

Grand finale or just another episode: Agreeing on the EU's New Pact on Migration and Asylum

In September 2020, the European Commission presented the European Union's New Pact on Migration and Asylum. The pact is a wide-ranging set of new or revised regulations, directives and informal action plans. It covers aspects of asylum and protection, borders, irregular movements and returns, as well as legal migration and labour mobility. It was at the time the new Commission's attempt to revive negotiations around a reform of the EU's migration and asylum policy after the previous commission's term had ended in 2019 without agreement.

So far, however, only a few elements of the pact have been agreed upon and implemented. The years since 2020 have seen new challenges, above all Russia's invasion of Ukraine and the ensuing displacement of Ukrainians to the EU and the effects of the Covid-19 pandemic on economies, labour markets and migration. The EU's handling of migration also reached new lows, as seen in the number of lives lost at its external borders, the catastrophic humanitarian conditions for migrants on Greek islands, a stand-off with Belarus over the alleged instrumentalization of asylum seekers, and mounting evidence of systematic pushbacks implicating the European Border and Coast Guard Agency (Frontex).

After bitter wrangling in the Council of the European Union, member states have adopted negotiating positions on the pact's core legislative components: the Screening Regulation, the Asylum and Migration Management Regulation, the Asylum Procedures Regulation and the Crisis and Force Majeure Regulation. At the time of writing, these four instruments were undergoing trilogue

negotiations between the council and the European Parliament. The clock is ticking as European elections are due in June 2024 and the European Commission's term will end then. Another failure to agree on a reform by that deadline would be widely seen as evidence of systemic barriers to European integration in this area.

The pact is a vast and complex package of legislative and non-legislative proposals pertaining to a wide range of migration issues. This paper focuses on its elements related to asylum, protection and borders; that is, those commonly known as the Common European Asylum Policy (CEAS). As the EU worked towards its central goal of internal free movement, common rules for migration from outside the EU became more important. The CEAS therefore harmonized standards and procedures for receiving asylum seekers and processing applications, as well as creating rules to determine which member state is responsible for an asylum case (known as the Dublin system). The implementation of the CEAS has long been beset by problems, however: asylum capacity is highly uneven across the EU; reception conditions and recognition rates vary widely between member states; and countries at the external borders consider themselves overburdened by irregular arrivals while those in the EU's interior such as Germany receive asylum seekers and refugees via so-called secondary movements. Meanwhile, corrective mechanisms via the Dublin system or internal relocation schemes have not worked well.

Furthermore, member states have lost trust that they are 'all in this together' and that their peers are genuinely trying to make the system work for the EU as a whole. The

situation has degenerated into a sorry spectacle of member states offloading the problem elsewhere (either in the EU or in third countries), flaunting EU and international rules and engaging in a race to the bottom regarding the rights and treatment of people in search of protection.

At risk of oversimplifying the intricate legislative proposals, the pact boils down to 1) a focus on irregular arrivals at the EU's external borders and accelerated processing of asylum applications and returns through screening and border procedures and 2) a new approach to solidarity and responsibility sharing among member states while keeping the Dublin rules largely intact. Civil society and experts fear that the new rules will weaken protection standards and procedural guarantees for asylum seekers and refugees, and lead to more overcrowded camps and inhumane living conditions for asylum seekers at the external borders. Furthermore, the pact does little to address the structural imbalances in the system or to incentivize countries of first arrival to comply with the rules.

Germany's position

Germany receives by far the largest number of asylum applications in the EU, though smaller member states process many more per capita of their own population. Its interest in a functioning EU asylum system lies in the promise of greater responsibility sharing in the realm of protection and of reduced irregular migration and secondary movements to Germany. The coalition agreement of the government sets out goals for a fundamental reform of the CEAS: a fair distribution of responsibility among member states, better standards for asylum procedures and integration, reducing irregular migration and deaths at the border, and ending illegal pushbacks. The coalition agreement also emphasizes cooperation with third countries. Germany's positions on the pact carry significant weight, given its role as a 'big player' on migration in Europe and its voting weight in the council.

In a leaked April 2023 internal position paper, the Ministry of the Interior affirmed Germany's overriding interest in finalizing the pact before the end of the European Commission's term. The paper indicated three priorities for the negotiations on the outstanding legislative proposals: compulsory border procedures for specific groups, reformed rules for the allocation of responsibility among member states in combination with measures to reduce secondary movements, and a sustainable and binding solidarity mechanism. In addition, the paper was sceptical of the commission's proposal to subsume 'instrumentalization' in the Crisis and Force Majeure Regulation. During council negotiations in June and October 2023, Germany agreed to compromise solutions on all legislative proposals, including the Crisis and Force

Majeure Regulation despite having concerns about the wide margin it allows for derogations.

What may have been a more liberal starting point has thus gradually shifted towards greater restrictiveness as Germany has come under pressure from other member states to unblock negotiations. The desire to demonstrate that the EU is capable of agreement has won out. Changes in the political context may have also played a role. When the pact was first presented in 2020, most analyses of the migration debate in the EU identified several camps: destination countries in western and northern Europe such as France, Germany and Sweden that seek to reduce asylum applications and secondary movements but are open to solidarity mechanisms such as relocation, the Mediterranean Five (Cyprus, Greece, Italy, Malta, Spain) that feel disadvantaged by the Dublin rules and call for greater solidarity from the rest of the EU and the Visegrád countries (Czechia, Hungary, Poland, Slovakia) that reject any further standard setting in migration and asylum at the EU level or any form of mandatory solidarity. Since then, however, more governments have come under pressure from right-wing, anti-migration rhetoric and as far-right parties have made large electoral gains. Germany has become increasingly isolated in pursuing a more moderate approach that balances protection and control.

In Germany, the negotiations on the pact have also revealed a deepening rift within the governing coalition, especially between the Greens and the Free Democrats. While the former objected to reduced protection standards and argued that the proposals would not solve the system's inherent faults, the latter prioritized an overall agreement, also with a view to protecting free movement within the Schengen zone. Furthermore, conservative, populist and far-right actors have increasingly dominated the discourse on migration and asylum. The opposition has put irregular migration at the top of its agenda, with an eye on votes in regional elections. At the same time, shortfalls in administrative capacity and social infrastructure and services have become more acute as refugee numbers rose, including with the arrival of more than 1 million Ukrainians.

Policy recommendations

At this late stage in the negotiations, the scope for substantive changes to the legislative texts of the pact is limited. The EU's course seems firmly set on greater restrictiveness. However, the EU's common asylum policy is an important litmus test for the strength of the rule of law and respect for refugee law and human rights in Europe. Bearing this in mind, the EU decision-makers should take into account the following points in particular:

- Accepting that border procedures are likely inevitable, efforts should focus on minimizing their most harmful effects. This includes ensuring access to

independent legal aid and legal remedies for all applicants, as well as special safeguards for families, children, unaccompanied minors and others in conditions of vulnerability. Overcrowded camps and protracted stays in reception facilities at the external borders must be avoided at all costs.

- As they bargain over details, negotiators must not lose sight of the workability of the overall system and the realities of implementation. The pact risks creating a thicket of rules that will be difficult to implement and oversee. In particular, derogations permitted under instrumentalization, crisis or force majeure modes should be narrowly defined to prevent a proliferation of parallel systems, which would lead to greater disintegration and unevenness rather than to harmonization and common standards.
- After several years of great reluctance by the European Commission to so much as reprimand member states for their violations, the new system must encompass independent, genuine and continuous monitoring mechanisms and sanctions for non-compliance, in particular concerning pushbacks and rescue-at-sea obligations.
- Lessons should be learned from the recent application of the temporary protection directive to Ukrainian refugees, with a view to keeping temporary protection in the EU's protection toolbox.
- Restrictions on accessing asylum should be balanced by a significant expansion of resettlement quotas, including by implementing the Union Resettlement Framework.

Whether or not the EU will adopt the pact in a nail-biting season finale is anyone's guess at this point. If it does, fundamental questions around implementation capacity, political will and incentive structures persist. The fact that some of the Council's negotiating positions were reached not by unanimity as per past practice but by qualified majority voting against the vetoes of Hungary and Poland is telling in this regard and does not bode well for future compliance with the rules. The effects of the reform will take time to materialize and will not immediately alleviate the strain currently felt by the asylum system in Germany and elsewhere.

In addressing migration, EU policymakers have tended to focus on factors that are beyond their control, or at least very difficult to influence in the short term: number of arrivals, root causes of migration or the willingness of countries of origin and transit to cooperate. This has led to disappointment among voters when measures have not delivered quick results and has played into the hands of the far right, for which no degree of restriction will ever be enough. While questions of root causes and cooperation with third countries are important, policymakers should pay more attention to measures that would reduce the permanent sense of crisis that has gripped the EU when it comes to migration. This includes not only reinforcing asylum systems and reception capacities, but also

investment in social infrastructure, public services and housing, which would benefit the population as a whole and bolster the capacities of countries and communities to adequately receive newcomers. Those already in the EU – including many with refugee status – need genuine opportunities and support to integrate in their communities and labour markets. Vicious anti-migrant rhetoric, by contrast, will only undermine public confidence in asylum and migration policies, endanger social cohesion and lead to outright violence.

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