

Policy Brief

The EU Migration Pact at Two: What Remains of the Fresh Start?

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#MigrationEU
#MigrationPact
#AsylumReform

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23 September marks two years since the European Commission presented the so-called [New Pact on Migration and Asylum](#). The proposals were supposed to initiate a fresh start in the reform of the long controversial Common European Asylum System. Here, we take stock of the negotiations and note that, while there has been some recent movement, the proposed reforms and the reference to individual advances in the negotiations seem increasingly at odds with reality given the ongoing fundamental rights abuses at the EU's external borders. The roadmap recently presented by the Council and the European Parliament (EP) envisages an end to the negotiations by April 2024. Progressive forces in both institutions should use this window of opportunity to make access to a fair asylum procedure and respect for fundamental rights at the EU's external borders central building blocks of the reformed asylum system.

1. Insurmountable conflicts and failed attempts at reform

With the so-called Common European Asylum System (CEAS), minimum standards in law for the recognition, reception conditions and asylum procedures of persons seeking protection in the EU were created from the late 1990s onwards. Since then, these standards have been specified and expanded several times. Most recently, the Juncker Commission (2014-2019) initiated a comprehensive reform of the CEAS with the [Agenda for Migration](#) presented in 2016 – itself in part a response to growing numbers of protection seekers in the summer of 2015. However, the negotiations

could not be concluded by the end of the legislative period.

The main reason for this is the very different interests of the member states. A central point of contention was and is the reform of the Dublin III Regulation and the question of a 'fair distribution of responsibility' within the EU. Member states at the EU's external borders, such as Greece, Italy, Malta, Cyprus and Spain - the so-called Med-5 - are pushing for a binding and fairer allocation of protection seekers. Due to the Dublin III Regulation, they are formally responsible for most asylum applications as country of first entry. Countries such as Germany, France, the Benelux states or Sweden, to which some of the protection seekers travel on, want to limit these so-called „secondary movements“ by expanding the responsibility for asylum in the country of first entry. Other states - especially the Eastern European Visegrád states, but also Austria and Denmark - are strictly opposed to mandatory relocation and advocate a very limited reception of protection seekers in the EU with asylum procedures taking place in third countries.

Legally, EU decisions on asylum issues can be taken by qualified majority. From a political point of view, however, an agreement by consensus is necessary since a majority decision in 2015 on the mandatory relocation of asylum seekers from Italy and Greece resulted in a political escalation and protracted legal disputes. Another reason for the slow negotiations is the so-called package approach. In contrast to the Dublin reform, the EU states and the EP, as equal co-legislators, reached far-reaching agreements on several other legislative projects. These include the recast of the Qualification Regulation, the Reception Conditions Directive, the Resettlement Regulation and the expansion of the European Asylum Support Office (EASO) (see table). However, these legal acts were frozen. This is because the Med-5 states in particular, but also the EP, insisted on adopting all legal acts only by way of a single package. In this way, the Med-5 wanted to ensure that their interests as countries of first arrival were safeguarded in the Dublin reform, while the EP was primarily concerned with maintaining human rights standards.

Against this backdrop of insurmountable conflicts within the EU, the need to strengthen external border protection has become the minimum consensus in European asylum and migration policy. This is indicated by the fact that EU states under the Juncker Commission could only agree on the further expansion of the European border management agency FRONTEX (see table). EU refugee policy in recent years has, what's more, been strongly influenced by political agreements with third countries - such as Turkey and Libya - which aim to reduce the number of asylum seekers and other migrants actually entering EU member states' territory.

2. Migration Pact: movement yes, fresh start no

With its New Pact on Asylum and Migration ([Migration Pact](#)) presented on 23 September 2020, the von der Leyen Commission (in office since the end of 2019) aimed to cut the Gordian knot in asylum policy. Based on extensive consultations with EU member states, the proposals were supposed to provide a basis for finally making progress on asylum reform that had been stalled for years. With its „fresh start“ rhetoric, the Commission tried to spread optimism. While some of the less controversial and in part already widely negotiated parts of the 2016 package were adopted, the Migration Pact replaces the previous proposals for a ‘fair sharing of responsibilities’ with the idea of [flexible solidarity](#) and mandatory [border procedures](#) (see table).

After much [criticism](#) and initial scepticism about the feasibility of the proposals, in June 2021 the EP and Council initially agreed on the expansion of EASO into a [European Asylum Agency](#) (EUAA), whose mandate was expanded to include cooperation with third countries. Faster and more comprehensive support for EU member states, which nevertheless remain largely responsible for asylum decisions, was also agreed.

Against the background of failed attempts to negotiate the CEAS reform as a package, the French Council Presidency pushed for a so-called gradual approach at the start of this year. Under this approach, individual legislative texts are to be negotiated step by step and independently of each other. On 22 June, shortly before the end of the French Presidency, the member states finally agreed on a mini-package and a joint [negotiating mandate](#) for the screening and [Eurodac](#) fingerprinting regulations. The Eurodac reform is intended to lead to a more precise registration of asylum seekers (rather than asylum applications) and other migrants, with the aim of determining the responsible member state more clearly. The screening regulation, on the other hand, provides, among other things, for a mandatory five- to ten-day preliminary screening of asylum seekers at the EU’s external border and assignment into different procedures. People from countries with a lower protection quota are to be directed either into so-called asylum border procedures, or into a return procedure. They can also be refused entry altogether if a security risk is identified in the screening.

Table 1: Overview of CEAS negotiations

	Proposal	Status
2016	Qualification Regulation	tentative political agreement
	Reception Conditions Directive	tentative political agreement
	Resettlement Framework	No agreement in the Council. Negotiating, mandate pending
	EU Asylum Agency (EUAA)	Concluded 2021
2018	Regulation establishing the European Border and Coast Guard (EBCG)	Concluded 2019
	Strengthening of EBCG through standing corps	Concluded 2019
	Return Directive	No agreement in the EP. Negotiating, mandate pending
2020	Asylum and Migration Management Regulation	No agreement in the Council. Negotiating, mandate pending
	Screening Regulation	Council with negotiating mandate. Waiting for EP
	Asylum Procedures Regulation	No agreement in the Council. Negotiating, mandate pending
	Eurodac Regulation	Council with negotiating mandate. Waiting for EP
	Crisis and Force Majeur Regulation	No agreement in the Council. Negotiating, mandate pending
2021	Schengen Borders Code	Council with negotiating mandate. Waiting for EP
	Instrumentalisation Regulation	Neither EP nor Council with mandate to negotiate

Source: Compiled by the authors

Note: The „package approach“ embraces only the Qualification Regulation, Reception Conditions Directive, Resettlement Framework, EU Asylum Agency, Asylum and Migration Management Regulation, Screening Regulation, Asylum Procedure Regulation, Eurodac Regulation, Crisis Instrument Regulation.

The screening regulation is problematic in several respects with regard to fundamental rights and protection standards, including those already enshrined in the CEAS. In particular, the regulation would anchor a so-called [‘fiction of non-entry’](#) in EU law, similar to airport procedures: persons seeking protection would be considered as ‘non-entered’ during screening, although they are de facto already on European soil and should be entitled to a full examination of their asylum application. NGOs and other observers fear that this fiction of non-entry and the implementation of the screening procedure would come with measures amounting to systematic detention of protection seekers.

As both regulations further extend the asylum responsibilities of countries of first entry, a mechanism for the relocation of persons rescued from distress at sea was agreed in return. The solidarity mechanism is initially limited to one year, is based on voluntary acceptance and may be extended after evaluation by the member states. During this period, a total of 10,000 asylum seekers are to be relocated. However, member states are free to decide whether to participate in relocation or to provide financial and logistical support. Eighteen EU states and three Schengen members have signed the [agreement](#) on the solidarity mechanism. Of these, 13 EU states have so far agreed to relocate 8,000 people among themselves. The agreement marks an improvement on the situation in previous years, when people rescued at sea were either not relocated at all or only on an ad hoc basis. However, given the more than [80,000 people](#) who arrived in Europe by sea routes by the end of August, the relocation quotas envisaged remain limited in scale and should only be a first step towards a more comprehensive relocation programme.

In response to such Council decisions, the EP and representatives of the rotating presidencies from France, the Czech Republic, Sweden, Spain and Belgium presented a joint [„roadmap“](#) on 7 September. In the roadmap, the signatories confirm their intention to conclude negotiations on the outstanding legal acts by the end of the EU legislative period in April 2024 and agree on regular meetings to take stock of the situation. However, the deal remains vague on many points. For example, it is still open whether the joint negotiations should be continued according to the gradual or the package approach. It is also unclear which legal acts are to be negotiated next. The roadmap is thus an attempt by the EP to strengthen its own role in the negotiations once more and persuade the Council to finally also discuss the Asylum and Migration Management Regulation and the Crisis Management Regulation. Moreover, the decision is a reaction to the fact that the window of opportunity until the end of the legislative period is beginning to close.

The latest compromises in the Council and the codified language of the agreed roadmap of the EP and Council presidencies illustrate once again how muddled the negotiations are. The [objective](#) formulated in 2016 to create a „fairer system based on common rules and a fair sharing of responsibilities“ has increasingly descended into horse-trading. Individual parties only move in the process if concessions are made elsewhere. This partly corresponds to the intergovernmental logic of the EU and its functioning as a „compromise machine“. In practice, however, this leads to the oft-demanded „European solution“, in which all EU states pursue a common goal, becoming ever more unreachable. The temporary solidarity mechanism agreed under the French EU Council Presidency, on the other hand, reinforces the impression that individual components of the migration pact can only be implemented in smaller coalitions.

3. Political willingness for refugee protection is questionable

However, even if a political agreement on the outstanding issues in the Council and subsequently between the Council and the EP took place by the end of the legislative period, this would not necessarily mean an improvement in refugee protection. In particular, it is questionable whether the proposed reforms can also contribute to ameliorating the situation at the EU's external borders in practice. This is where the chasm between reform proposals aimed at ever more restrictions on the one hand and the urgency of finding long-term solutions that safeguard fundamental rights on the other becomes glaring.

Statements by the Commission and member states that international refugee protection and European law are being respected on the ground are countered by numerous reports of systematic pushbacks and disregard for the basic rights of those seeking protection. As recently as July, Greece was again [condemned](#) by the European Court of Human Rights. These incidents are by no means isolated. Recently published [research](#) on a report by the European Anti-Fraud Office (OLAF) shows that pushbacks at the EU's external borders happen systematically – and with the knowledge of Frontex.

Against this background, the impression is growing that the ongoing reform negotiations stand in the way of enforcing existing legal standards rather than promoting them. A main reason for this suspicion is the absence of any infringement proceedings. These would have to be initiated either by the Commission or by another member state. However, the Commission argues that, given the ongoing reform negotiations and several potential legal changes, the legal basis for such proceedings is constantly in flux.

Some observers suggest the Commission has therefore degenerated into a kind of 'secretariat of the Council' and its proposals ultimately echo the wishes of the member states instead of making ambitious demands based on the existing legal system and the need for refugee protection. Implicitly and explicitly in this view, the Commission thus supports the controversial actions of individual member states instead of urging them to comply with European law. The Commission's December 2021 [proposals for a regulation](#) to respond to the instrumentalisation of protection seekers by third countries, for example, aim to legalise Poland's policy of sealing off its borders and effectively ignoring protection claims. Instead of strengthening protection seekers' rights, the regulation makes it easier for member states to suspend current protection guarantees. At the same time, there is a tacit agreement in the Council not to denounce the lack of compliance with legal standards and open violations of the law, such as those that systematically occur at the Greek border. The concern that a direct confrontation would jeopardise the necessary unanimity in the further reform negotiations seems overwhelming.

Conclusion : Progress in negotiations does not equal success

Two years after the presentation of the New Pact on Migration and Asylum, little is left of the announced fresh start, despite some movement in the negotiations. Instead, the long struggle for a compromise has itself contributed to the fact that rule of law violations at the EU's external borders go by and large unpunished. Yet, member states now seem willing to follow the French Presidency's proposal and pursue a gradual approach in the forthcoming negotiations, which would facilitate the adoption of legal acts. Meanwhile, recent decisions on a temporary solidarity mechanism suggest that progress on key contentious issues - such as the relocation of protection seekers - will only be possible in small groups, thus indicating a movement towards the proposed flexible solidarity model. However, given the prevailing majority in the Council and the Commission's political agenda, an improvement

of refugee protection in Europe cannot be expected even in the event of a far-reaching political agreement. For this reason, a reform of the CEAS in line with the proposals of the Migration Pact could hardly be considered a success. Neither for the rule of law and legitimacy of the EU, nor for the situation of protection seekers.

Against this background, there are essentially two options with regard to further negotiations. As proposed by the European Council on Refugees and Exiles (ECRE), the first question is whether terminating the negotiations and fully implementing existing legal norms would be preferable to any further CEAS reform. Given the quite justified criticism of the Migration Pact, this proposal is at least understandable even if it appears to be more of a mind game than a viable political strategy. A renewed failure of the asylum reform cannot be completely ruled out. Yet, the recently presented roadmap makes it clear that the Council, Commission and EP seem determined to adopt at least parts of the Migration Pact by the end of the legislative period. In the current partial legal vacuum, a complete blockade of the reform proposals would indeed not be a promising option. For, should the negotiations fail, individual member states are unlikely to return to observing the very fundamental rights that are systematically disregarded at the EU's external borders. Moreover, in such a scenario, the Commission in particular would lose the credibility necessary to be able to fulfil its role as guardian of the treaties again.

Alternatively, the roadmap that has now been set in motion offers a clear mandate to conclude the negotiations in a timely manner. Admittedly, individual components of the migration pact, especially the border procedures, are fraught with risks for refugee protection. Nevertheless, it seems a better strategy to continue the negotiations and in doing so extract the maximum for refugee protection. This applies in particular to the Asylum Procedure Regulation and the Asylum and Migration Management Regulation, which are still to be negotiated. Whether an agreement is reached on the issues contained therein, concerning a flexible solidarity mechanism and mandatory border procedures, will be decisive for the future design of the EU asylum system. Therefore, the progressive forces in the EP and the Council should use the roadmap to set their own success parameters and red lines for the further course of the negotiations. These should be guided in particular by three central premises of international and EU political norms:

1. to preserve access to asylum procedures and related rights for all persons seeking protection.
2. enforce compliance with international and European law throughout the EU and in particular at its external borders.
3. to ensure effective and timely implementation of relocation mechanisms among willing EU states to demonstrate that solidarity can indeed work in practice.

Civil society and national parliaments also have an important role to play in the political formulation of these premises. They may not have a direct say in the matter, but they can exert pressure on national governments. This is particularly true for Germany. In its coalition agreement, Germany's three-party government announced a paradigm shift in its migration policy that explicitly includes a more humane and rights-based EU asylum policy. With the roadmap that has now been adopted, the EP and the Council have again made the reform of the EU's asylum system a priority for the coming months. This provides an opportunity for the German government to finally implement the „solidarity-based and crisis-proof“ asylum system called for by Chancellor Scholz in his [keynote speech](#) on the state of EU politics.

In that speech, Scholz also said that the reception of Ukrainian refugees was a sign of the capacity to act in European asylum policy. The activation of the Temporary Protection Directive on 4 March 2022 and the mostly smooth reception of refugees from Ukraine show that the EU - contrary to what is often claimed - is quite capable of coping with large refugee movements. For the further course of the negotiations on the Migration Pact, the member states should therefore bear in mind the advantages of a humane and regulated refugee reception for a stable and long-term functioning European asylum policy.

This policy brief was also published in the [Refugee Law Initiative Blog](#) and the [Forced Migration Studies Blog](#).

Note: In addition to the linked sources, this text is also based on discussions with representatives of central European institutions in which the authors participated as part of a dialogue programme of the Friedrich-Ebert-Stiftung in Brussels in June 2022.

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