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## ***Fresh start, renewed risks***

# The external dimension of the EU Pact on Migration and Asylum

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## Introduction

During the presentation of the EU Pact on Migration and Asylum, European Commissioner Margaritis Schinas presented the external dimension as one of the main pillars of the Pact (or “floors of the house”). However, no real novelties or legislative proposals are put forward besides an increased focus on readmission policies and the concept of “safe third country”. This focus on returns takes place to the detriment of the establishment of an effective asylum system. It also occurs in the absence of a post-deportation monitoring mechanism to countries that systematically and notoriously violate fundamental rights (such as Egypt, Turkey and Algeria among others) and, in so doing, breaches the principles enshrined in international and European conventions.

This document will look into the main elements when it comes to the external dimension of the Pact. It will address the four following points.

- 1. The conditionality between visa and readmission agreements: politically dangerous for Europe and a cause of human rights violations.**
- 2. The “solidarity” mechanism: sponsoring returns and supporting externalisation policies**
- 3. The highly problematic concept of safe third countries**
- 4. The positive elements to be strengthened: a monitoring mechanism for fundamental rights compliance and legal pathways**

## 1-The conditionality between visa and readmission agreements: politically dangerous for Europe and a cause of human rights violations

As underlined by Commissioner Johansson during the presentation of the Pact, the objective is to increase cooperation with third countries to facilitate return and readmission through “mutually beneficial” partnerships. As has in fact been the spirit of the European institutions since 2011, these “mutually beneficial” partnerships are based on the method of the “carrot-and-stick” approach. They also reproduce the dangerous logic of conditionality between migration and development by linking development aid to the acceptance, by the relevant third countries, of migration controls, admission agreements and visa policies.

According to the proposals, the European Commission will report on how well countries cooperate on returns and readmissions. The Commission can also identify relevant measures to improve cooperation on readmission notably using a new mechanism to turn visa processing into leverage by **restrictive visa measures** (as enshrined in the Visa Code (Regulation (EC) No 810/2009 as amended).

The Visa Suspension Mechanism<sup>1</sup> provides for the “systematic assessment of visa-free countries against criteria including irregular migration risks and abusive asylum applications”. This could lead to the removal of some third countries from the visa-free list, thus applying the logic of negative conditionality<sup>2</sup>.

It is important to note that, according to the Pact, Member states can decide not to apply the border procedure after the first screening. As a consequence, the normal procedure will apply to those who are nationals of a third country, which is not seen as **sufficiently cooperating for readmissions**.

Another worrying trend is to use **informal arrangements** on readmissions with third countries, thus circumventing the competences of the European Parliament in terms of monitoring and scrutiny. The EU currently has 18 readmission agreements and 6 informal arrangements. These include the ongoing negotiations with Morocco and Tunisia, two countries which have no asylum law in place, rarely provide access to basic socio-economic rights and fail to protect migrants’ and refugees’ rights. Morocco for instance has been repeatedly accused of violent pushbacks and of deporting migrants from different African countries to Guinea, Senegal and Mali. Added to this is the fact that, in addition to the agreements initiated and signed by the EU, the Member States themselves have a series of bilateral agreements with third countries, which therefore also escape the control of the European Parliament and jeopardise the image of a united EU.

This conditionality-based approach is politically dangerous for Europe and harmful to migrants for two main reasons:

- Restrictions in visa allocation will de facto lead to reducing the already limited legal pathways to Europe, forcing migrants to risk their lives in a dangerous journey by land and sea. The recent arrivals from Morocco to the Canary Islands is a clear example of this harmful vicious circle. Moroccan citizens are increasingly forced to take to the sea because of difficulties for obtaining a visa. In response to the increase, the European Commission and Spain threaten Morocco with further visa cuts if it does not accept more migrant returnees from the Canary Islands. However, the more the legal pathways are constrained, the more likely Moroccan citizens will undertake perilous journeys and face death and human rights violations. This approach will not reduce the scale of the migratory flows that the EU is so keen to halt.

- Focusing the bilateral dialogue with third countries using a carrot-and-stick approach will have a negative impact also on foreign policies which should instead promote dialogue, development and the respect of the rule of law and democratic processes. Moreover, this political approach can also be exploited by third countries who can use their borders as leverage against European countries to get additional funds or negotiate on other sensitive issues (geopolitics, ongoing conflicts, drift in the respect of fundamental rights etc.). Third countries like Libya and Turkey have already used it in the past, and the same approach could probably explain recent cases such as the increase in departures from Tunisia to Lampedusa in August 2020 and from Morocco to the Canary Islands in November 2020. Migrants and refugees thus become *de facto* victims and hostages of this logic of threat.

### **A negative approach to conditionality in the new Multi-Annual Financial Framework (MFF)**

The discussions on the MFF were strictly connected to the Pact and should therefore be taken into consideration given the concerns.

The first concern relates to the heavy allocation of funds from the EU migration budget mostly towards border management and returns to the detriment of protection and integration programmes. The second concern is this conditional approach to development which establishes migration as one of the key criterions for fund allocation.

The new financial programming will support in priority the objectives of the European migration policy in terms of border management, returns and externalisation of migration control in countries of origin and transit. Resources will be allocated under the internal affairs instruments, as well as the new instrument for the external dimension, the NDICI (Instrument for Neighbourhood, Development and International

The new MFF will follow and reinforce the logic adopted in 2015 with the “Valetta Process” and the creation of the EU Emergency Trust Fund for Africa (EUTF): the use of the development budget for border control-related projects and the use of international cooperation support as leverage for readmission agreements and strengthening capacities to prevent departures.

While in the past, the negotiations were based on a positive approach of conditionality (“more for more”), for several years we have been observing that a negative approach (“less for less”) has gained more and more steam. This approach dangerously links foreign policy and international cooperation policy to the performance of third countries in the field of return and control, diverting the development budget to activities that could lead to violations of fundamental rights, especially the principle of non-refoulement.

## 2-The “solidarity” mechanism: sponsoring returns and supporting externalisation policies

The Pact also foresees a distorted concept of solidarity which is clearly understood as solidarity among Member States. Solidarity is no longer seen in terms of welcoming and relocating people but in terms of expelling and returning them.

**The solidarity mechanism** is activated when a Member State declares itself to be in a situation of "migratory pressure". Another Member State must then provide support to the Member State in difficulty by choosing among different forms of “solidarity”: relocation, sponsoring returns and measures aimed at strengthening the capacity of members states in the field of asylum, reception, return as well as in their externalisation policies.

We have to think that the alternative is pure *façade*.

Indeed, why would Member States now choose relocation as a form of solidarity when some avoided doing so in 2016 when it was mandatory? As for envisaging that some States would provide financial support to their neighbours who would be "under pressure", one can only dream of this when the negotiations on the recovery plan have been so stormy and difficult. It is therefore very likely that Member States will choose either sponsorship return or support for the external dimension of migration and asylum over relocation. And, both options raise concerns.

According to the “**return sponsorship**” system, the sponsoring Member States would provide support on returns, forced or voluntary, using their programmes and resources and supporting the policy “dialogue” with third countries in order to push them towards accepting the readmission. The sponsoring Member State can choose the nationality of people to be supported for returns, based on the readmission agreements signed and the highest possibility of expulsion. However, if a person cannot be expelled within eight months, the sponsoring Member State would transfer the person and continue its efforts to return them. It is unclear what the fate of these people will be once they are transferred to the country sponsoring the return: will they be detained again, after already being detained for long periods during the asylum border procedure and the return procedure? If so, for how long? Given the discrepancy in treatment from country to country and the absence of monitoring mechanisms, this procedure raises doubts and concerns. Regarding resources, a financial contribution of 10,000 euro will be given per relocated person - including following return sponsorship - and of 12,000 for an unaccompanied minor.

The second option under the “solidarity mechanism” is **to support a Member State to strengthen the capacities of border management and the external dimension**. This point lacks clarity in the Pact and raises concerns because Member States could easily interpret it broadly. The Italy-Libya or Malta-Libya agreements could be then be construed as support to Member states in their policy of externalisation of rescue. For instance, a country like Hungary could choose to support Spain in its bilateral relationship with Morocco on projects specifically related to border management and increased capacity of interception. In addition to increasing the European budget for these activities by using development funds, Member States could support the externalisation policies even in situations where fundamental rights violations have been demonstrated.

### 3-The highly problematic concept of “safe third countries”

By automatically referring asylum seekers coming from a “safe” country to the return procedure (as their application is deemed inadmissible), the concept of “safe third countries” continues to apply. This occurs in violation of the right of individual assessment of asylum applications, as enshrined in the Convention relating to the Status of Refugees (1951 Geneva Convention) and as [reiterated](#) numerous times by EuroMed Rights. Indeed, each personal situation is unique, and no country is free from malfunctioning or human rights violations, therefore no country can be deemed “safe”. Nobody can guarantee that a country is safe for all its citizens and to label a country as “safe” suggests that there is no general risk of persecution and that the state of law is respected, which is not the case in many countries considered “safe” by the EU and its Member States. Moreover, as [emphasised](#) by the Office of the United Nations High Commissioner for Refugees (UNHCR), “in so far as application of the concept would a priori preclude a whole group of asylum-seekers from refugee status, in UNHCR’s view this would be inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the Status of Refugees”, such as the principle of non-discrimination on grounds of nationality. This opposition is also linked to the fact that a specific “accelerated” procedure and the prevailing presumption in the examination of asylum seekers’ applications breach the principle of equality before the law and make the procedure fundamentally biased.

Although the Commission wishes for a “greater degree of harmonisation of the safe country of origin and safe third country concepts through EU lists”, the Pact does not mention the introduction of a shared list of “safe third countries”. While the use of a “common” list may put an end to discrimination between asylum seekers on the basis of their country of arrival in the EU, it would not bring to an end the inequality of rights between applicants based on their origin. Aside from the fact that it will be left at the discretion of Member States, there are other concerns: the high risk of chain refoulements, even from so-called “safe third countries”, and the fact that pushbacks, including of unaccompanied minors and particularly vulnerable people, could be disguised behind the label of “voluntary returns”. This is particularly worrying in light of recent testimonies such as the practice of violent pushbacks of unaccompanied minors from Morocco to Guinea and from Algeria to Niger.

### 4-Positive elements to be strengthened: a monitoring mechanism for fundamental rights compliance and legal pathways

Among the many legislative and non-legislative proposals that make up the Pact, the few positive elements that do exist are buried among the more problematic ones. However, the two following mechanisms need to be strengthened and safeguarded:

- The mechanism for monitoring fundamental rights’ compliance and investigate human rights’ violations
- The mechanism for legal pathways and resettlement pledges

The provision to implement a **mechanism for monitoring fundamental rights compliance and investigate human rights violations** in relation to the screening (art. 7 COM (2020) 612 final), to national rules on detention and the principle of non-refoulement is a positive development. However, many doubts arise on the true independence, the actual implementation and the scope of application of such a mechanism. The mechanism seems to apply only to the screening and not to other procedures. It should therefore be

expanded to the whole set of procedures in order to truly monitor and redress possible human rights' violations by national authorities, including pushbacks and breach of the principle of non-refoulement. The European Parliament and independent bodies must ensure effective control and scrutiny over such a mechanism.

Another concern relates to the fact that the Regulation makes the participation of non-governmental organisations in the monitoring mechanism optional and fail to allow for the involvement of independent national institutions tasked with monitoring human rights violations, such as ombudsmen. It should be mandatory to involve independent national institutions and civil society organisations in the monitoring and support them through EU funding. Moreover, the Regulation should clarify how the Member States should investigate allegations to put an end to violations, guarantee access to justice and ensure transparency.

Despite declarations to **increase legal pathways and resettlement pledges**, scaling up humanitarian admission programmes and expanding community sponsorship schemes (as suggested in the Recommendation on legal pathways (C (2020) 6467 final)), measures truly fall short. There are no concrete commitments yet in place. It is high time the EU put a real mechanism for protection, inclusion and safe and legal access to the European territory at the heart of the Pact. Such an objective could be achieved by increasing safe and legal pathways to the EU, implementing safe and fair labour migration policies, liberalising visa policies (including for work, studies, family reunion) towards a free movement area across the Mediterranean. With the excessive and disproportionate focus on the visa suspension mechanism and on returns, this Pact risks creating a vicious circle and further reducing legal pathways. "Humanitarian corridors" project, resettlement pledges and community sponsorship schemes should be increased to allow people in need of protection to enjoy their right to seek asylum and come to Europe safely, without endless suffering and risk to their lives.