

# Unpacking the Pact: Winners and Losers of the New EU Migration Deal

Article by Catherine Woollard

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A long-negotiated Council agreement to redesign the EU asylum system offers few reasons to celebrate. Heavily reliant on “safe third countries” and flexible notions of compulsory solidarity, the deal reduces protection standards and represents a victory for immigration hardliners.

On 8 June, EU member states reached an agreement on the Pact on Migration and Asylum to reform key pillars of the EU asylum system. At the heart of the discussion since the beginning of 2023, when Sweden took over the rotating presidency of the Council of the EU, the agreement is not the final word. The Council will first have to negotiate with the Parliament in order to reach a common position which will then become law. However, it is likely that the Parliament will concede on most points, and that the reforms the Council agreed on will be adopted.

The agreement reduces protection standards in the EU. Whether it will meet its other objectives of deterring arrivals, enabling rapid returns and reducing so-called secondary movements (from the country of arrival towards other EU countries) remains to be seen.

Hungary and Poland opposed the deal, primarily because they don't believe that the EU should have an asylum system. Bulgaria, Malta, Lithuania and Slovakia abstained, each for different reasons.

## Preserving dysfunctions

EU member states have agreed on a labyrinth of procedural rules, byzantine in their complexity and based on an attempt to limit the number of people who are granted international protection in Europe. These rules, however, fail to address the main dysfunction of the system, the Dublin rules, which remain largely intact. An underlying objective is to further transfer responsibility to non-EU countries, even though over 80 per cent of the world's refugees are hosted in low- and middle-income countries outside the EU. The targets are the countries of the Western Balkans and North Africa, through the use of legal tools such as the “safe third country” concept. Yet the reforms do nothing to increase the likelihood that these countries will agree to host people returned from the EU.

Within Europe, the terms of the deal would increase the focus on external borders. Overall, the reforms go in the opposite direction to the successful response to the displacement of Ukrainians citizens, which demonstrated the value of light procedures, rapid access to a protection status and work permits, freedom of movement, and a fairer distribution of responsibility across Europe.

## Greek islands as a model?

On the contrary, the Council's agreement includes expanded use of border procedures, inadmissibility procedures, and accelerated procedures, and deploys legal concepts to deflect responsibility to third countries. As a result, more people would risk being stuck at the borders in situations akin to the Greek

islands model.

The use of border procedure would become mandatory for people from countries for which the recognition rate is 20 per cent or below, ie. that the EU perceives as safer [editor's note: so-called "border procedures" require that all asylum requests are processed at the border in a matter of days; in theory, people denied protection can swiftly be returned and people who meet the requirements can rapidly be identified]. Central and northern EU countries insisted on making solidarity mechanisms conditional on this change, because their primary concern is ending the secondary movement of asylum seekers. Safeguards such as access to legal assistance or appeal would be reduced, with almost no exceptions for vulnerable people, families or children, and more procedures would be managed in detention.

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The rules on responsibility would remain as they are under the Dublin Regulation, with the country of first entry still in charge of processing asylum requests. In the Pact, the period of responsibility of the country of arrival for an applicant is extended to two years for people who enter at the external border, but reduced to 15 months after a rejection in the border procedure (to give states an incentive to use the border procedure), and to 12 months for those rescued at sea (to give states an incentive to stop watching people drown). Improvements to the rules on responsibility (compared to Dublin) proposed by the Commission, including a wider definition of family to allow family reunification with siblings, have been rejected.

## **Flexible solidarity**

The pact introduces a solidarity mechanism to compensate external border countries in situations of "migratory pressure". It is still unclear whether the definition of military pressure will incorporate the "instrumentalisation" of migrants by non-EU state actors. A separate mechanism for situations of search and rescue has been dropped.

Solidarity is mandatory but flexible. All countries have to contribute but they can choose what to offer: relocation and assuming responsibility for people; capacity-building and other support; or a financial contribution. The Council has agreed on a minimum of 30,000 people to have their applications processed in a border procedure every year. There will also be a "cap", a maximum which increases over the first three years until hitting 120,000.

The adequate capacity of each member state (the minimum or target number of border procedures) will be set using a formula based on the overall adequate capacity and the number of "irregular" entries (i.e. people crossing borders without the necessary requirements for legal entry). Member states can notify the Commission that they will cease using the border procedure when they approach their target capacity. The target for relocations is also set at 30,000.

Relocations are incentivised over other forms of solidarity through the presence of "offsets" (reductions of solidarity contributions for the countries offering relocation). The financial equivalent of a relocation is set at 20,000 euros. EU funds for reception capacity will also be allocated to manage the border

procedure.

## **Risk of arbitrariness**

While the presence of a solidarity mechanism to be codified in EU law can be regarded as a positive development, the expanded use of the border procedure equals more people in detention centres at the external borders, subject to sub-standard asylum procedures. Moreover, with the increase in responsibility for external border countries, and given how controversial detention centres are for local communities, there is a risk that pushbacks will increase. If Italy's share of the 30,000 annual border procedure cases is 5000, for example, political calculations might suggest denying entry once that threshold is reached.

Setting a numerical target for the use of the border procedure – which would almost always take place in detention – also creates the risk of arbitrariness in its application. The widespread use of the “safe third country” concept as a basis for denying people access to an asylum procedure or to protection in the EU represents a further risk. The very definition of what a safe third country is has been eroded. According to the agreement, a safe third country needs to meet certain protection criteria and there needs to be a connection between the person and that country, as per international law. However, what constitutes a connection is determined by national law. Examples in the text are family links and previous residence, but member states could decide that transit establishes a sufficient connection.

Solidarity is also flexible. Relocation of people across the EU would lead to a fairer division of responsibility instead of too much being required of external border countries. But member states retain the right to opt out of relocation. As for the procedural rules described in the agreement, they appear complex to the point of unworkability.

## **What will change in practice?**

More of the people arriving to seek protection in the EU will be subject to a border procedure, rather than having their case heard in a regular asylum procedure. This means that people arriving in Europe to seek protection will face a harsher system.

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The agreement increases the responsibilities of countries at external borders, which continues to provide member states with incentives to deny access and keep low standards of reception and inclusion.

There could now be greater focus on implementation and management of asylum systems. However, the only concrete references to compliance are in relation to member states achieving the set number of border procedures and in ensuring that Dublin transfers happen.

Secondary movements will remain likely, and smugglers will continue to adapt, for example by offering the prospect of taking people to EU countries away from the external borders.

## **Winners and losers**

The agreement is a victory for the Commission, which has invested everything in getting the Pact passed, for hardliners such as France, the Netherlands and other member states who have largely got what they wanted, and for the Swedish presidency, which has brokered a deal that suits its national politics. “With better controls at the member states’ borders and more effective returns, the situation in the EU will be more sustainable,” stated Swedish Minister for Migration Maria Malmer Stenergard.

Among the likely winners of the agreement are also smugglers, who will be able to charge more for the more complex and longer journeys that people will have to take.

For refugees, access to a fair asylum procedure will be harder, and the risk of detention and pushback will be higher. The length and complexity of procedures will also increase. Non-EU countries at the external borders will have to deal with pushbacks and will be under pressure to build asylum systems to meet the definition of “safe third country”.

The five Mediterranean EU countries – Malta, Cyprus, Greece, Italy and Spain – gave in on every major point and gained very little. They will have to manage the border procedures in exchange for mandatory but flexible solidarity, in which relocation is not prioritised.

Among the losers of the agreement is also the German government, who did not manage to push through the minor improvements that coalition members had agreed upon, and on which it had the support of a small progressive alliance and potentially of southern member states – for example, on exemptions to the border procedure. Given the strong resolve to reach a deal, more could and should have been demanded.



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