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Policy Paper

Clear, fair and fast?

Border procedures in the Pact on Asylum and Migration

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#NewPact
#Asylum
#BorderProcedure

The processing of asylum applications on the EU external borders is central to the Commission's new Pact on Asylum and Migration. According to the Commission, the proposal is to deliver "clear, fair and faster" border procedures. We argue in this policy paper that attaining all three objectives is unrealistic. While the Pact prioritises clarity and speed, it risks impeding fundamental rights and therefore lacks in fairness. To address this imbalance, the paper makes three recommendations to policy-makers: focus on who should be exempted from border procedures, match faster procedures with accountability, and make fairness the procedure's prime parameter.

Executive summary

The European Commission's recently presented Pact on Asylum and Migration sets out a revised process of managing access to asylum in the EU. It centres on pre-entry screening of irregular arrivals as well as asylum and return procedures at the border. Initially designed to handle asylum requests submitted at airports or transit zones, the border procedure would thereby become the *de facto* standard for the majority of asylum-seekers.

By processing applicants in closed facilities at the EU's external borders, the Commission hopes to win over sceptical member states for the proposed solidarity mechanism. To alleviate the administrative burden on countries of first arrival, **Commissioner Ylva Johansson promised that the Pact would deliver "clear, fair and faster" procedures at the border.** To that end, the proposal introduces tighter procedural deadlines, harmonises asylum border procedures and streamlines them with a potential return process. Hence, the border procedure is more than just closely interwoven with the Pact's other elements: it fills a key political role in seeking to appease different factions of member states.

In this paper we show that **the Commission's three objectives (clarity, speed and fairness) conflict with each other.** By pursuing clearer and faster asylum and return procedures at the border, the envisaged procedures risk undermining the guarantees set out by the EU's Charter for Fundamental Rights and the Geneva Convention. In short, they lack fairness.

Increased "clarity" arises from standardising the border procedure for the majority of new arrivals. Additional criteria for applying that procedure appear to make existing rules clearer but bring with them a simplified categorisation of asylum seekers. Furthermore, the proposed rules have arbitrary affects and may increase legal insecurity for asylum seekers. By introducing significantly shorter procedural time limits, prolonging border detention and integrating asylum and return procedures, the Commission substantiates its ambition for greater speed. Yet, in most member states with border procedures in place, the proposed deadlines merely solidify existing practice. By contrast, in countries of first arrival, keeping up with tighter deadlines for a greater number of applicants will be difficult. Critically, the standardisation and acceleration of border processing is likely to reduce the quality of asylum decisions. Containing asylum seekers in remote and closed facilities will undermine fairness. Lack of fairness arises in particular from limited procedural safeguards on, *inter alia,* remedies, the right to remain as well as practical issues such as fraught access to legal counselling or interpretation.

Therefore, we argue that any political agreement on the Pact's proposal for border processing should not be made without adjusting the three objectives set out by the Commission.

1. **Clearer, but fair** procedures require:

- upgrading the **exemptions** made in applying the procedure, in particular adequately protecting minors and vulnerable persons
- replacing the arbitrary threshold of an EU-average recognition rate of 20% for applying the border procedure with common, reliable and differentiated country-of-origin information produced by the future EU Asylum Agency

2. **Fast but fair** procedures require:

- **Investing in national asylum systems and EU support capacities** to make shorter deadlines an attainable objective
- Increasing the **accountability of EU Agencies** providing operational support

3. **Making fairness the prime parameter** for border procedures requires:

- Guaranteeing the **right to remain** for all applicants by introducing an automatic suspensive effect with no exemption
- Setting deadlines that realistically allow applicants to seek **legal advice** in preparing their case
- **Refraining from automatically detaining** applicants in remote locations
- Installing comprehensive **human rights monitoring** at all stages of the procedure

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Introduction

On 23 September 2020, the Commission put forward the long-awaited "New Pact on Asylum and Migration". Four years after the last Commission proposal to revise the Common European Asylum Policy (CEAS), negotiations had reached a deadlock. With the new Pact, the von der Leyen Commission is trying to deliver a "fresh start" for EU asylum and migration policy. Vice-President Margaritis Schinas described the New Pact as a house with three floors. The first floor represents the external dimension of EU migration policy, in particular its relationship with countries of transit and origin. The second consists of a "robust management of our external borders".[1] On the third floor sits a proposed new system of responsibility sharing among EU member states. This "bel étage" of the European house is supposed to address one of the most contested issues in previous negotiations: relocation of asylum seekers. Inevitably, this has become the focus of attention.

Another Pact proposal that is a cornerstone of the European house, but initially received lesser attention, is the revamped asylum border procedure. Following pre-entry screening, applicants with lower recognition rates would be channelled into a designated border procedure.[2] By turning it into the *de facto* standard procedure for the majority of irregular arrivals, **the border procedure would serve as gatekeeper for the proposed solidarity mechanism,** tightly restricting the number of applicants accessing EU territory and the presumed stairway to relocation.

In addition to the lack of European solidarity, slow and opaque asylum procedures contributed to the persistent overcrowding of refugee camps on islands in the Aegean. In recent years, camps like those in Moria became a symbol of the EU's failure to combine effective asylum processing, responsibility sharing and guaranteeing fundamental rights. "No more Morias" was thus one of the most frequently used phrases during the new Pact's unveiling.[3] To that end, **Commissioner Ylva Johansson promised to deliver "clear, fair and faster" border procedures** to prevent people from having to wait in limbo.[4] A Commission Task Force has already been charged with testing the Pact's approach in a pilot project on Lesbos in the coming months.[5]

Against this background, our paper considers whether the proposal for a standardised border procedure can indeed guarantee *clear, fair and faster* asylum procedures and avoid any repeat of the problems seen in Moria and other hotspots. We argue that attaining all three objectives is unrealistic. While the Pact adds clarity to the extent that it *de facto* standardises the border procedure, it thereby essentially creates a simplified system for differentiating between different asylum applicants. The Pact theoretically establishes the conditions for faster procedures. However, a closer look at the proposal raises questions about its practicability. Crucially though, the Commission

[1] *Speech* by Margaritis Schinas, Vice President of the European Commission on 23 September 2020.
[2] The recognition rate is the percentage of applicants from a specific country of origin that obtain refugee status or subsidiary protection. As a benchmark for "low recognition rate", the Commission proposes 20% or lower in the latest available yearly Union-wide average Eurostat data.
[3] Eszter Zalan (2020), *"Commissioner: No one will like new EU migration pact"*, EUobserver, 18 September.
[4] Commission (2020), *"College Meeting: A fresh start on migration – Building confidence and striking a new balance between responsibility and solidarity"* (Press Release), 23 September.
[5] Commission (2020), *"Migration: A European taskforce to resolve emergency situation on Lesvos"*, 23 September.

proposal may compromise the fairness of asylum procedures. The German Council Presidency wishes to reach a political agreement on key elements of the Pact, including the border procedure, by early December.[6] We argue that there should be no political agreement on border processing without re-calibrating some of the proposal's underlying provisions: the emphasis should be placed on guaranteeing access to a fair asylum procedure. To reach that goal, it is essential to address potential violations of applicants' rights flowing from inevitable difficulties in operating the pre-screening and border processing centres, accelerating asylum procedures and organising returns with appropriate safeguards. The paper proceeds in three steps. First, it details the main parameters of the border procedure and outlines how it relates to the Commission's proposal for a solidarity mechanism. Second, the paper analyses to what extent the proposed border procedure can indeed deliver on the three objectives set out by the Commission *(clear, fair and fast)*. The final section sets out our recommendations for the reform negotiations.

"Emphasis should be placed on access to a fair asylum procedure."

1 Border procedures: The Pact's silver bullet?

The Commission's New Pact is designed as an umbrella package covering a variety of measures, some of which are still forthcoming. The package published on 23 September 2020 targets undocumented migration and asylum. It consists of two legislative amendments, three recommendations and three new legislative proposals. All of them address elements relevant to the functioning of the CEAS (Common European Asylum System). Yet, two aspects stand out as cornerstones of the "European house" envisioned by Schinas: the proposed Regulation for a solidarity mechanism and the amendments to the Asylum Procedure Regulation putting in a place a mandatory border procedure.

1.1 The new Pact's main proposals: flexible solidarity & border processing

In its proposal for a migration management directive, the Commission seeks to address the lack of responsibility sharing among member states via a new solidarity mechanism. Where a member state is found to be under migratory pressure, the Commission shall identify measures appropriate to address the situation, which may include assistance from other EU countries. In such a case, member states submit a Solidarity Response Plan, outlining the type of contribution they intend to make. Member states are free to choose from three options: They can either relocate asylum seekers (who are not subject to the border procedure), provide operational support, or contribute through so-called return sponsorship. Under return sponsorship, a member state commits to assist in the return of unsuccessful asylum applicants. If such persons are "not removed within eight months, the member state providing return sponsorship shall transfer the persons concerned onto its own territory".[7] A very similar mechanism applies to disembarkations of migrants rescued at sea.[8] In the event of a renewed "migration crisis", the palette of solidarity contributions that

[6] Martin Banks (2020), *"EU's new Migration Pact draws mixed reactions from MEPs and NGOs"*, The Parliament Magazine, 24 September.
[7] Commission (2020), *Proposal for a Regulation on asylum and migration management*, COM(2020) 610 final, Article 55(2), p. 85.
[8] Commission (2020), *Proposal for a Regulation on asylum and migration management*, COM(2020) 610 final, Article 47, p. 76–77.

member states can choose from is reduced to either relocation or return sponsorships, while the deadline for a successful return is reduced to four months.[9]

Complementary to the solidarity mechanism, the Commission proposed restructuring access to asylum procedures, and establishing a border procedure for applicants considered as enjoying few prospects of receiving international protection. First, new pre-entry screening is introduced for "all third-country nationals who are present at the external border without fulfilling the entry conditions, or after disembarkation, following a search and rescue operation."[10] Within five days, a health and vulnerability check, along with a security and identity check, is to determine the appropriate procedure for each asylum applicant. Based on the result of the screening, the proposal for an amended Asylum Procedures Regulation would oblige member states to apply the border procedure in cases where the applicant poses a risk to national security[11] or withholds relevant information.[12] The border procedure is also mandatory for applicants that come from countries whose share of positive asylum decisions in EU member states is below 20% on average, compared to the total number of decisions. Where there are large numbers of simultaneous arrivals, the scope of the border procedure is broadened to include applicants from countries given an EU-wide recognition rate of less than 75%.[13]

Where the border procedure is mandatory, the merit of the application will be examined.[14] In cases where a third country is considered to be either a "safe country of origin" or a "safe third country" for the applicant, the border procedure may be limited to assessing the application's admissibility.[15] If the application is inadmissible, a return decision is issued. If protection is refused on appeal, a border return procedure is then activated.[16] This "seamless" continuum between asylum and return procedures is a key element of the proposal.

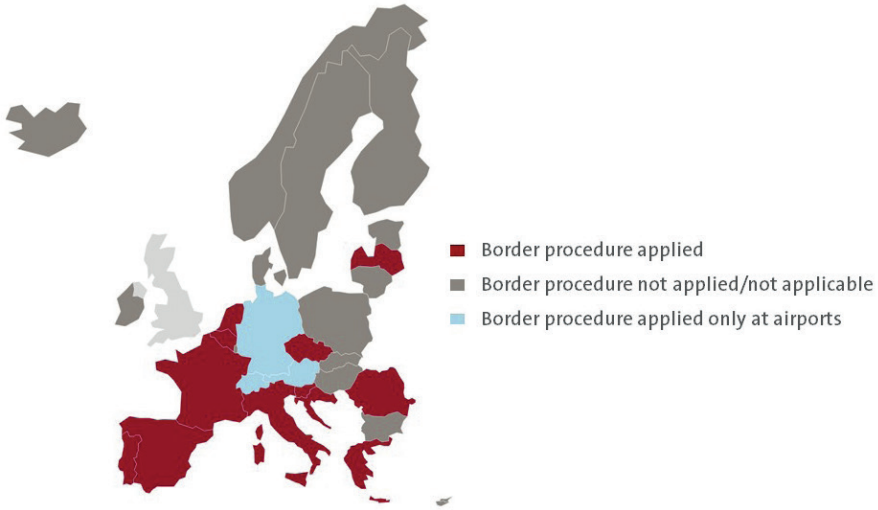
1.2 A gatekeeper for the solidarity mechanism

Border procedures are not a new phenomenon in the EU's asylum system. They were already included in the first EU Asylum Procedures Directive adopted in 2005. Back then, border procedures were introduced as a concession to some member states, in particular France, allowing them to continue implementing lower procedural

[9] Commission (2020), *Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum,* COM(2020) 613 final, Article 2, p. 26–27.
[10] Commission (2020), *Proposal for a Regulation introducing a screening of third country nationals at the external borders (thereafter "Screening Regulation"),* COM(2020) 612 final, p.1.
[11] Article 40(1)(f) of the 2020 *Proposal for an Asylum Procedures Regulation* COM(2020) 611 final.
[12] Article 40(1)(c) of the 2020 *Proposal for an Asylum Procedures Regulation* COM(2020) 611 final: "the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity or nationality that could have had a negative impact on the decision".
[13] Article 4(1)(a) of the 2020 *Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum,* COM(2020) 613 final.
[14] Article 43(1) of Procedures Directive 2013/32/EU and Article 41(2) of the 2020 *Proposal for a Common Procedures Regulation,* COM(2020) 611 final COM(2020) 611 final.
[15] Grounds for inadmissibility: there is a first country of asylum; there is a safe third country that the applicant can return to, the application is a subsequent application with no new elements, the applicant is already covered by the application of a family member (Article 36(1) of 2016 proposal)
[16] Article 35a of the 2020 *Proposal for an Asylum Procedures Regulation* COM(2020) 611 final.

standards in specific contexts, such as airports, ports or transit zones. Initially, border procedures were allowed only under a "twilight clause". Member states could keep existing border procedures in place but were not allowed to introduce new ones. This changed in the recast Asylum Procedures Directive of 2013, which authorised member states that did not practise border procedures to start doing so. Nevertheless, under the current legislative framework, border procedures remain entirely voluntary.[17] As a consequence, **only some member states apply the border procedure thus far and they do so to differeing extents** (see map 1).

Map 1: Application of border procedures in EU+ countries



Source: EASO (2020), "Border Procedures for Asylum applications in EU+ Countries", p.9.

In the new Pact on Asylum and Migration, border processing is no longer the exception. It becomes central to the design of the overall CEAS, in particular to the functioning of the new solidarity system. Since "only persons who are more likely to have a right to stay in the Union should be relocated", only applicants "who are not subject to the border procedure" are eligible to enter the "European house".[18] An exception is made for crisis situations when applicants undergoing the border procedure can also be relocated to other member states. Arguably, pre-screening and border procedures are designed to limit the number of asylum seekers that will be channelled towards relocation. Border processing thus acts as gatekeeper for the solidarity mechanism. This is part of the Commission's attempt to win over member states querying obligatory relocations, arguing that "more efficient border procedures will lessen the burden on the asylum and migration authorities inland".

While the gatekeeping approach has found political support in many quarters, a criticism among countries of first arrival is that they would remain in charge of receiving and processing the majority of new arrivals. Assessing the proposal, the Greek Minister for Migration and Asylum, George Koumoutsakos, found that "extensive and mostly mandatory border procedures, in conjunction with the obligation to guarantee a fair process of asylum requests at the border, are meant to place permanently a disproportionate and cumbersome burden on first entry member states." He added that "large numbers of third country nationals would

[17] Article 43 of *Procedures Directive 2013/32/EU*
[18] Commission (2020), *Proposal for a Regulation on asylum and migration management*, COM(2020) 610 final, Article 45(1)(a).

risk being stranded for a long time under obvious confinement conditions at the external borders before being returned, whenever and if at all possible."[19] Indeed, processing large numbers of applications at the border will likely require keeping asylum seekers in closed facilities, with significant costs and organisational challenges.

2 Border procedures: clear, fast and fair?

To prevent a repeat of the mistakes that led to overcrowded and insalubrious EU hotspots, such as Moría, Ylva Johansson, Commissioner for Home Affairs, promised to "translate European values into practical management". According to the Commission, the Pact would deliver "clear, fair and faster border procedures, so that people do not have to wait in limbo" and member states are no longer disproportionally burdened.[20] But can the Pact bring about "clear, fair and faster" procedures? The next section assesses how far the Commission's proposal for a border procedure can attain all three objectives.

2.1 Clarity: clarifying rules and standardising the border procedure

In 2016, the Commission proposed transforming the Asylum Procedures Directive into a Regulation. This change to the instrument's legal nature was confirmed in the Pact, with the Commission adding several amendments to the 2016 text. Their purpose is essentially twofold. They seek to clarify *which procedure applies to whom* and to *standardise border procedures* for irregular arrivals.

First, the Commission hopes to adapt access to asylum in the EU to how migratory flows are made up by establishing a multi-tier system of procedures.[21] While this might contribute to more clarity by harmonising national practices, it risks creating an over-simplified framework for channelling asylum seekers into different procedures. According to the Commission, "the increased proportion of applicants for international protection unlikely to receive protection in the EU leads to an increased administrative burden".[22] This would ultimately result in "delays in granting protection for those in genuine need of protection".[23] To address this, the Commission proposes a multi-tier system, designed to process different types of applicants through different channels. Persons likely to gain protection, young children and their families, or persons with special needs, would be channelled towards the regular asylum procedures. All other applicants would have their claim processed at the border. This compartmentalisation is meant to clarify for whom the border procedure should apply. By turning the Procedures Directive into a Regulation, all provisions would have direct and binding effect on member states. Var-

[19] Public online event by the Hellenic Foundation for European and Foreign Policy (ELIAMEP) and the Hanns-Seidel-Stiftung Athens Office, *"Assessing the New Pact on Migration and Asylum"*, 14.10.2020.

[20] Commission (2020), *"College Meeting: A fresh start on migration – Building confidence and striking a new balance between responsibility and solidarity"* (Press Release), 23 September.

[21] Arrivals to the EU are characterised as 'mixed migratory flows' including "refugees fleeing persecution and conflict, victims of trafficking and people seeking better lives and opportunities", see Mixed Migration Centre, (2018) *"MMC's understanding and use of the term mixed migration"*, p. 1.

[22] Commission (2020), *Proposal for an Asylum Procedures Regulation,* COM(2020) 611 final, p. 1.

[23] Commission (2020), *Proposal for an Asylum Procedures Regulation,* COM(2020) 611 final, p. 2.

ying national practices would thus converge within the proposed system, thereby adding procedural clarity to current practices.

However, this harmonisation effort may increase the potential for false negatives in the initial assessment of asylum claims. The screening system is based on the notion that the common asylum system should prioritise the application of persons "in genuine need of protection" and expedite those with little chance of obtaining protection. **This thinking underestimates the complexity of asylum assessments** and risks giving member states a blank cheque to expedite administrative procedures. By seeking to clarify which procedure applies to whom, the Commission's proposal accentuates an extant problematic trend towards fragmented asylum procedures. In particular, collectively disqualifying groups of applicants from regular asylum procedures threatens to undermine the right to an individual assessment of their reasons for entering the EU irregularly. Hence, the proposals made in the Pact do not so much add clarity to the asylum procedure as produce a system based on an over-simplified categorisation of asylum seekers. The Commission proposal's emphasis on administrative convenience thereby risks subverting the core function of asylum, which is to guarantee protection to those in need.

Second, the new Pact provides for more clarity by standardising the border procedure for the majority of new arrivals. However, the criteria defining how and where the border procedure is to apply are problematic and create legal insecurity for applicants. Hitherto, border procedures were only foreseen for processing applications posed directly at a member state's border or in transit zones (including airports).[24] Yet, the revised Article 41 of the Asylum Procedures Regulation recommends applying the border procedure for any person "who does not fulfil the conditions for entry" to the EU. This includes persons apprehended on EU territory if their entry was unauthorised, persons rescued at sea or – in crisis situations – persons relocated from another member state.[25] In addition, the decision to apply the procedure to all applicants with an EU-average recognition rate below 20% directs substantial numbers of asylum applicants into the border procedure. Besides the three mandatory situations (lack of applicant cooperation, threat to national security, and "low" recognition rates, the border procedure can also apply in six further situations. These pertain to the credibility of the claim, the applicability of the safe third country or safe country of origin provisions or a potential breach of mobility restrictions.[26] If member states use all optional clauses, the lion's share of applicants will be kept in the border processing centre for the entire asylum procedure on the merits of their case, and not just for the initial admissibility check.

"The lion's share of applicants will be kept in border processing centres."

As a result, the border procedure would become *de facto* the standard approach for handling most applicants. As table 1 indicates, applicants from all three major

[24] Article 43(1) of *Procedures Directive 2013/32/EU.*

[25] Article 41(1) of the 2020 *Proposal for an Asylum Procedures Regulation,* COM(2020) 611 final; Art. 41(1)(d) states that "The border procedure may take place: (d) following relocation in accordance with Article [X] of Regulation (EU) No XXX/XXX [Ex Dublin Regulation]", which is likely to pertain to crisis situations.

[26] These are grounds for accelerated procedures, listed in Article 40(1) of the proposed Procedures Regulation. The list includes the 8 grounds foreseen in the 2016 proposal, and the additional 20% recognition rate criterion of the 2020 proposal. This accelerated procedure foresees that decisions on cases likely to be unsuccessful should be taken within two months. See Article 40(2) of the *Proposal for a Regulation establishing a common procedure for international protection in the Union,* COM(2016) 467 final.

nationalities who arrived in Italy and Spain throughout 2020 would qualify for the border procedure, since their average recognition rate is below 20%. Average recognition rates of arrivals in Malta and Greece suggest that the border procedure would not apply. However, considering that the border procedure can also be applied to applicants who passed through a safe third country, the majority of asylum seekers entering Greece from Turkey would equally be subject to the procedure – despite their higher average recognition rates.[27]

Table 1: Nationality of top three arrivals & recognition rates per selected EU member state (2020)

Greece		Italy		Malta		Spain	
Nationality of arrivals	**Share of positive decisions**	**Nationality of arrivals**	**Share of positive decisions**	**Nationality of arrivals**	**Share of positive decisions**	**Nationality of arrivals**	**Share of positive decisions**
Afghanistan	53%	Tunisia	5%	Sudan	42%	Algeria	8%
Syria	91%	Bangladesh	7%	Bangladesh	7%	Morocco	10%
Congo	30%	Côte d'Ivoire	19%	Eritrea	75%	Mali	19%

Note: Data on the nationality of arrivals and corresponding recognition rates include period from January to August 2020. Source: EASO, Eurostat, UNHCR.

The Commission's proposed EU-average recognition rate below 20% as benchmark for the asylum procedure raises a number of questions. It says the average recognition rate criterion is "more objective and easy-to-use for member states, which should help make sure that they actually use the border procedure".[28] Yet, member states' recognition practices diverge substantially. For example, Tunisian nationals had an EU average recognition rate of 10.6% in 2017 and would thus have had their application processed under a border procedure. Their chances of a positive decision during that year were nevertheless substantially higher in Italy and Greece (25%).[29] As this example shows, using an EU average would prevent access to the regular asylum procedure for certain nationalities in an arbitrary way, especially where the variance between recognition rate is very wide.

Since border procedures are conceived as "pre-entry procedures",[30] applicants would not be considered as having legally entered the territory of a member state, despite their physical presence.[31] This "fiction of non-entry" reflects the goal of discouraging undocumented entry and onward movement from the country of first entry to another member state. At the same time, it creates a situation of legal insecurity for asylum applicants. Applying the "fiction of non-entry" to

[27] Asterios Kanavos (2018) *"A critical approach of the concept of Turkey as a safe-third country under the scope of the EU-Turkey "Common Statement" as interpreted by the Greek Council of State and two different Independent Appeal Committees"*, Journal of the European Database of Asylum Law (EDAL), 10 July.

[28] Commission (2020), *Proposal for an Asylum Procedures Regulation,* COM(2020) 611 final, p. 13.

[29] Migration Policy Institute (MPI). *Asylum Recognition Rates in EU/EFTA by Country,* 2018–2017.

[30] Comments by Stephan Mayer, Parliamentary State Secretary to the Federal Minister of the Interior, Building and Community of Germany at the public online event by the Hellenic Foundation for European and Foreign Policy (ELIAMEP) and the Hanns-Seidel-Stiftung Athens Office, *"Assessing the New Pact on Migration and Asylum"*, 14.10.2020.

[31] Article 41(5) of 2020 *Proposal for an Asylum Procedures Regulation* COM(2020) 611 final.

persons apprehended on the territory or rescued at sea or relocated widens the gap between the physical reality and legality of entry considerably. Where legal safeguards cannot be respected during the process, the Commission's proposal foresees an end to the border procedure with applicants moved to the regular asylum procedure on EU territory. If adopted in a formulation giving it direct effect, this safeguard could provide greater protection to applicants seeking judicial remedies against degrading confinement or detention. In practice, however, rulings of the Court of Justice or European Court of Human Rights on degrading reception conditions do not always lead to policy changes.[32]

Overall, the amendments proposed by the Commission theoretically add clarity to the scope and criteria for defining to whom the border procedure applies. Given the broad scope for applying the procedure, the Commission proposal certainly paves the way for standardising the border procedure for the majority of applicants. In practice, **the new setup is likely to result in legal insecurity for asylum applicants at the border** and may reduce the quality of administrative procedures. Moreover, the multiplicity of options for applying the border procedure risks creating uncertainty as to how member states choose to implement it, undermining the goals of harmonisation and greater clarity.

2.2 Speediness: the case for swift processing

The Commission made it clear that two major objectives are being pursued by means of standardising border procedures. First, they should speed up asylum processing. Currently, a regular asylum procedure varies in length significantly across EU member states. In Greece, the average time between an applicant's registration of his or her asylum application and a first instance decision was 10.3 months in 2019.[33] In the same year, asylum procedures in Germany took 6.1 months on average. Faster procedures are commonly considered necessary to make them more humane and efficient, in particular with regard to two issues: the time spent in limbo while awaiting a decision and the returnability of unsuccessful asylum seekers.

Indeed, the second objective behind the Commission's proposal is to increase the rate of returns of unsuccessful applicants. Despite return being a top priority for the EU and most member states, the rate of effective returns has been relatively unchanged since 2015, varying on an EU average between 36% and 45%.[34] While these objectives are reflected in the proposed changes to the Pact, there remain doubts as to their practicability.

The new time limits proposed for the border procedure are tighter than those applicable in a regular asylum procedure. **Shorter deadlines alone, however, are unlikely to increase the pace of asylum procedures** if unaccompanied by a substantial investment in the capacity of competent authorities. After pre-entry screening,

[32] See the report on Greece's immigration detention system by the Council of Europe's anti-torture Committee, Council of Europe (2020), *"Council of Europe's anti-torture Committee calls on Greece to reform its immigration detention system and stop pushbacks"*, Press release, 19 November 2020.

[33] Asylum Information Database (AIDA) (2020), *"Regular Procedure, Greece"*, in "Country Report: Greece", 2019 Update, 23. June, written by the Greek Refugee Council.

[34] ECRE (2019), *Return policy: Desperately seeking evidence and balance. ECRE's assessment of latest developments in EU policy and law on returns*, Policy Note, p. 2.

persons channelled into the border procedure would have a maximum of five days to submit their formal asylum application instead of ten (see Table 2). The overall duration of the border procedure, including appeal, would have to be completed within three months instead of six to 15 months in the regular procedure.

Table 2: Time limits in the Pact on Asylum and Migration

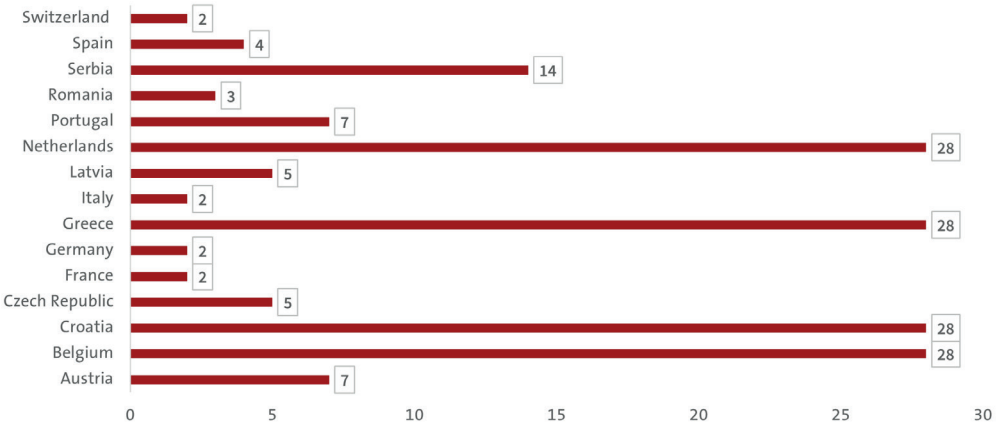
	Asylum and return border procedures		Regular procedure
	Normal times	**Crisis situation**	
Days to lodge application	5 days	Same obligations for applicants. Registration can be delayed by 4 weeks	From 10 days to 1 month during high arrivals
Duration of procedure *(max. extension)*	12 weeks including appeal (from the date of application)	20 weeks (from the date of application)	6 to *15 months*
Days to lodge appeal	Up to 1 week	–	Up to 1 week (inadmissibility or accelerated procedure); 2 weeks to 2 months for regular cases, protection withdrawal and return decisions
Time limit for appeal proceedings	12 weeks (from the date of application)	20 weeks (from the date of application)	From 1 to 9 months (first level of appeal)
Max period of detention	Max. 6 months (12 weeks for the asylum procedure and 12 weeks for return procedure). Up from 4 weeks under the 2013 Procedures Directive	20 weeks (from the date of application)	Max. 18 months (recast Return directive)

Sources: European Commission, New Pact proposals COM(2020) 611 final and COM(2020) 613 final

The short time limits proposed by the Commission are compatible with existing legislation of the member states (see figure 1). According to the European Asylum Support Office (EASO), deadlines for first instance decision are already set to be under a week in ten of the 15 countries that operate border procedures, and this deadline does not exceed a month in any of them. In Belgium and Greece, procedure and appeal are supposed to be concluded within 28 days.[35]

[35] EASO (2020), *"Border Procedures for Asylum Applications in EU+ Countries"*, p. 12–13.

Figure 1: Time limits for a decision in border procedures by EU+ country (in days)



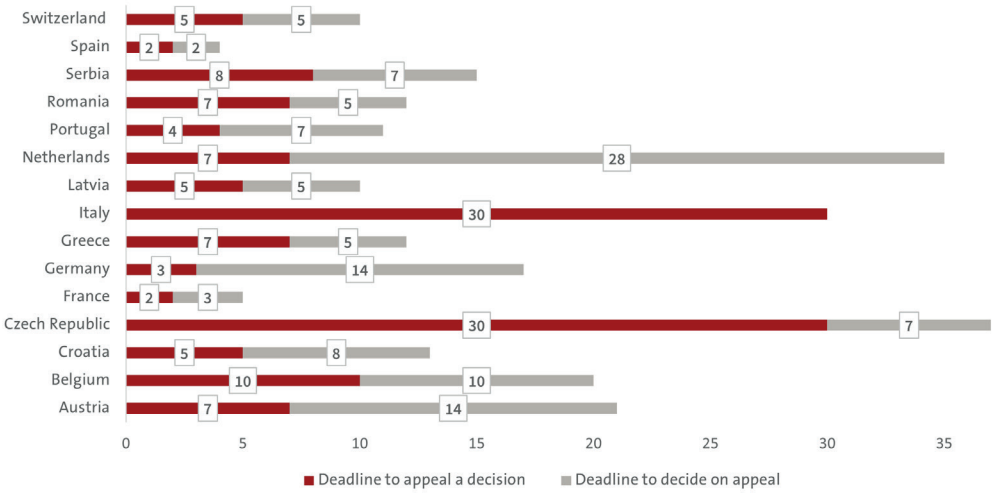
Source: EASO (2020), "Border Procedures for Asylum applications in EU+ Countries", p.13.

In practice, however, the feasibility of the tight deadlines for issuing any asylum decision raises doubts. Greece and Cyprus, which are likely to bear the bulk of the work, have been struggling to shorten their asylum procedures. In both countries, the average time to process pending cases in 2019 varied from six months to more than a year.[36] In Greece the length of the first instance border procedure exceeds seven months.[37] Greece and Cyprus are also the two EU member states most heavily reliant upon temporary staff among the workforce in their competent authorities, leading to reduced planning capabilities and stability.[38] To respect the maximum duration of three months, member states on the external borders would thus have to significantly beef up their asylum processing staff in a more sustainable manner. Without such investments, the proposed asylum border procedure is bound to disappoint expectations and might lead to a backlog at the judicial level. Investment in situ is essential if one is to address the overall issue of applicants being stuck in limbo. Long waiting times for an asylum decision are only one factor feeding uncertainty. Inadequate access to information on the asylum procedure and its progress is just as crucial.

The Commission's shortened deadlines for issuing an appeal are equally unlikely to have any substantial impact on the duration of procedures. Among those member states already operating a border procedure, **the proposal largely solidifies existing arrangements.** Under it, applicants would have only one week to appeal against negative asylum decisions, compared to two weeks in the regular procedure. As data from EASO shows, deadlines for lodging an appeal and a respective decision vary in countries that are applying the border procedure (see figure 2). Yet, most of them already limit deadlines to one week or less. Introducing the time limits set out in the new Pact would thus only have a significant impact in Belgium, the Czech Republic and Italy.

[36] AIDA (2019), *"Asylum authorities. An overview of internal structures and available resources"*, report published on 30 June.
[37] Nora Markard (2020) *"Paper doesn't blush: The Commission presents a plan that does nothing to address the realities at the EU borders"*, 12 October.
[38] AIDA (2019), *"Asylum authorities. An overview of internal structures and available resources"*, report published on 30 June.

Figure 2: Time limits for appeals in border procedures by EU+ country (in days)



Source: EASO (2020), "Border Procedures for Asylum applications in EU+ Countries", p.15.

Regarding the Commission's ambition of increasing the returnability of unsuccessful applicants, shorter deadlines help address only part of the problem. In fact, **the Pact falls short of delivering answers to some of the more pressing obstacles to return.**

It is generally assumed that the less time a person spends in the host country and the more isolated that person is from society, the easier it is to implement voluntary return or deport people back to third countries. To that end, the new Pact proposes issuing a negative asylum decision at the same time as the relevant return decision, rather than issuing them subsequently as now. Both decisions would then be examined jointly in court during appeal so that returns could be enforced as soon as judicial remedies were exhausted. To increase the rate of return, rejected applicants would remain confined in border processing centres with no access to EU territory until the expiration of the 12-week deadline for return. If necessary, they could be kept or placed in specific detention facilities until the deadline expires.[39]

However, shortening deadlines and streamlining the return process does little to address the political obstacles. Most saliently put forward by the Commission as a reason for unsuccessful returns is the lack of cooperation on the part of countries of origin or transit. Just as significant, however, are administrative hurdles within member states.[40] Both aspects remain unaddressed by the Pact. Whether the EU has any new trump cards to boost return and readmission cooperation with third countries remains unclear. Similarly, the envisaged return sponsorship scheme has given rise to much perplexity as to how effective it might be and what the potential consequences would be for the individuals concerned. Potentially, the scheme could mean detention at the border for up to eight months. Upon failing to return an unsuccessful applicant within this deadline, relocation to the country in charge of return would be compulsory. The return sponsorship scheme risks resulting in "second class" relocations. While migrants would likewise be transferred from the country of first entry to another member state, they would be barred from receiving the rights and entitlements that come with a regular relocation.

[39] Article 41a (5) to (8) of the *Proposal for a Common Procedures Regulation*, COM(2020) 611 final.
[40] Victoria Rietig and Marie Lou Günnewig (2020), *"Deutsche Rückkehrpolitik und Abschiebungen, Zehn Wege aus der Dauerkrise"*. DGAP Analyse Nr. 3, 26. May.

All in all, the Commission has not shied away from proposing explicit deadlines and time limits, as well as an ambitious redesign of the relationship between asylum procedures and return. Theoretically, these proposals may help increase overall processing speeds, particularly through the introduction of short asylum and return border procedures in the countries that do not operate them. But **the crux of more efficient procedures remains member state compliance with deadlines and safeguards.** Equally, ensuring that faster procedures do not come at the cost of fundamental rights guarantees depends on the quality of national arrangements. In any event, speeding up procedures at the EU's external borders raises substantial issues of fairness.

2.3 Can the Pact's border processing model be "fair"?

The fairness of asylum procedures is potentially the most important indicator of an asylum system's quality. By "fair", we mean that the border procedure should respect the fundamental rights and dignity of asylum-seekers, as guaranteed under the EU Charter of Fundamental Rights, the European Convention on Human Rights, the 1951 Geneva Convention and other relevant international treaties. A "fair" border procedure should guarantee in particular the right to apply for asylum,[41] protection against refoulement[42] and against human and degrading treatment. In addition, all rights pertaining to good administration and due process, the rights of the child and of persons with special needs are central to fair procedures.[43] The border procedure proposed by the Commission entails a substantial risk of breaching these fundamental rights. Most problematic in that regard are the standardisation of confining applicants in closed facilities, the remote location of such facilities and the limits on procedural guarantees. While the Pact does put forward some remedies, these remain too vague to mitigate the proposal's negative impact on the fairness of asylum procedures.

A major detriment to fairness is that **the proposed border procedures imply automatic confinement at border or transit processing centres, which may amount to detention.** Within the limits set by human rights law, detaining asylum seekers and refugees is allowed under EU law. However, as detention constitutes a restriction of the fundamental right to liberty, it must only be used as a last resort, especially concerning vulnerable persons and children.[44] Hence, the Reception Conditions Directive precludes detaining a person for the sole reason that he or she is an applicant for international protection.[45] EU law encourages member states to use detention with restraint and to favour alternative measures, even in the context of return procedures.[46] However, a recent trend towards showing greater lenience towards detention practices is maintained by the Pact's proposed

[41] Article 18 of the *EU Charter of Fundamental Rights*.
[42] Article 33 of the 1951 *Geneva Convention Relating to the Status of Refugees* and Article 3 of the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 3 of the *European Convention on Human Rights*.
[43] EU Agency for Fundamental Rights and Council of Europe (2020), *"Fundamental rights of refugees, asylum applicants and migrants at the European borders"*
[44] Article 11 of the *Reception Conditions Directive* 2013/33/EU.
[45] Łukasz Bojarski and Katrin Wladasch (eds.) (2018) *"The Charter and the Detention of Migrants and Asylum Seekers"* in Judging the Charter, "The Charter in judicial practise with a special focus on the case of protection of refugees and asylum seekers" *(website)*.
[46] Marie Walter-Franke (2017), *"Asylum detention in Europe: State of play and ways forward"*, Jacques Delors Institute, Policy Paper No. 195, 18 May.

amendments to the Reception Conditions Directive, which would increase the potential for detention.[47] Member states would, for example, be allowed to allocate asylum seekers to "accommodations" including movement restrictions, without providing reasoned decisions. This would undermine the rights to liberty and good administration.[48]

Current practices in member states operating a border procedure confirm this development and should hence be viewed with caution when serving as benchmarks for the Commission proposal. The European Court of Justice and the European Court of Human Rights have repeatedly condemned member states for violations of fundamental rights in the context of border procedures and access to asylum. Such cases involved inhumane reception conditions in the Greek hotspots, with lack of access to essential health care for gravely ill or highly pregnant individuals.[49] A prominent case recently condemned the prolonged unlawful detention of families in Hungarian transit zones, which then had to be dismantled.[50] Further cases involve pushbacks by the Polish[51] and French[52] border police. A recent report by the Council of Europe's anti-torture committee also called out once again the "inhuman and degrading treatment" in Greek detention facilities and accused the authorities of conducting illegal pushbacks.[53]

Advocates of restrictions on freedom and of detention argue that they help prevent secondary movement and act as a deterrent for persons without well-founded asylum claims.[54] This is debatable. The effectiveness of coercion and deterrence is the subject of much controversy among migration scholars due to the intertwining of factors impacting migration motives, destination and routes. Yet, for the lion's share of applicants, including unaccompanied minors as well as children under the age of 12 and their family members,[55] the border procedure proposed by the Commission will mean a ban on entry to EU territory. In turn, this would mean that they would be confined in closed centres during the entire asylum process and a potential return process.[56]

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47 A new detention ground is proposed in case an applicant breaches geographical restrictions on his or her freedom of movement, Article 8(3)(c) of the *Proposal for a recast Reception Conditions Directive,* COM(2016) 465 final.

48 ECRE (2018), *"Taking Liberties: Detention and Asylum Law Reform. ECRE's concerns about the restrictions on asylum seekers' liberty in the reform of the Common European Asylum System and in Practice",* policy note No. 14, p. 2.

49 See an overview of cases on the website Equal Rights beyond borders, *"Litigation in Greece".*

50 Judgment of the CJEU in Case C–924/19, *FMS and Others vs Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendeszeti Főigazgatóság,* 14 May 2020, ECLI:EU:C:2020:367. See commentary of the case by Galina Cornelisse (2020), *"Borders, Procedures and Rights at Röszke: Reflections on Case C-924/19 (PPU)",* EDAL, April 2020.

51 Judgment of the CJEU in Joined Cases 40503/17, 42902/17 and 43643/17, *M.K. and Others vs Poland,* 23 July 2020, not yet published.

52 Judgment of the French Conseil d'Etat in Case No. 440756, *Applicant (Central African Republic),* 8 July 2020, ECLI:FR:CECHS:2020:440756.20200708.

53 Council of Europe (2020), *"Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)".*

54 Beirens, Hanne (2020), *"Chasing efficiency: Can operational changes fix European asylum systems?",* MPI and Bertelsmann Stiftung, p. 36.

55 Article 40(5) of the 2016 *Proposal for an Asylum Procedures Regulation,* COM(2016) 467 final.

56 Article 40a of the 2020 *Proposal for an Asylum Procedures Regulation,* COM(2020) 611 final.

The standardisation of confinement and detention via the border procedure has substantially negative implications for applicants' enjoyment of fundamental rights. Experience with the border procedure in transit zones and the Greek hotspots substantiates the view that lower safeguards profoundly affect the fairness of asylum processing. In remote or closed accommodation, EU standards on reception conditions are rarely respected.[57] While the abhorrent conditions of residence in the Greek hotspots are notorious, many member states are unable or unwilling to provide suitable accommodation, with reports of overcrowding, carceral conditions, and lack of access to elementary healthcare.[58] Such environments are not only unfit for persons suffering from trauma and for children, but also have grave consequences for the physical and mental health of all residents. As underlined by the European Council on Refugees and Exiles (ECRE), detention thus damages the quality of the asylum process by undermining asylum seekers' "trust in the process and [their] ability to disclose information and articulate fears and often traumatic experiences to substantiate their claim".[59]

The remoteness of processing centres, such as those on islands in the Aegean, is also a practical challenge for national asylum authorities, putting the quality of administrative proceedings under stress. Applicants are often inadequately prepared through lack of access to information from independent actors (NGOs or the UNHCR) or because they cannot obtain proper legal assistance, representation or interpretation services. This is particularly problematic considering the shortened deadlines. The coronavirus pandemic underlined these problems, which were amplified when hotspots were put under lockdown while time limits for registration, application and appeals remained in place.

Further, the new Pact also includes elements that will reduce procedural guarantees. Particularly problematic is the limitation of legal remedies to one level of appeal,[60] conflating the review of the asylum case, the return decision, and the right to remain into a single judicial process. **Another grave issue is the introduction of new limitations on the right to remain during appeal** for persons from countries with low recognition rates.[61] The border return procedure also foresees the detention of persons who had not been detained during their asylum procedure, if there is a perceived risk of absconding.[62]

The new Pact does announce a set of tools to tackle some of these problems, though these provisions remain rather vague and require further clarification. Most notably, a monitoring mechanism is planned to oversee "the respect for fundamental rights in relation to the screening, as well as the respect of the applica-

[57] Maybritt Jill Alpes, Sevda Tunaboylu, Ilse van Liempt, (2017), *"Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece Over Access to Asylum",* Robert Schuman Centre for Advanced Studies, Policy Brief, Issue 2017/29, November 2017.

[58] Gruša Matevžič,(2019), *"Crossing a Red Line: How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry",* Red Line Project, Hungarian Helsinki Committee, Global Detention Project, Greek Council for Refugees, Italian Council for Refugees and Foundation for Access to Rights, p. 5–6.

[59] ECRE (2018), *"Taking Liberties: Detention and Asylum Law Reform. ECRE's concerns about the restrictions on asylum seekers' liberty in the reform of the Common European Asylum System and in Practice",* policy note No. 14, p. 3.

[60] Article 53(9) of the 2020 *Proposal for an Asylum Procedures Regulation,* COM(2020) 611 final.

[61] Article 54(3) to (7) of the 2020 *Proposal for an Asylum Procedures Regulation,* COM(2020) 611 final.

[62] Article 41a(6) of the 2020 *Proposal for an Asylum Procedures Regulation,* COM(2020) 611 final.

ble national rules in the case of detention and compliance with the principle of non-refoulement".[63] As for its specific design, the Pact merely foresees an "important role" for the Union's Fundamental Rights Agency (FRA), which should support member states in developing an independent monitoring system.

Additional benchmarks are also adopted to protect unaccompanied minors and children below the age of 12 and their families, who are exempted from the border procedure unless they represent a risk to national security and public order.[64] Member states are advised to discontinue border procedures if they cannot provide adequate support to people with special needs, for medical reasons or if they are unable to comply with the guarantees applying to detention.[65] These crucial benchmarks must at all cost survive the forthcoming negotiations.

Overall, existing practices and the stepped-up procedures foreseen in the Pact make it hard to believe that the proposed border procedure will live up to the promise of fairness. In particular the standardisation of detention and the remoteness of processing facilities militate against a fair procedure.

3 Conclusion and recommendations

In its proposal for a new Pact on Asylum and Migration, the Commission has promised to deliver "clear, fair and faster" procedures at the border, framing them as a remedy against overcrowded and insalubrious refugee camps. The new Pact assigns a pivotal role to the border procedure. Filtering out applicants considered unlikely to get protection and containing them in border processing centres should effectively limit the number of persons eligible for relocation. However, the proposal for an asylum-seeker border procedure risks reproducing the conditions that have led to the overcrowding and degeneration of Moria and other camps.

Our analysis shows that the proposed reform of the border procedure emphasises clarity and speed but undermines fairness. The amendments to the Asylum Procedures Regulation proposed in September 2020 theoretically provide greater clarity on how and when the border procedure can – or should – be applied. Yet, standardising the border procedure comes with an over-simplified and problematic categorisation between asylum seekers. Tighter deadlines for lodging an asylum application and appeal decision can help speed up asylum procedures. However, these amendments equally pose practical difficulties. Critically, however, they profoundly undermine the fairness of asylum procedures. The standardising of the confinement and detention of asylum applicants at the EU's external borders unduly restricts asylum seekers' fundamental rights and makes them more vulnerable to coercive practices. Moreover, the number of cases in which the border procedure is likely to apply suggests having to build (closed) facilities large enough to adequately accommodate asylum seekers. While such camps might be better managed and equipped in future, they essentially amount to more of the "hotspot-approach" that brought us Moria.

"The proposed border procedure emphasises clarity and speed but undermines fairness."

[63] Commission (2020), *Border Screening Proposal*, COM(2020) 612 final, p. 3.
[64] Article 41(5) of the 2020 *Proposal for an Asylum Procedures Regulation*, COM(2020) 611 final.
[65] Article 41(9) of the 2020 *Proposal for an Asylum Procedures Regulation*, COM(2020) 611 final.

Given inevitable trade-offs between the three objectives of clarity, speed and fairness, it will be necessary to re-calibrate these priorities in the forthcoming negotiations among member states and with the European Parliament. **Rather than bureaucratic efficiency (i.e. clarity & speed), ensuring access to a fair asylum procedure should be the priority.** Otherwise, member states will end up in a position where they have to choose between respecting international refugee and human rights law or complying with the Pact's asylum rules. Given the latest reports about illegal pushbacks, it is all the more important to reinstate respect for fundamental rights as the prime parameter at EU external borders.

The objective of Germany's EU Council Presidency is to reach a political understanding on the border procedure at the last Justice and Home Affairs Council meeting in December 2020.[66] However, a compromise without any adjustment to some of the procedure's detailed provisions would create a problematic basis for the Pact's future. To create a more sustainable balance between its three objectives, the forthcoming negotiations among EU member states and with the European Parliament should focus on making the following corrections to the proposal:

3.1 Clarity: re-focussing on exemptions

Two amendments can help make sure that the border procedure provisions continue to provide more clarity for its application, while increasing fairness:

First, emphasis should shift from the question of *who does qualify* for the border procedure to *who must be exempted* from the procedure. In its current form, the Commission proposal exempts unaccompanied minors and children under the age of 12 with their family members from undergoing the border procedure, unless they pose a security concern.[67] The exemption of minors and their family should be made unconditional by deleting the age limit and security exception. Otherwise, the proposal risks breaching the obligations of member states under the Convention on the Rights of the Child. Persons with special procedural needs should equally be exempted from the border procedure. Currently, member states are advised to discontinue border procedures if they cannot provide adequate support to persons with special needs, for medical reasons or if they are unable to comply with the guarantees applying to detention.[68] Yet, precluding vulnerable people only in cases where the "necessary support cannot be provided" remains too vague to guarantee the necessary procedural safeguards.

Second, the blanket application of EU-average recognition rates as criteria for determining whether or not an asylum-seeker should undergo the border procedure needs some adjustment. Given the divergence among recognition rates among national asylum systems, an EU-wide average may be pragmatic but hardly reliable. Instead, common country of origin information should serve as a primary source to determine eligibility for the border procedure along with recognition

[66] Comments by Stephan Mayer, Parliamentary State Secretary to the Federal Minister of the Interior, Building and Community of Germany at the public online event by the Hellenic Foundation for European and Foreign Policy (ELIAMEP) and the Hanns-Seidel-Stiftung Athens Office, *"Assessing the New Pact on Migration and Asylum"*, 14.10.2020.
[67] Article 41(5) of the 2020 *Proposal for an Asylum Procedures Regulation*, COM(2020) 611 final.
[68] Article 41(9) of the 2020 *Proposal for an Asylum Procedures Regulation*, COM(2020) 611 final.

rates. The development of common country of origin information will be an essential responsibility of the European Agency for Asylum (EUAA), which is to succeed EASO once relevant legislation is passed. Such wide-ranging harmonisation is preferable to arbitrary thresholds. To ensure the quality of the EUAA's reports, independent accountability and transparency mechanisms are necessary. These could involve publicly available periodic reviews by an auditing body of experts accountable to the European Parliament. This would provide a more nuanced response to mixed migratory flows while helping to harmonise asylum processing.

3.2 Speed: matching faster procedures with higher accountability

Shorter deadlines to issue asylum, appeal and return decisions put pressure on national authorities. **The Commission proposal would entrust member states on the external borders with the considerable responsibilities** of performing pre-entry screening, channelling applications towards the right procedure, and handling border procedures. The EU must therefore be able to provide assistance where needed. Operational support by EUAA should be available throughout all stages of the asylum procedure. To ensure that tighter deadlines can be met, EUAA officers would have to perform, on behalf of any member state:

- provision of information on the asylum procedure and procedural rights,
- identification and registration of applicants, and the coordination of timely security and health checks as part of the pre-screening, in cooperation with other EU Agencies
- vulnerability assessments prior to the definition of the appropriate procedure
- admissibility interviews, including the provision of interpretation services
- examining asylum applications and preparing a first instance decision where requested by the host member state.

Yet, EASO's past involvement in the Greek "hotspots" has raised issues of competence and procedural safeguards, compromising the fairness of asylum procedures.[69] Ensuring the transparency and accountability of the agency's involvement in asylum processing is therefore pivotal for guaranteeing that procedural rights are respected in the proposed border procedure. To that end, **it is crucial to pass the proposed Regulation transforming EASO into the new European Union Agency for Asylum (EUAA)** prior to any future deployment of EUAA officers. Training officers posted by other member states under national asylum legislation is equally crucial. EUAA involvement should genuinely support the national system by providing national case workers with documentation of EUAA's work in the relevant language and by ensuring the processing is legally flawless. Otherwise, the absence of high-quality decisions can lead to a backlog at the judicial level, shifting pressure back onto the national judiciary. Such a backlog would in turn make it impossible to respect the three-month deadline. EUAA involvement should also help ensure a humane response on the ground. This includes guaranteeing adequate staffing of reception facilities, practical improvements in communications between applicants and authorities, as well as, crucially, ensuring effective access to counselling and legal representation.

[69] See ECRE (2016), *"The implementation of the hotspots in Italy and Greece – A study"*; or ECCHR (2019), *"EASO's involvement in Greek Hotspots exceeds the agency's competence and disregards fundamental rights"*, April 2019.

3.3 Fairness: the prime parameter

Increasing the fairness of border procedures requires adjusting reception conditions as well as procedural safeguards in the Commission's proposal.

Processing asylum claims in closed facilities rests upon the assumption that such procedures are fast and easy. Yet, this is not necessarily the case. So, asylum applicants must not be restricted in their access to legal assistance and representation, which can be difficult to provide in closed and remote facilities. Instead of automatically detaining asylum applicants, the border procedure should uphold the principle that **detention should only be used as a measure of last resort.** Alternatives to detention, including geographical restrictions, should be preferred as was provided for in the 2013 Reception Conditions Directive and its 2016 recast. Improving the quality of reception standards also requires providing an infrastructure that guarantees applicants the right to medical treatments, adequate housing and decent sanitation.

To guarantee all rights pertaining to due process and protection against refoulement, three corrections should be made to the procedural standards of the proposed border procedure:

- First, **the right to remain during an appeal must be guaranteed to all applicants.** In particular, asylum-seekers from countries with an EU-average recognition rate of less than 20% must equally benefit from an automatic suspensive effect. The corresponding paragraph in the Commission proposal should be repealed. Otherwise, the border procedure could create the pre-conditions for unlawful returns amounting to refoulement.

- Second, tipping the balance towards fairer border procedures requires making concessions elsewhere. In that regard, **the deadline for lodging an asylum claim should be extended from five to eight days** in order to allow applicants to adequately prepare their case. For the same reason, the deadline for lodging an appeal should be extended from seven to 14 days.

- Third, **asylum-seekers in the border procedure must be considered as having legally entered the territory of an EU member state.** The current provision allowing for a "fiction of non-entry" should be adjusted accordingly. Considering that asylum-seekers can spend up to six months in the border procedure, not acknowledging their legal presence would pose a severe curtailment of their rights.

Finally, the provisions for an independent monitoring mechanism should be specified and extended to also oversee the asylum border procedure. By exclusively monitoring pre-entry screening, the mechanism as now envisaged would fall short of covering all stages of the asylum process and hardly enhance the fairness of border procedures. Such a mechanism requires giving the competent agency a strong mandate and corresponding capacities. Clarification is also needed on the scope and powers attributed to the Fundamental Rights Agency (FRA) in overseeing whether member states provide effective access to legal information, assistance and representation in line with the Asylum Procedures Regulation and the Reception Condition Directive. In addition, the monitoring mechanism could be co-organised by EASO and the European Parliament with a view to increasing the number of dedicated personnel and resources and strengthening democratic oversight.

In conclusion, the new Pact on Asylum and Migration and its provision for an asylum border procedure fails to live up to the promise of "no more Morias". We recognise that, ultimately, implementation at the national level remains the decisive factor on whether border processing can be humane and respectful of fundamental rights. However, **the EU must ensure that a reformed CEAS itself is respectful of the rights of applicants and proves practicable for countries of first entry.** Fragmenting the asylum procedure for the sake of bureaucratic efficiency might be counterproductive on both accounts. It jeopardises the individual right to asylum by creating a "second class" procedure and increases the administrative burden for member states at the EU's external borders. To ensure that the new Pact can politically and practically deliver a truly "fresh start", the forthcoming negotiations must correct the current imbalance between clarity, speed and fairness. Otherwise, this European house will be built on shaky ground.

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