2024 a slender majority in the European Parliament (300 votes in favour, 270 against) approved the regulations that make up the Pact on Migration and Asylum, which seeks to impose order on a dysfunctional and divisive system. The history of the pact goes back to the autumn of 2020, when the Commission, following lengthy consultations, put forward a new set of regulations aimed at improving the EU's asylum system. The genesis of the Commission's proposal may in turn be traced back to the so-called 'refugee crisis' of 2015. Although somewhat contained, this nevertheless persisted in the years that followed, causing major disagreements between Member States, a tightening up of refugee policies in many of the states that had hitherto had more generous asylum systems, the restoration of border controls in various Schengen area countries and permanent resentment among southern Member States due to what they felt was the unequal distribution of the burden of irregular migration. As a result, asylum and related matters (managing borders, resettlement of claimants, controls at internal borders, repatriation and so on) have been an almost constant priority for EU Council meetings since 2015.

The gestation of the pact over the last four years has created many expectations and, in its final manifestation, disappointment, especially among NGOs specialising in supporting asylum applicants, among left-wing Social Democrats and on the right of traditional Christian Democrat and liberal parties, amongst others.

1. What is, and what is not, in the pact

It is first worth noting, for those unfamiliar with the subject, that despite its name (the Pact on Migration and Asylum), in reality the pact deals only with those irregular immigrants who claim asylum. In other words, the pact does not seek to deal with migration in general or to address the problems Member States collectively face in terms of labour shortages in specific industries, or because of their ageing populations. Policies for attracting immigrants to specific sectors (such as agriculture, construction and healthcare) or to attract highly-qualified immigrants to other sectors, fall outside the provisions of this pact, as does everything related to integration policies and the processes for regularising irregular immigrants implemented by many Member States. Migration policies as a whole continue to fall under the remit of individual states, although the existence of free movement within the Schengen area forces them *de facto* to coordinate with each other.

The pact comprises a set of five regulations extending over some 2,000 pages of text. It is neither easy to summarise nor easy to read without prior knowledge of each of the elements being regulated and the technical terminology employed. Moreover, each of the regulations refers to the others, such that reading them separately is not particularly enlightening. At the same time, the issues regulated by the pact are bound up with the rules that regulate the movement of people in the Schengen area, which is currently undergoing reform.

A consensus between the Member States was reached on two of the five regulations after two years of talks, and these received the unanimous approval of the Council in June 2022. One of these is the [Screening regulation](#), aimed at harmonising controls at the EU's external borders, which establishes procedures for verification of identity, security checks, and health and vulnerability checks of people intercepted after an unauthorised border crossing, including those rescued at sea. The other is known as [EURODAC](#), the fingerprint database that the EU uses to monitor asylum seekers within the Schengen area and prevent 'asylum shopping' (the practice of requesting asylum in subsequent Member States having been rejected in the first), and to monitor the 'secondary movements' of asylum seekers who move to other Member States. EURODAC will be upgraded to a biometric database that will be shared online using the EES (Entry Exit System), enabling information about all arrivals and departures from the Schengen area to be recorded, whether regular or irregular, with or without visas, such that it will be possible to ascertain for example if someone remains in the Schengen area after their visa or permitted three-month stay as a tourist has expired.

Following agreement on these two regulations, talks stalled on the other three regulations put forward by the Commission: the [Asylum and migration management regulation](#), the [Common asylum procedure](#) and the [Response to asylum crisis and force majeure situations](#), which were finally agreed at the European Council meetings in June and December 2023, with the opposition of Poland and Hungary. Ranged against each other in the talks surrounding these three interconnected regulations were the demands of the southern European countries (with their insistence on more European solidarity) and the reluctance of the eastern countries (essentially Poland and Hungary) to accept a proportional quota of the asylum seekers, and pressures from the centre and north (the asylum seekers' preferred destination) to prolong the period in which the country of entry

to European soil, typically located in southern Europe, remains responsible for such immigrants. The central and northern countries wanted this period to be indefinite, but in the end it was set at 20 months (12 months in the case of people rescued at sea).

The main goal of the Screening regulation is to impede the entry of 'bogus' asylum seekers, in other words those whose main motivation for migration is economic (the vast majority of those who cross the Mediterranean border), who tie up national asylum-processing systems and consume considerable public resources. People who 'pose a security risk, who mislead the authorities by providing false information or withhold information, or who are coming from countries with a low recognition rate' will be subjected to a 'border procedure' with the result that they will not remain at liberty in the country while their claim is being examined, but be obliged to remain at specific facilities at or near the border, for a maximum period of 12 weeks until it is decided whether they will move on to the 'in-territory' asylum procedure –the normal asylum procedure– or to expulsion.

In other words, a 'no entry' fiction is created for the country tasked with applying the procedures. Possible detention for a maximum 12-week period is justified both as a way of preventing people from fleeing and dispersing across the territory and of streamlining their eventual return. For those whose applications are rejected or denied, expulsion is envisaged as being easier because, supposedly, they will have failed to enter the country proper and their whereabouts will be known to the authorities. The threshold for what is defined as a 'low recognition rate' is 20%. Afghans and Syrians have an almost 100% chance of their asylum request being accepted on European soil, while a Senegalese or Moroccan person will have very little chance.

A significant new feature of the Common asylum procedure is the reference to the 'safe third country' to which Member States may return or deport asylum seekers, provided that they have a connection with the country in question and this meets the conditions to be described as such. For example, an asylum seeker who arrives in an EU country having spent time in Serbia or Morocco, having established connections in that country, may be returned there on the grounds of it being deemed a 'safe third country'.

The Regulation on Asylum and Migration Management establishes a solidarity system for distributing the burden that Member States face in discharging their duties in this area. Following the failure of the compulsory sharing proposal put forward by the European Commission in the 2015-16 crisis, it has now submitted a very different model. While solidarity remains compulsory, it is flexible in the way it takes effect: a Member State may either receive its annual quota of asylum seekers, or pay €20,000 for each non-admitted asylum seeker, or spend the same amount on immigration-related projects in the countries of origin, or on helping to manage the return of unsuccessful applicants, or providing technical measures or personnel to the countries that need it. The regulation stipulates that at least 30,000 people should be resettled every year, normally from Member States with external borders (basically the Mediterranean countries) to the rest, and the distribution criteria are related both to the population and GDP of each country and also to the number of irregular arrivals previously received.

2. Political context and limitations of the pact

The final talks to seal the pact took place in 2022 and 2023, in a very different context to the one that had prevailed when the Commission initially submitted its proposal in 2020, in the midst of a pandemic and the drastic reduction in movement that this entailed.

Once the pandemic had been overcome, irregular migration and the arrival of asylum seekers in Europe resumed in greater numbers, and after Russia's onslaught on Ukraine this was supplemented in 2022 by some 4 million Ukrainians being granted refuge on European soil. Many Western countries in 2022 and 2023 found their refugee-processing systems overwhelmed by the high numbers of applicants, with 300,000 irregular arrivals recorded in 2022 and 380,000 in 2023, with accumulated asylum seekers standing at around a million people in 2023, and tensions in various countries surrounding housing stocks after the Ukrainian refugees were housed, and after the traumatic experience of 2021, with immigration being used as a political weapon on the Polish border with Belarus (and in Spain's North-African enclave of Ceuta). In general, the arguments surrounding the pact have taken place in a political climate of the growing acceptance by European political parties and public opinion of restrictive stances on asylum, with electoral gains being made in many countries by xenophobic and nativist parties, and mainstream parties, including Social Democrats in northern and central Europe, sliding towards postures of greater control, reduced rights and fewer possibilities for gaining entry. Many Member States, including Germany, Sweden, Austria, Belgium, the Netherlands, Italy and France, are tightening up their asylum and migration policies.

In this context, talks on the pact could only reach an agreement on the basis of the single common denominator: the countries' shared goal of securing greater control over arrivals, which entails fewer possibilities of requesting asylum at Europe's external borders. This outcome, politically inevitable in the current context, is the main criticism that NGOs and other observers level at the pact. The procedures will be stricter and, as a result, the number of those rejected will be greater because, currently, a large proportion of those who are accepted into the asylum process ultimately see their applications denied. Under the new regulations, the number whose attempt to enter the asylum process is rejected from the outset will be greater. On the other hand, the protection offered to minors, families with children and particularly vulnerable immigrants has been strengthened.

It was never the intention of the pact to facilitate asylum but rather to regulate and harmonise it and make its management in Europe more predictable in order to avoid conflicts between Member States. The main goal of the pact is internal: to establish similar procedures and standards across Member States, to determine responsibilities and solidarity, so that this subject –the management of those who arrive irregularly and request asylum– ceases to be an ongoing cause of friction between the countries belonging to the Common European Asylum System (CEAS) and/or the Schengen area.

The pact enables border procedures and standards at the reception centres to be harmonised, but there will continue to be major national differences in terms of the levels of state assistance given to asylum seekers and refugees (housing and social support), the various nationalities' acceptance rates and the likelihood of being sent back in the event of rejection. Moreover, the pact does not create a single refugee status valid

throughout the EU: anyone obtaining this status in one Member State may not reside in another.

Meanwhile, the pact does not address many of the main shortcomings in the way irregular immigration and asylum are currently managed.

First, the return or repatriation of failed applicants continues to depend on agreements with the countries of origin, which are often non-existent or weak. Only 20% of those due to be returned actually are, and most remain in a sort of limbo on European soil pending some form of regularisation. The pact is unable to solve this problem, which depends on the EU's foreign policy and that of each Member State. Although the pact includes mentions of the external aspects of migration policies (relations with the countries of origin), the signature of agreements will obviously depend on bilateral agreements (initiated by the Commission, such as those sealed with Egypt and Tunisia, or by Member States, such as those agreed between Spain and Morocco). In this regard, the pact suggests that immigration be systematically included in the EU's foreign relations with countries of origin, including in trade agreements; that the fight against human trafficking be stepped up with specific programmes in certain countries; that cooperation on readmission be improved (exerting pressure through, for example, the awarding of visas to the countries of origin that do not collaborate on such readmission); and that more channels be opened to facilitate legal migration through the EU Talent Partnerships.

In all these respects, progress will depend on negotiations with each country, so that the pact's provisions in terms of foreign policy predominantly serve as a guide for action. Some of its elements are unlikely to succeed, such as the aforementioned fight against human-trafficking networks. These networks do not comprise stable or hierarchical organisations that can be dismantled by decapitation: rather they are lattice structures that consist of many local elements, coordinated in an *ad hoc* fashion, each of which is easily replaceable when one of them disappears. In this respect, 'putting an end to the people-smuggling networks' is a kind of labour of Sisyphus: as long as demand for these transit facilitators persists, supply of the service will continue to emerge, even if increased police activity against the networks has reduced their rewards.

Meanwhile, the 'Talent Partnerships', designed to channel legal immigration and to provide training for migrants –whether in the home or recipient countries– are highly useful and necessary tools, but they are nonetheless modest plans lacking the capacity to handle large volumes of migrants such as those that currently make up the demand from African and Asian countries.

Implementation of the pact's regulations will require a fresh injection of funding to enable Member States to create new structures (such as border control facilities and detention centres) and to implement new procedures at external borders, with their appropriate allocation of personnel and resources. The EU's new budget will be hammered out in the summer of 2025, and the EU has many programmes with funding claims set to vie with this one. The Commission stands to collect €600 million per annum from applying the pact, assuming that most states will prefer to pay €20,000 for every asylum seeker they do not accept from the total of 30,000 to be resettled annually. But this amount is

tiny relative to the estimated costs: Germany in 2015 and Poland in 2022 each spent around €8 billion on attending to refugees.¹

Despite the fact that the pact continuously refers in its justification to responsibility and solidarity, in reality it regulates responsibility (what each Member State should do to address its own influx of irregular arrivals) far more clearly than solidarity (how the burden of managing and receiving asylum seeker, or returning them, is to be distributed). The responsibilities are well defined and clear, but the solidarity is configured by means of a highly complex system whereby those countries obliged to support their frontline counterparts have so many alternatives at their disposal that it is not at all clear or predictable how such solidarity will manifest itself. It also remains to be seen whether the EU has the capacity to oblige Member States such as Poland who refuse to take part in such solidarity in any of its forms.

Meanwhile, the number due to be resettled (30,000 people per year) accounts for only 10% of all irregular arrivals, based on the aforementioned annual levels recorded in both 2022 and 2023, such that the scope of the solidarity in terms of distribution appears relatively limited.

Nor is it clear how 'situations of crisis and *force majeure*' are defined; these are covered by the last of the pact's regulations and enable the country or countries affected to suspend application of some of the asylum and border-control standards, to lengthen procedures and to request additional solidarity measures. The text mentions 'mass arrivals' but does not quantify this or specify the circumstances under which an influx may be regarded as a 'mass' arrival. In any event, the Council will be responsible for authorising the application of the exceptional measures provided for in the crisis regulation.

At the request of various eastern Member States, the concept of 'crisis' includes the instrumentalised influx of migrants used as a political weapon in bilateral relations, as occurred in Poland and Lithuania in 2021 when Belarus engineered the arrival of thousands of Asian and African immigrants in both countries. It is possible that in future there will be more of these 'hybrid attacks', which use immigration to harm neighbouring countries or as a lever to exert pressure in negotiations on other areas; this was the case with Ceuta in 2021, when Morocco facilitated the entry of 10,000 Moroccans into the city, many of them minors, in reprisal for the leader of the Polisario Front receiving medical treatment in Spain.

Conclusions

A difficult path ahead

The regulations that comprise the pact are due to come into force in June 2026, and between now and then the Commission proposes to negotiate with Member States the details of how it will be applied to ensure that they have all constructed the necessary

¹ Hugo Brady (2024), 'Breaking taboos: EU asylum reform and the challenge of migration', EuroComment, 2024/1.

border infrastructure and that they possess the administrative procedures required to screen and process asylum claims by that time. Meanwhile, during this period of more than two years, following its endorsement by the European Parliament and before it comes into force, the Commission will try to ensure that all Member States have the political will to abide by the rules; this is a major challenge, owing not only to their rejection by Poland and Hungary but also to the misgivings of the German *Länder* in the EU's largest recipient of asylum seekers.

Although Germany does not directly receive irregular asylum seekers (its only external border is the Baltic coast), it is the EU country that has the highest number of refugees arriving from other Member States. This causes significant tensions in the *Länder*, which are responsible for managing refugees. The rise in the electoral popularity of the German far right is connected to the reception system being overwhelmed, which has also caused a hardening in the positions of the mainstream parties.

It is not uncommon to hear German representatives complain that Germany needs the solidarity of the rest, a solidarity that the pact appears to have designed to benefit only those states with external borders, in the south and in the east. For its part the main opposition party, the CDU, has already announced that externalisation will be its main tool in this area, in other words that it will try to reach agreements with third countries (not EU members), so that during the time needed for their claims to be processed asylum seekers remain there, and in the event of being rejected will be returned from there. This is the model that the Italian government has recently agreed with Albania, in a deal whereby asylum seekers will remain in the latter country while their claims are examined. It is possible that Germany will seek a similar agreement with one of the eastern countries that are candidates to accede to the EU (Serbia, Montenegro, Macedonia, Georgia...). Apart from the implications of this from the perspective of the EU's asylum policy,² it is worth noting that such agreements are only useful for the EU's Member States insofar as these other countries to which the management is farmed out are non-EU and non-Schengen territories. Therefore, this practice implicitly represents an impediment to their convergence processes and future membership.

When it is applied, the pact is going to run into political and possibly also legal challenges and a largely hostile international setting.

Hungary will hold the presidency of the Council in the second half of 2024, followed by Poland and Denmark in 2025, which means it will be led by two Member States –Hungary and Poland– that oppose the pact, and then by one, Denmark, that some years ago shifted to highly restrictive positions in this area and is affected only in part by EU asylum policies as it obtained an opt-out from justice and interior policies in 1992 and does not form part of the Common European Asylum System (CEAS), although it is part of Schengen. It is therefore unlikely that any of these three Member States is going to promote the pact very actively, particularly when it comes to the parts it least identifies with, raising considerable doubts about the chances of it really coming into force in its entirety by the summer of 2026. Moreover, it should be pointed out that the European

² For the externalisation of asylum policy and an analysis of the Italy-Albania case, see <https://www.swp-berlin.org/en/publication/the-externalisation-of-european-refugee-protection>.

Parliament emerging from the forthcoming elections in June is likely, if opinion polls are proved correct, to be more hardline on immigration policy than the current one, so substantive political pressure in favour of the current pact is not to be expected from that quarter either.

Meanwhile, the highly negative reaction the pact has received among NGOs specialising in refugees' and immigrants' rights indicates that their repudiation will end up in the courts, with possible cases being pursued against the 'non-entry' fiction for the 'border procedures', or challenging the type of legal assistance those subjected to this procedure receive.

The growing instability in Africa, particularly in the Sahel region, in the Middle East (Palestine and the regional destabilisation the war has unleashed) and in eastern Europe (Ukraine) augurs an increase in movements towards the EU and, as a result, a parallel rise in political tensions within and between Member States stemming from asylum management.

Moreover, if there is no substantial progress in Member States' or the EU's relations with the countries of origin, enabling deportation rates to be significantly increased, all the structures erected by the pact will prove ineffective in its goal of preventing irregular immigration.

If all these factors prevent the pact from being applied, we may well see a retrenchment towards even more hardline positions in each Member State, greater threats to terrestrial freedom of movement in the Schengen area (12 Member States already conduct controls at their land borders) and a greater tendency to farm out the processing of asylum seekers to non-EU countries. Apart from what this may mean from a purely migratory perspective, such a failure would be a powerful indication of the EU's political weakness, and of how much it struggles to coordinate responses to shared challenges.