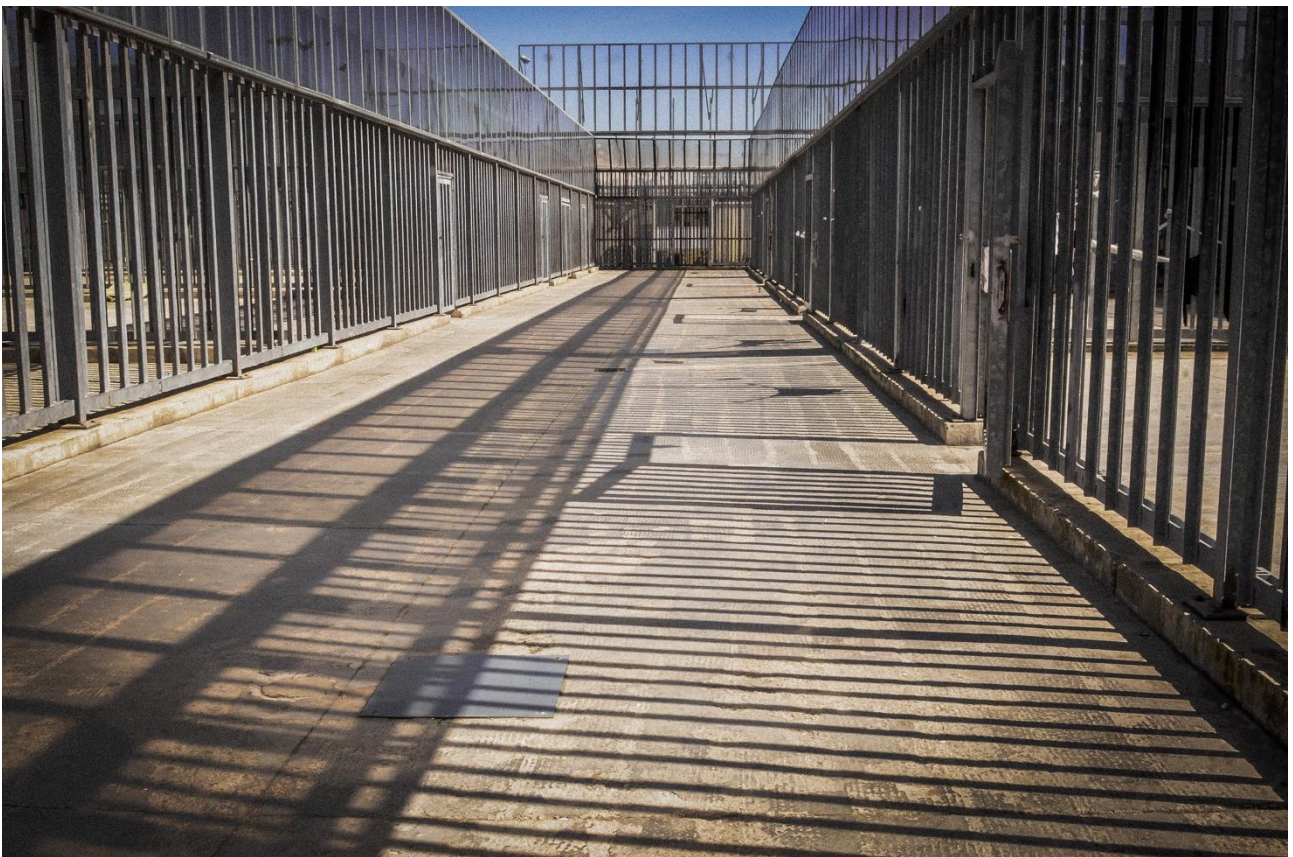




EuroMed Rights
EuroMed Droits
الأورو-متوسطية للحقوق

The new Pact on Migration and Asylum



The Global Impact

May 2021

Rue des Comédiens 22, 1000 Bruxelles, Belgium, T +32 2 513 37 97

Email information@euromedrights.net – Website: www.euromedrights.org

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Bibliographic Information:

Author: Gaia Romeo

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Executive summary

The aim of this study is to analyse two particular aspects of the new EU Pact on Migration and Asylum: the new set of border procedures and the mechanism of "solidarity". These two aspects correspond to the two parts in which this study is divided.

The first part, ***Arrivals at borders***, illustrates the new set of border procedures introduced with the proposal - the screening and the asylum and return border procedures - and analyses the **human rights violations** their implementation could entail. Subsequently, by using data from 2020, the study will show the **expected impact of border procedures in Spain and Italy** to inquire on how these would violate fundamental rights, including the right to asylum, and to what extent these measures will represent a heavy "burden", practically and financially, for the countries of first arrival.

The second part, ***The European "solidarity"***, discusses the proposed reform of the **Dublin Regulation** and its "correction" with the mechanism of European solidarity under three forms: relocation, return sponsorship and capacity building. A specific focus, in this regard, will be dedicated to the **crisis situation**: the consequences of its possible implementation will be illustrated with **a simulation on the case of Greece** in the "European refugee crisis" "year, i.e. 2015. Then, the study will use the past, failed example and the most recent declarations of Member States on relocation to explain why voluntary **relocation** is doomed to fail even before entering into force. It will also provide evidence of the severe human rights violation occurring today in return procedures to show that the new **return sponsorship** system doesn't address their many criticalities. Eventually, it will explain how this Pact perfectly fits in a more significant and growing **strategy of externalisation of migration policies**, which can be understood only by analysing parallel tools, like the new Visa Code and the 2021-2027 Multiannual Financial Framework (MFF).

Introduction

On 23 September 2020, the European Commission (EC) issued a new Pact on Migration and Asylum, a comprehensive proposal to reshape the EU approach to migration. EuroMed Rights has already published three pieces of analysis¹ denouncing the New Pact as a "fresh start" only for human rights violations. These pieces of analysis highlight how the New Pact will replicate and exacerbate past mistakes and will obsessively focus on returns rather than create a real mechanism for protection, inclusion and safe access to the European territory.

This new, fourth analysis integrates the material produced so far with new findings and data analysis to provide a complete, consistent interpretation of the possible effects of the new Pact on both EU internal and external policies and practices.

Two elements, in particular, constitute the core of this study: the new, mandatory set of border procedures and the "solidarity" mechanism, which are also the two pillars on which this proposal was built. This research intends to analyse these two elements in terms of their feasibility and compliance – or not- with fundamental rights.

Feasibility is critical to understand the (in)humane, concrete dimension of the Pact. The provisions in the different texts – [twelve](#) in total, between legislative and non-legislative – are often unclear, confusing and contradictory. It requires a solid, imaginative effort and a good knowledge of the current asylum procedures and migration practices to read between the lines and understand the consequences should the Pact be adopted and implemented.

Therefore, this study aims to inscribe the new proposed legislation in a concrete framework as much as possible. The hypothesis of this research is that **the infeasibility, impracticability, and the disconnect from reality of this proposal will have one main consequence: rendering as wastepaper all the references to international human rights legislation and all ideas of dignity, protection and humanity**. Wishfully writing that fundamental rights will be included into the new border procedures does not make it a reality. Declaring that there will be ["no more Morias"](#) doesn't magically make all the Morias disappear, and calling "solidarity" a system whose primary goal is to return as many migrants as possible, won't make it genuinely solidary.

Having said that, the Pact presents a few positive aspects: new legal pathways, cooperation among Member States on search and rescue operations, decriminalisation of humanitarian aid and the introduction of a monitoring mechanism during the screening procedure. With the exception of the monitoring mechanism, which deserves further analysis, the other provisions remain abstract and timid. They do not constitute the scope of a Regulation but are contained in Recommendations, whose binding power is weak. Thus, they will not be discussed much in this study: because their impact will probably be minimal.

¹ [A "fresh start" for human rights violations](#) (October 2020); [New Pact, Wrong Impact](#). How the EU Pact on Migration disadvantages both Italy and asylum seekers (November 2020); [Fresh start, Renewed Risks](#). The external dimension of the EU Pact on Migration and Asylum (January 2021).

I- Arrivals at borders

1.1. [The screening, the asylum and the return border procedures](#)

a) A new set of mandatory border procedures

The first element this study will analyse is the new set of mandatory border procedures: the screening, the asylum border procedure and the return border procedure. They are the object of two legislative proposals which borrow some of the unfinished measures envisaged in the 2016 asylum reform bill ²:

- A Proposal for a Regulation introducing a screening of third-country nationals at the external borders (hereafter, [Screening Regulation](#))
- An Amended Proposal for a Regulation establishing a common procedure for international protection in the Union (hereafter, [Asylum Procedure Regulation](#))

The **screening procedure** applies to all third-country nationals present at the external borders (including at crossing points and transit zones) or disembarked after a search and rescue operation. It also applies to third-country nationals apprehended within the territory of a Member State where they had not been previously subject to border controls. The procedure will last five days and will consist of an identification phase, through a succinct de-briefing form, health and vulnerability checks, and security checks - including fingerprinting and the taking of facial image data - via the enhanced version of the Eurodac database.³ Depending on the outcome of the screening, applicants will be channelled through different procedures.

There are three possibilities: **first**, the applicant declares that s/he is not willing to apply for international protection, or his/her application is rejected as unfounded. This decision can be taken at a Member State's discretion when the applicant is from a "safe country of origin" or a "safe third country". In this case, the applicant is directed to a **return border procedure**.

The second possibility is, for the applicant, to be deferred to a **normal asylum procedure**. In this regard, the only innovation brought by the new set of rules is a list of criteria to access it. According to the last available yearly EU-wide average Eurostat data, the normal process applies mainly to nationals of third countries or stateless persons who were resident in a country for which the rate of positive asylum decisions is higher than 20%.⁴ Moreover, unaccompanied minors and children under 12 with family members have the right to access the normal procedure unless they are considered to represent a risk to national security or public order. Applicants can also access the normal procedure when medical reasons require it or when the border procedure cannot be applied without detention, but its guarantees and conditions are not met. Member States can eventually decide not to apply the border procedure – and therefore to apply the normal procedure - to nationals of a third country which is not seen as sufficiently cooperating for readmissions.

² Such as the return and Dublin procedures.

³ Cf. [Amended proposal for a Regulation on the establishment of 'Eurodac' for the comparison of biometric data](#), also part of the package.

⁴ The Asylum Procedure Regulation does not specify how the recognition rate is calculated. However, the [Commission Staff Working Document](#), a non legislative document contained in the package, specifies that it is meant as the share of positive decisions at first instance resulting in the granting of refugee status or subsidiary protection status over the total number of asylum decisions at first instance (p. 20, note 17).

Thirdly, and for all the other cases, and those who are found to be "a risk for national security" or have misled the authorities by presenting false documents or information, the applicants will be channelled to the **asylum border procedure**. Both the return and asylum border procedures constitute the main object of the Asylum Procedure Regulation.

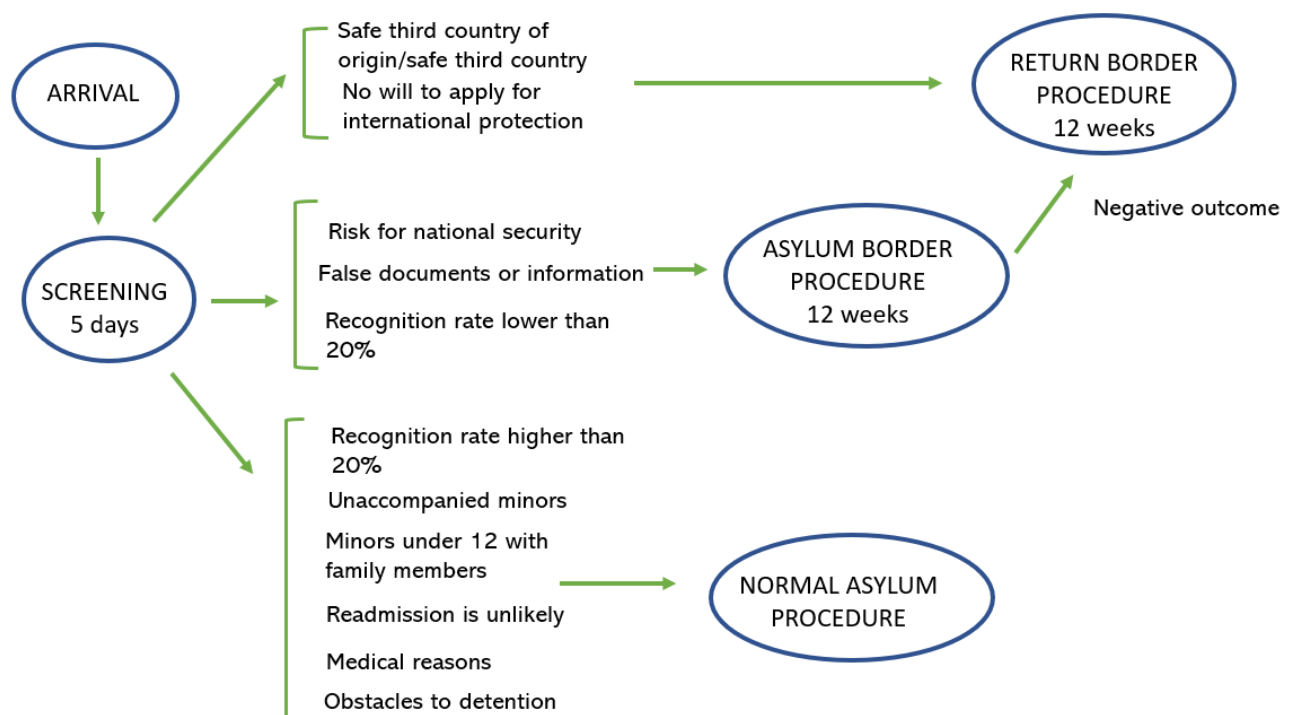
The asylum border procedure can have a maximum duration of 12 weeks, starting from the registration and comprising both the application's outcome and a potential appeal. In principle, if the procedure is not completed within this time limit, the applicant will have the right to enter the Member State territory to complete the asylum procedure.

If the outcome of the procedure is negative, a **return decision** is to be issued in the same or in a separate, parallel act. Applicants will have the right to lodge only one appeal against both decisions concerning international protection and return, and will not be granted the right to remain pending the outcome of the appeal procedure unless national laws allow the competent authority to decide in this regard.

Appeals against the outcome of a subsequent application have no suspensive effects either, but competent authorities can allow the applicant to remain upon his/her request⁵.

As soon as the "right to remain" has expired, a **border procedure for carrying out the return** will start. The maximum timeframe is also 12 weeks.

TAB 1: The new set of border procedures.



⁵ Asylum Procedure Regulation, Art. 54.

b) Human rights concerns related to the border procedures

The idea of carrying out border procedures related to international protection is not new in European legislation. This possibility is already foreseen in Article 43 of Directive 2013/32/EU⁶, though it is not mandatory, and its description is not very detailed. In short, this Article provides that Member States can process applications for international protection at the border, in transit zones, to decide on their admissibility and conduct a substantive examination. In the event of arrivals “involving a large number of third-country nationals”, border procedures can be carried out also in proximity to the borders.

Four weeks is the maximum timeframe for retention at borders, even though the same procedure can be carried out for a non-specified timeframe if applicants are accommodated normally in locations near the border.

The European Commission never provided an impact assessment on this provision, nor on the Directive it is part of – and this is already worrying since the Pact intends to extend and render its use mandatory. However, in November 2020, the European Parliamentary Research Service (EPRS) published an implementation assessment on asylum procedures at borders.⁷ Its key findings constitute the core of the Report on the implementation of Art. 43 adopted by the European Parliament in February 2021.⁸

These reports, together with field observations carried out by EuroMed Rights members and partners, other civil society organisations and independent actors, clearly show how border procedures raise serious concerns in their application, particularly regarding fundamental rights and procedural safeguards. On this ground, the following paragraphs will explore how the new set of border procedures does not address the criticalities observed in the actual border procedures and raise as well some new concerns.

Arbitrary deprivation of liberty and connected violations

The first problematic point regarding both the screening and the asylum and return border procedures is the **location** where these procedures would occur and the **arbitrary deprivation of liberty** it would entail. The two Regulations provide that the screening should take place “at or in proximity to the external borders”⁹ and the border procedures in locations at external borders or transit zones but also in proximity or even in other locations within the territory of the Member States, in case no other options are available. While individuals will be obliged to “remain in the designated facilities” during the screening¹⁰, the *asylum border procedure* can be “applied without the recourse to detention”. As for the *return border procedure*, the use of detention will be regulated by the recast Return Directive.

⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). Available at <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032>. The Directive should have been turned into a regulation in the reform of the asylum system introduced in 2016.

⁷ EPRS, “[Asylum procedures at the border. European Implementation Assessment](#)”, November 2020.

⁸ EP, “[Report on the implementation of Article 43 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection \(2020/2047\(INI\)\)](#)”, 20 January 2021.

⁹ Screening Regulation, Art. 6.

¹⁰ Screening Regulation, Art. 8.

These three procedures, however, will be carried out in a **pre-entry phase**: the first consequence is that even though it is not clearly provided, applicants will be *de facto* detained or at least confined on a circumscribed territory, e.g. an island. In any case, their retention will constitute an arbitrary deprivation of the liberty of movement.¹¹ The second consequence is inherent to the *fictio iuris* the pre-entry phase represents: it will be considered that the applicants have not entered the national territory, while in reality they did enter and their applications will be processed by national authorities and in compliance with national law. In this situation, **basic procedural guarantees**, such as a judicial review of their detention, would not be granted. Moreover, applicants would lack access to proper **legal information and legal assistance**, due to the *de facto* detention condition and the very short deadlines of the procedure.

"The very nature of border procedures makes it difficult to provide full procedural guarantees in practice", as in the conclusion of the explanatory statement of the EP Report on the implementation of Art. 43.

The screening and the vulnerabilities assessment

The second main concern is related to the way the **screening procedure** will be carried out. The Regulation provides that, during the screening, particular attention should be paid to *"individuals with vulnerabilities, such as pregnant women, elderly persons, single-parent families, persons with an immediately identifiable physical or mental disability, persons visibly having suffered psychological or physical trauma and unaccompanied minors"*. The **assessment of such vulnerabilities** is critical because they constitute a criterium for the application of the normal asylum procedure and for immediate psychological care. However, besides the fact that victims of torture are not even mentioned, the indication of "immediately identifiable" and "visible" signs is very problematic, since many vulnerabilities – e.g. in the case of victims of gender-based violence or trafficking, or of persons suffering from serious psychological distress - need far more than five days to be identified. Moreover, in this frame it is important to remind that many asylum seekers, especially those arriving in Italy, have spent some time in Libya, where they have probably passed through "unimaginable horrors", in the words of United Nations political mission in Libya (UNSMIL) and the UN human rights office (OHCHR). According to a report released in late 2018, in fact, unlawful killings, torture, arbitrary detention, slavery, human trafficking and gang rape are committed daily on migrants by State officials, armed groups, smugglers and traffickers.¹² This being the antechamber of the arrival to Europe for many, it is evident that the proposed vulnerabilities assessment in the frame of a five-day screening is not very likely to serve its purpose, having tragic consequences in terms of mental health.

¹¹ As noted by the mentioned EPRS implementation assessment: "In many Member States a legal basis for practices that in actual fact amount to detention is lacking (de facto detention). In other Member States, for example those that apply the hotspot approach, the blurring of restrictions on freedom of movement and detention is a key source of concern, and domestic law does not always provide a clear legal basis for either detention or, alternatively, the restrictions on the freedom of movement of applicant." (p.43).

¹² [Desperate and Dangerous](#): Report on the human rights situation of migrants and refugees in Libya, December 2018.

Age verification

Another question related to the screening is **age verification** since unaccompanied minors and minors under 12 and the family members accompanying them have the right to access the normal asylum procedure. To date, the frame of policies, practices and procedures for age verification – including nonmedical and medical methods - is very fragmented in the different EU countries. Both the lack of standardisation at EU level and the methodologies themselves have been criticised by relevant international actors, such as the UN High Commissioner for Refugees (UNHCR), the European Asylum Support Office (EASO) and the Fundamental Rights Agency (FRA). The European Academy of Paediatrics (EAP) even recommended its members not to participate in the process because of its lack of scientific basis.¹³ Regrettably, the Pact does not address this issue, and the only provision on minors in the Screening Regulation is that "support shall be given by personnel trained and qualified to deal with minors, and in cooperation with child protection authorities".¹⁴ Besides questionable age verification methods, **the threshold of 12 instead of 18 years old for accompanied children to be channelled to the border procedures is hardly justifiable.**

There is no reason why minors between 12 and 18 should not be considered children and therefore not allowed to enjoy the rights connected to their status.¹⁵

The outcome of the screening and the criterium of nationality

Regardless, the **five-day timeframe** of the screening procedure doesn't seem to be adequate to carry out all these assessments. Moreover, after this time limit, individuals will be deferred to another procedure et cela sans possibilité de recours, whether or not the screening has been completed.

On these grounds, it is quite clear that the outcome of the screening will be determined mainly based on the applicant's nationality. This is highly problematic because, according to international legislation, all applicants should be granted the right to be individually assessed, and the **use of the criterium of nationality** can prevent a proper individual assessment. Applicants deferred to the asylum border procedure because the recognition rate of their country of origin is lower than 20% would therefore suffer from double discrimination. They would have fewer procedural safeguards in their application process ("because of the very nature of the border procedure") and might suffer - even unconsciously - from a prejudice based on their nationality in the assessment of their applications. Moreover, it is not clear why the recognition rate is based on first-instance decisions, while a significant number of negative decisions are overturned in appeal. And it has been observed in recent years that the recognition rate can vary greatly between EU Member States and from year to year.

¹³ Detailed info in this regard can be found in this article: "[Age assessment and the protection of minor asylum seekers: time for a harmonised approach in the EU](#)", Refugee Law Initiative, August 2020.

¹⁴ Screening Regulation, Art. 9.

¹⁵ [Convention on the Rights of the Child](#), cf. Art. 37 on detention.

The extreme consequence of using the criterium of nationality is, of course, the concept of **"safe third country"**. This concept will be more extensively discussed in the second part of this report. However, its problematic nature is evident because applicants from "safe" countries can be deferred to a return procedure directly after the screening. The inadmissibility of their application for international protection on this ground can be considered as a violation of the principle of *non-refoulement*.

The right to an effective remedy

Another questionable aspect of the screening procedure is that - since it is considered an administrative procedure - its outcome cannot be the object of judicial review. Given the importance of this decision and the consequence that it will have on the application process, the question is not insignificant. In general, the whole set of border procedures seems to have a problem with the **right to an effective remedy**. To date, in accordance with Directive 2013/32/EU, all applicants for international protection can access at least two levels of jurisdiction, and some Member States allow a third higher level. Applicants also have the right to remain in the territory pending the outcome of the remedy, even though national authorities can decide otherwise. Should the new Pact be approved, the situation would change significantly. Not only will Member States strongly be encouraged to provide only one single appeal, but the appeal would not automatically have a suspensive effect.

And in cases of subsequent applications, Member States will be even more strongly encouraged to provide so in national law. Local courts would be entitled to grant the applicant the right to stay, but the perspective is completely reversed.

Border procedures at internal borders

The border procedures have been conceived mainly to be applied **at the European external borders**, in countries of first arrival. However, the Screening Regulation provides that the screening and the procedures following its outcome can also be applied to third-country nationals apprehended within the territory of a Member State where they had not been previously subject to border controls. **Nothing prevents, in practice, from applying them at internal borders.** In fact, this is already the case with the current border procedure as are regulated by Art. 43 of Directive 2013/32/EU: some Member States properly or *de facto* apply it also at internal borders.¹⁶

According to the EPRS impact assessment, the same violations of fundamental rights and lack of procedural safeguards happen wherever the border procedures are applied, and also in countries of secondary movement and where numbers are very low: it is, for example, the case of Germany, where, since 2015, the border procedure was applied to only around 500 persons per year, or of France, where in the same period it was applied to a number that slightly increased from around 1,000 to around 2,000 individuals per year.¹⁷ On these grounds, **there is no reason to believe that all the violations of human rights deriving from the new set of border procedures would not be relevant if applied in countries of secondary movement.**

¹⁶ EPRS implementation assessment, p. 42.

¹⁷ EPRS implementation assessment, Annex V, Country profile: France, p. 234 and Annex VI – Country profile: Germany, p. 248.

Nevertheless, a few remarks concerning their implementation only in these latter countries can be made. First, while it is stated that "the proposed measures contribute to preserving the area without controls at internal borders"¹⁸, making the border procedures mandatory and not applicable only at external borders could entail **that countries of secondary arrivals would be encouraged to strengthen controls at internal borders**. The illegal practice of **racial profiling** at internal border controls could also be increased to identify potential candidates for the border procedures. Very controversial, to the point of absurdity, would be in this case the *fictio iuris* for which the border procedures are applied in a "**pre-entry situation**": how could it be pretended that someone who has been in the EU territory for weeks or months has not entered yet?

In conclusion, the fact that the Screening Regulation established that Member States should develop a **national, independent monitoring mechanism** on the respect of fundamental rights with the support of the Fundamental Rights Agency is much welcomed. However, it is regrettable that such a mechanism would concern only the screening and not the asylum and return border procedures which would strongly benefit from it.

1.2. [Countries of first arrival: Spain and Italy](#)

The countries on which the new border procedures will mostly be applied are essentially the countries of first arrival: Spain, Italy and Greece. If the new Pact is adopted, the first practical consequence for these countries is that they would need to ensure the availability of facilities for carrying out the new procedures: in short, to make sure that migration detention facilities have the capacity to arbitrarily deprive the liberty of movement of a considerable number of individuals in the timeframe set by the EC proposal.

The object of this chapter is to assess what could be the **possible impact of the Pact on the use of detention in Spain and Italy** by using data from 2020. The case of Greece will be used instead in the second part of this analysis to simulate the effect of the new rules in a crisis situation.

a) Detention conditions and facilities

In **Spain**, the proper facilities for the detention of foreigners are the **Detention Centres for Foreigners (Centros de Internamiento de Extranjeros, CIE)**: they serve as pre-removal centres and are regulated by the Organic Law on the Rights and Freedoms of Aliens in Spain and their Social Integration (Aliens Act). However, third-country nationals arriving by sea can be issued with a detention order and detained in a **police station** or a **Centre for the Temporary Attention of Foreigners (Centro de Atención Temporal de Extranjeros, CATE)**. These facilities operate under police surveillance and are not regulated by any specific legal framework. In addition, there are two **Temporary Stay Centres for Immigrants (Centros de Estancia Temporal de Inmigrantes, CETI)** in the autonomous cities of Ceuta and Melilla: they host undocumented migrants entering the Spanish territory before they are returned to Morocco or moved to the Spanish mainland. Finally, asylum

¹⁸ Screening Regulation, p.8.

seekers arriving at seaports or airports can be held in **Border Inadmission Chambers (Salas de Inadmisión de fronteras)**, de facto **transit zones**. The **total number of places**, considering all the facilities, is **4,103**.

In **Italy**, there are only two types of migration detention facilities. The **Permanent Repatriation Centres (Centri di Permanenza per il Rimpatrio, CPR)** are the proper pre-removal centres, but asylum seekers are *de facto* also detained in **hotspots**. These latter facilities were introduced in 2015 to filter – and possibly returning – asylum seekers arriving by sea. However, since 2018 they have been used as informal detention centres on the ground of new legislation allowing detention "for the purpose of establishing or identifying identity". The legal framework for such detentions is therefore unclear. In total, considering both CPR and hotspots, the **total capacity is 2,307 places**.

In both **Spain and Italy**, **detention conditions can vary a lot**, not only among the different kinds of facilities but also among the different facilities of the same type. Regardless, what all these facilities have in common is that the detention conditions are **deplorable**. This was amply documented by several civil society and human rights organisations, as well as by the Ombudsman (Defensor del Pueblo) in Spain and the National Guarantor for the rights of detained persons in Italy. The infrastructures are generally inappropriate, and detainees often **do not have access to legal information and assistance**. Moreover, access to **health and psychological care is insufficient**. Many detainees suffer from mental issues problems, and several cases of suicide and attempted suicide have been registered. Besides, there have been reports of **mistreatment, torture and disproportionate use of force** by police officials.

In Italy, a sentence from the Court of Bari (Apulia) in 2014 described the conditions in the CPR of Bari (former CIE – Identification and Expulsion Centre) as **"inhumane" and worse than a prison**.¹⁹ Moreover, in both countries, civil society organisations, journalists and other external actors face many obstacles in accessing the facilities, often based on vague reasons.²⁰

b) A simulation on 2020

Spain and Italy have quite similar profiles when it comes to migration flows: **in 2020, Spain registered 41,861 arrivals, while Italy had 34,154**.²¹ In both cases, most asylum seekers traditionally come from countries with a low recognition rate.

In 2020, the five most common countries of arrival in Spain were Algeria (39%), Morocco (20%), Mali (13%), Guinea (8%) and Côte d'Ivoire (7%), while in Italy they were Tunisia (38%), Bangladesh (12%), Côte d'Ivoire (6%), Algeria (4%) and Pakistan (4%).²² All countries with a recognition rate lower than 20%.

¹⁹ Rainews.

²⁰ Detailed information and data on migration detention facilities in Spain and Italy can be found in ["Locked up and excluded. Informal and illegal detention in Spain, Greece, Italy and Germany"](#), Migreurop, September 2020. Additional information on the negative impacts of the reception model of big overcrowded centres on the mental health of asylum seekers and refugees can be found in Medici per i Diritti Umani's report ["Bad reception: a new trauma for refugees"](#), October 2020.

²¹ Data on Spain comprise both arrivals by sea and by land, while data on Italy only take into account arrivals by sea. This is due to the fact that in Italy refoulements and pushbacks often take place at airports and at the Slovenian land borders, leaving no official track. In this regard check AIDA-ECRE [Asylum Country Report on Italy, 2019 Update](#).

²² As for Italy, data on nationalities refer to the whole of 2020. As for Spain, only data until September 2020 are available.

Based on the available data on arrivals, most common nationalities and unaccompanied minors, it can be estimated that, if it were already in force in 2020, **the new asylum and return border procedures would have applied to 37,089 (88,6%) and 26,779 (78%) asylum seekers in Spain and Italy, respectively.**²³

Out of these, some asylum seekers could have been deferred to the return procedure directly after the screening on the ground that they come from a “safe” third country. It is difficult to estimate how this provision could have been applied, however, it is possible to report how many asylum seekers it could have possibly affected. Spain doesn’t have an official list of “safe” third countries, but the “safe” third country concept has been used in some Courts’ ruling – among the most common countries of arrival, concerning citizens of Morocco and Algeria.²⁴ Therefore, in 2020 this provision could have interested up to around 24.698 asylum seekers.

Among the list of “most common countries of arrival” to Italy, Algeria, Morocco and Tunisia are considered as “safe” third countries since 2019²⁵. This provision therefore could have affected up to 15,371 persons.

The figures below show the evolution of detentions that would have taken place in 2020 in Spain and Italy if the Pact was already in force. Two potential scenarios are shown. In both, all asylum seekers spend five days in detention to undergo the screening procedure.

In the first scenario, all asylum seekers who have been channelled to the asylum border procedure stay in detention for an average of 18 weeks. 18 is the median number between 12 (the maximum time limit for the asylum border procedure followed by the return border procedure) and 24 (the total of asylum border procedure followed by the return border procedure). In the second scenario, all remain in detention for 24 weeks, which is the maximum possible time limit according to the proposal. A realistic scenario is somewhere between the two, considering that: some asylum seekers would obtain a form of protection and be released after 12 weeks of asylum border procedure (less than 20%); some others, the majority, after the asylum border procedure would obtain a negative response and be channelled through the return border procedure and stay for another 12 weeks; and eventually some asylum seekers (it is difficult to estimate how many) could have their applications considered as inadmissible on the ground that they come from a “safe” third country and be directly deferred directly to the return procedure, whose maximum timeframe is 12 weeks.

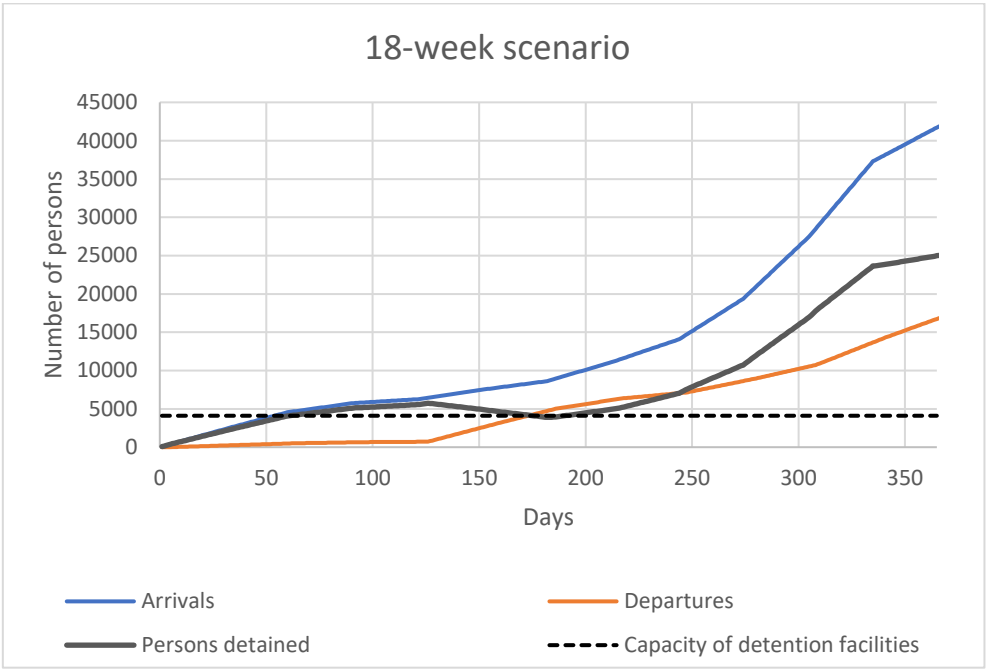
It can be assumed that different kinds of migration detention facilities would be used for the screening, the asylum and the return border procedures, but, for the sake of this simulation, only the total number of available places has been considered.

²³ The full set of data can be found in the Annex “Tables of data” at the end of this study. The percentage of asylum seekers that would have undergone the asylum border procedures has been calculated by comparing the arrivals with the data on most common nationalities and their recognition rate. The total number of unaccompanied children has been subtracted to the sum, as in both countries the greatest majority of them come from countries with a low recognition rate. The result should be intended as a reasonable estimation more than a precise calculation.

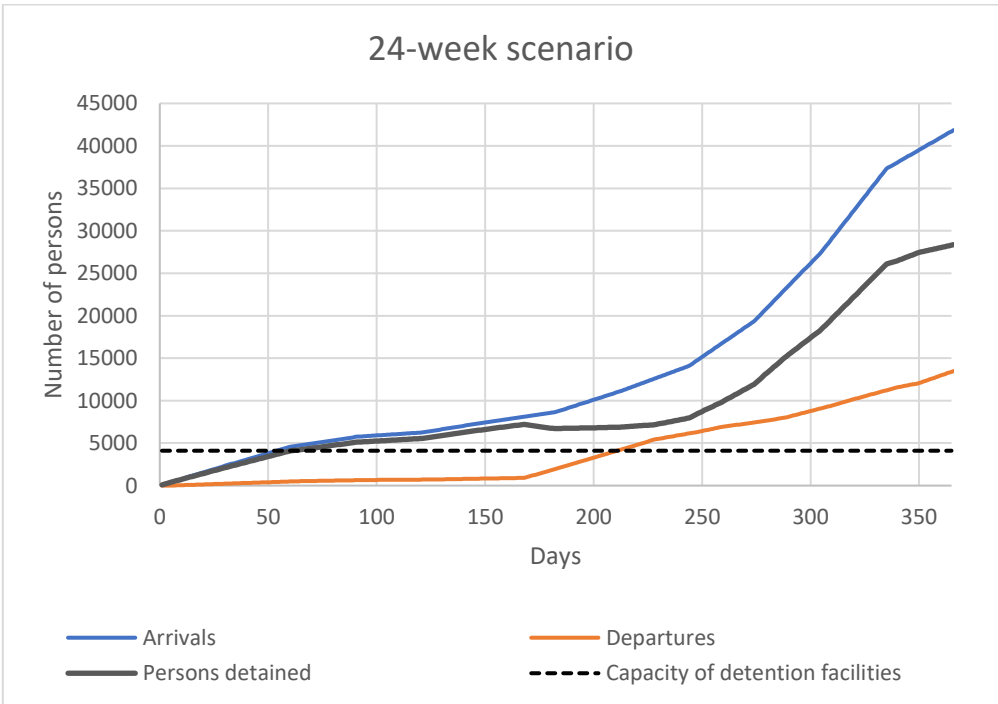
²⁴ AIDA/ECRE [Asylum Country Report on Spain](#), 2021 update.

²⁵ Ministry of Foreign Affairs’ [decree](#) of 4/10/2019.

TAB 2: A simulation on Spain / 18-week scenario

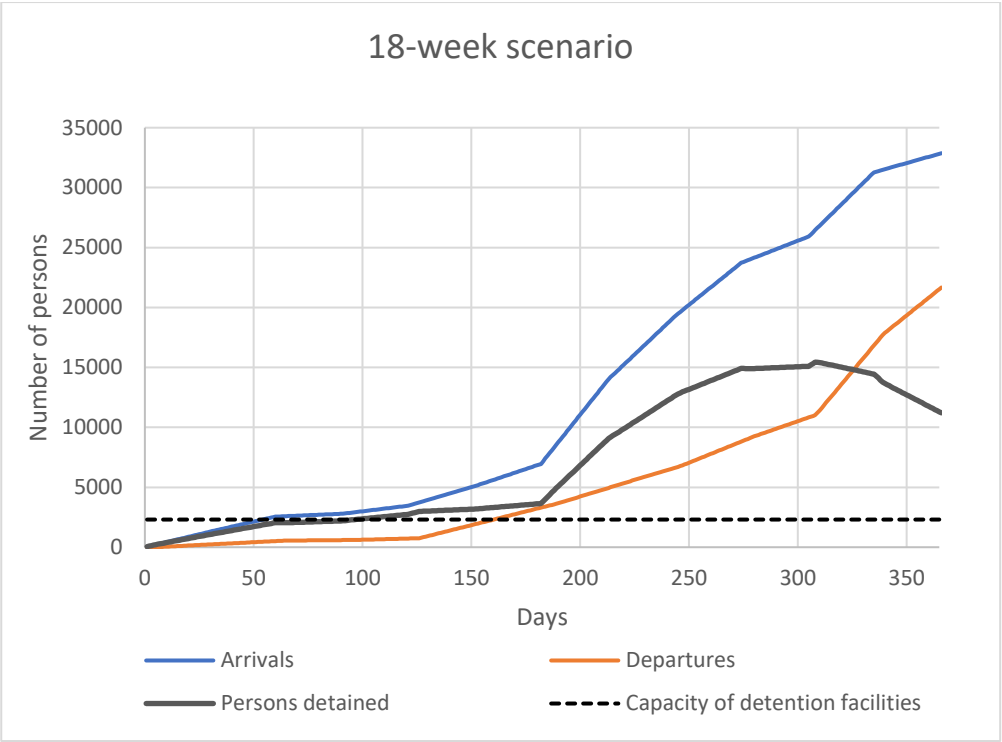


TAB 3: A simulation on Spain / 24-week scenario

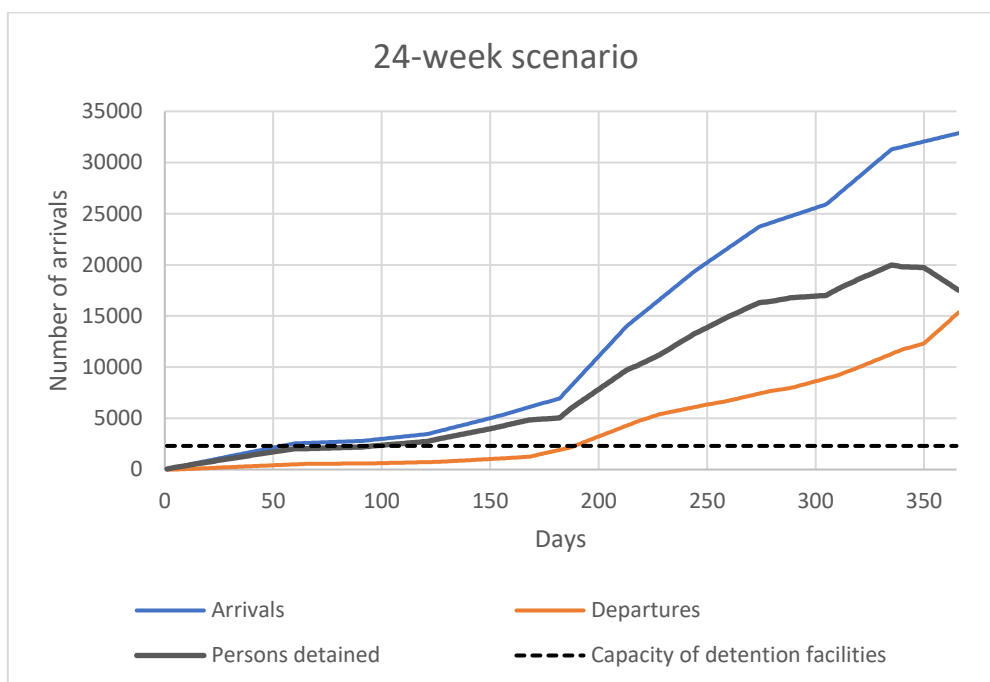


In both scenarios, in the Spanish case, the number of people who should be detained is unmistakably much higher than the available places. **In moments of worst pressure, 25,022 or 28,371** (respectively in the 18 and in 24-week scenarios) **people would be detained at the same moment**, while the **capacity of migration detention facilities is 4,103 places**.

TAB 4: A simulation on Italy/18-week scenario



TAB 5: A simulation on Italy/24-week scenario



As for Italy, the result is unsurprisingly similar. If the Pact were already in force, **between 15,440 and 19,987 people would have been detained in the moments of worst pressure in facilities whose maximum capacity is 2,307 places.**

There is every reason to believe that, if implemented in other European countries, such as Malta or Greece, this scheme is likely to lead to situations that are intolerable in terms of legal standards and the dignity of individuals.

In both countries' legislation, all detentions measures have to be validated by a judge- within 48 hours in Italy and 72 in Spain. If the new procedures were applied, this validation should happen during the second day of the screening and again after the screening's outcome for those deferred to one of the two border procedures. In general, the **question on how deprivation of liberty on such a large scale would be compliant with national and international legislation arises.** Italy, for example, has already been condemned by the European Court of Human Rights for the violation of Art. 5 CEDH (right to liberty and security) in a case concerning three Tunisian nationals who had been unlawfully detained and after returned (*Khlaifia and others v. Italy*, decision of 15/12/2016). Besides the specific case, the violations for which Italy was condemned are intrinsic to the "hotspot" system²⁶ and would be inherited by the new procedures.

²⁶ ASGI, CILD, IndieWatch, Action Aid, "[Considerazioni a cura del progetto In limine relative all'attuale funzionamento del centro hotspot di Lampedusa alla luce delle violazioni riscontrate dalla Corte nella sentenza Khlaifia e altri c. Italia](#)", June 2018.

While today, with much smaller numbers, **de facto detentions** are already often implemented in a grey zone and outside of a proper legal framework, there is no doubt that **this could become the norm while applied on a much bigger scale**. And this would be true not only for the problems related to the implementation of detention but for **all the criticalities observed** in migration detention facilities and, in general, when border procedures are applied.

The concrete risk is that border procedures will encourage and repropose a system characterised by open centers on islands or closed facilities on the land, which has proved to be detrimental from every angle. Spain is already going towards this direction, by financing new camps on the Canary Islands,²⁷ on the model of the Moria camp in Lesbos, where asylum seekers are de facto detained and live in appalling conditions.²⁸

As for Italy, an example could be the former CARA (Center for the reception of asylum seekers) of Mineo, a village close to the Sicilian town of Catania. This camp, “the biggest on Europe” in 2014 hosted over 4,000 persons against a capacity of 2307 and was finally closed in 2019. While not being a detention center, it gives an idea of what the facilities that might be used for the new border procedures would look like: dramatically overcrowded, characterised by a lack of basic services -including health and psychological care and legal aid - and by alarming social degradation and emargination. A center whose story was marked as well by the well-justified suspicion of mismanagement of public funds, as denounced by a report issued by a committee of inquiry of the Italian Parliament²⁹: such accusations are currently object of judicial proceedings.³⁰

In both cases whether in the Canary Island today and in the area of Mineo at the time – a worrisome increase of racism and episodes of discrimination were registered in relation with the existence of the centers.³¹

The model that the new procedures will not favour, in contrast, would be the integrated and decentralised reception system, which has proved to be the most successful for the integration of asylum seekers in the hosting community: a model which in Italy is already under attack.³²

Another critical point that the new procedures do not take into account is the **duration of asylum** procedures: the most recent available data about Spain show that in 2018 the average length of the procedure was 473 days, meaning approximately **1 year and 3 months**. However, it has been reported that the procedure can vary a lot depending on the applicant's nationality. For example, in 2018, it was 288 days for Syrians, 505 days for Afghans and 633 days for Iraqis.³³ In **Italy**, the applicant must wait at least 10 months from lodging the first application to the outcome. If we add the duration of the first appeal, the total length of the procedure would likely reach **2 years or even more than 3 years and 7 months**, especially if we also factor in the possibility of judicial review in the Court of Cassation.³⁴

²⁷ EuroMed Rights, [With the forgotten migrants of the Canary Islands](#), December 2021.

²⁸ More info on the Moria camp and the connected violations can be found in chapter II. 2 of this report.

²⁹ La Repubblica, “[Cara Mineo, la commissione d'inchiesta: 'Chiudere subito la struttura e revocare il direttore indagato per truffa'](#)”, 21 June 2017.

³⁰ MEDU, “[Oggi chiuderà il CARA di Mineo](#)”, July 2019.

³¹ LasciateCIEntrare, “[Sicilia. Chiude il CARA della mega accoglienza, restano i problemi e cresce il razzismo](#)”, 20 May 2019; El Pais, “[Escalada de xenofobia en Canarias](#)”, 31 January 2021.

³² Oxfam “[La demolizione del sistema di accoglienza diffusa](#)”, 6 May 2019.

³³ AIDA/ECRE [Country Report on Spain](#), 2019 Update - April 2020, Asylum Procedure, C – Regular Procedure.

³⁴ [Atlante SPRAR](#) 2016, p. 206. The most recent data on the issue unfortunately date back to 2016, however, civil society organisations providing legal help to refugees in Italy confirmed that the trend has not changed since.

Looking at these data, it is pretty clear that the **maximum timeframe of 12 weeks for completing the asylum border procedure foreseen by the new Pact seems quite unrealistic** if procedural safeguards are respected.

Finally, it is legitimate to ask who is supposed to pay for the functioning of these procedures – and the answer is still not clear. Theoretically, as stated in the explanatory memoranda preceding the two proposals, the costs of the new sets of procedures should be covered by the 2021-2027 Multiannual Financial Framework (MFF): more precisely, the screening would be covered by the Instrument for Financial Support for Border Management and Visa (BMVI), which is part of the Integrated Border Management Fund (IBMF), and the asylum and return border procedures would be covered by the Asylum and Migration Fund (AMF). However, it can be argued that the MFF has been drafted long before the new Pact, so its financial implications cannot have been taken into consideration. Therefore, there is no assurance that its costs can be covered under these instruments. Moreover, the usual co-financing rate for the AMF and the BMVI is 75% of the total eligible expenditure of the activity, meaning that Member States need to cover 25% of the costs from their own resources.³⁵ In short: **the financial burden of the new procedures for the countries of first arrival risque d’être insupportable.**

II- The European "solidarity"

If the introduction of the new set of border procedures is the first, main novelty introduced by the Pact, the second one is the proposal of a mechanism of "European solidarity" whose aim is to correct the proposed reform of the Dublin Regulation – currently stalled in discussions between institutions. This part of the research will explain the new proposal and analyse its impacts in terms of human rights violations. To do so, it will simulate the implementation of the crisis mechanism as if the Pact was already in force in Greece in 2015, during the "refugee crisis", discuss the weakness of the relocation mechanism and show the human rights violations that the return sponsorship and other forms of solidarity would entail, with a specific focus on the external dimension of the Pact and of the other, parallel, EU migration tools.

1.1. The "reform" of the Dublin Regulation and the "solidarity mechanism"

a) The "reform" of the Dublin Regulation

The "reform" of the Dublin Regulation and the establishment of a more solidary system among the EU Member States in sharing the "burden" of new arrivals was one of the most awaited points of the proposal. However, **the proposed Regulation** on asylum and migration management (hereafter, [RAMM Regulation](#))³⁶ **maintains and even reinforces the principle that the first country of arrival is responsible for asylum procedures.**

³⁵ ["Financial Implications of the New Pact on Migration and Asylum: Will the Next MFF Cover the Costs?"](#).

³⁶ The RAMM Regulation is partially based on its previous 2016 version, which was adopted by the European Parliament in November 2017 but failed to reach agreement in the Council.

In fact **the principle that the applicant must apply for international protection in the country of first arrival remains** – with the slight addition of the possibility to apply also in the country of legal stay, if any. During the screening, if the security checks shows that the person presents a "*security risk*", no transfer to other Member States will be allowed. In case of a transfer decision, the applicant must be present and available for the authorities and respect such decision. Moreover, with the clear intent of avoiding secondary movements, the clause envisaging a cessation of responsibility after twelve months from the date of entry and the expiry of the deadline has been extended to three years and, as proposed in 2016, "*take back requests*" will now be transformed into "***take back notifications***"

The proposal introduces though some new positive criteria for Member States' responsibility: the definition of family members has been extended to siblings and to family relations formed after leaving the country of origin but before arrival on the Member State territory. Also, the rules on the evidence required will be more flexible; formal proof, such as DNA testing or original documentary, should not always be necessary. The proposal has also added criteria related to the possession of a diploma or qualification issued by an educational institution of a Member State as proof of links to a territory.

b) Three forms and three cases of "solidarity" mechanisms

The idea is that the lack of a proper reform of the Dublin Regulation should be corrected by a "solidarity" mechanism among Member States. There are three forms of solidarity from which Member States will be able to choose: **relocation**, **return sponsorship** and **capacity building**.

Relocation means that other Member States could take responsibility for an the application of an individual who is not subject to the border procedures.

In the case of **return sponsorship**, Member States could provide support by carrying out forced or voluntary returns, using their programmes and resources. The sponsoring Member State would choose the nationality of return candidates based on the readmission agreements signed bilaterally or multilaterally and the highest probability of expulsion. In both cases of relocation and return sponsorship, the "solidary" Member State would receive a financial contribution of EUR 10,000 per relocated or returned person - EUR 12,000 in the case of an unaccompanied minor.

The third option is **capacity building**: the supporting Member State could provide it in one of these three fields: border management, external dimension or reception and asylum needs.

"Solidarity" after search and rescue operations and in a situation of migratory pressure

There are also situations in which such a mechanism should be activated: after a search and rescue operation, in a situation of migratory pressure or in a crisis situation. In the first case - solidarity following **disembarkation after search and rescue operations** - an annual Migration Management Report will set every year both the expected rescue operations and the extent of the solidarity response which will be required from those Member States who are not directly affected. Member States will inform the Commission on the chosen form of solidarity they intend to undertake.

On this basis, the Commission will adopt an implementing act that will "establish a solidarity pool to provide support to the challenges faced by the Member State of disembarkation".³⁷ The Commission will be able to adapt the solidarity plan in case the projections prove to be incorrect.

The assessment of a situation of **migratory pressure**³⁸ will be made only at a Member State's request to the Commission. After having confirmed this status the Commission will detail how other Member States shall contribute, through measures of relocation, return sponsorship, or a combination of both. Member States, which in some instances would be allowed to choose a form of capacity building, will then indicate how they intend to contribute to their "Solidarity Response Plan". Again, the Commission will adopt an implementing act and readjust Member States' contribution, if the assessment does not correspond to the actual needs. Unlike in the case of disembarkation, relocation would include beneficiaries of international protection for up to three years from when they were granted international protection.

The Crisis mechanism: derogatory rules

While these two mechanisms of "solidarity" are part of the RAMM Regulation, the third case, the **crisis mechanism**, is the object of a separate, *ad hoc* Proposal for a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum (hereafter, [Crisis Regulation](#)). It is accompanied by another document, the "[Migration Preparedness and Crisis Blueprint](#)". In this case, the mechanism is more complex.

The "*Migration Preparedness and Crisis Blueprint*" is a system to coordinate migration management in normal and exceptional times. To implement it, all actors involved should work together in an EU Migration Preparedness and Crisis Management Network ("the Network"). They should appoint a Point of Contact and send periodic reports to permanently monitor and anticipate migration flows and situations. The Network should also establish implementation guidelines to ensure that the information is exchanged efficiently. In the case of a critical situation – as the one defined in the Regulation, but not necessarily - the Network will also support the Commission by providing information and guidance and coordinating response measures.

The Crisis Regulation introduces a set of specific rules that Member States can apply in the case of a situation of crisis or the risk of this situation. A situation of crisis is defined as "an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked in its territory following search and rescue operations, being of such scale (in proportion to the population and GDP of the Member State concerned) and nature, that it renders the Member State's asylum, reception or return system non-functional and can have serious consequences for the functioning of the Common European Asylum System or the Common Framework (...)". A Member State finding itself in a such a situation can submit a reasoned request to the Commission. Due to the vagueness of the definition of crisis, the Commission will have leeway to decide whether there is a crisis or not. While waiting for the Commission's response, the Member State can amend the deadlines as summarised in the table below:

³⁷ RAMM Regulation, p.19.

³⁸ "Migratory pressure is defined as " a situation where there is a large number of arrivals of third-country nationals or stateless persons, or a risk of such arrivals, including where this stems from arrivals following search and rescue operations, as a result of the geographical location of a Member State and the specific developments in third countries which generate migratory movements that place a burden even on well prepared asylum and reception systems and requires immediate action". (Art. 2 (w), RAMM Regulation).

TAB 6: Main differences between border procedures in normal times and during a crisis situation.

	Normal procedures	Crisis situation
Screening	<ul style="list-style-type: none"> • 5 days 	<ul style="list-style-type: none"> • 10 days
Timeframe for implementation of derogations on screening		<ul style="list-style-type: none"> • Unilaterally 15 days • After EC's validation, 4 + 4 + 4 (12) weeks in total
Asylum border procedure	<ul style="list-style-type: none"> • 12 weeks • Recognition rate up to 20% 	<ul style="list-style-type: none"> • 20 weeks • Recognition rate up to 75%
Return border procedure	<ul style="list-style-type: none"> • 12 weeks 	<ul style="list-style-type: none"> • 20 weeks
Timeframe for implementation of derogations on border procedures		<ul style="list-style-type: none"> • 6 + 6 months

Within this framework, the Regulation introduces the possibility to presume the risk of absconding in individual cases, unless proven otherwise: it means that detention measures can be applied with basically no ground. In total, the derogation provides that applicants could be kept in the border facility for an amount of time that exceeds nine months.

The Crisis mechanism: a specific form of “solidarity”

A **specific "solidarity" mechanism** applies in this framework. As soon as the Commission has assessed a crisis situation in one or more Member States, all the others will have a week to submit a Crisis Solidarity Response Plan. The Commission will then adopt an implementing act setting out the number of persons to be relocated or subject to return sponsorship and determine the distribution of these people between Member States, determined as usual by the population and the GDP of each country. Alternative solidarity measures cannot be chosen in this context. The line between relocation and return sponsorship is not very clear in this case: Member States could offer to relocate some asylum seekers, transfer them to their own national territory, and later decide to return them instead. Member States choosing return sponsorship will have four months instead of the usual eight to return or remove irregular migrants; otherwise, they will have an obligation to transfer the concerned persons to their territory. Though, whereas for **reasons of force majeure** a Member State cannot fulfil its obligation, the Commission might allow it to extend the implementation of relocation and return sponsorship up to six months and extend the deadline for registration for the applications up to four weeks. This means that **the right to asylum can be frozen for almost a month.**

The last special measure foreseen by this Regulation is the possibility, for Member States, to grant an **immediate protection status** to persons who are facing, in their country of origin, "an exceptionally high risk of being subject to indiscriminate violence, in a situation of armed conflict, and who are unable to return to that third country". The idea of granting temporary protection in the event of a mass influx to make the migration procedures more manageable for the Member States is not new. It constitutes the scope of the Temporary Protection Directive, which was never activated and which the proposal for the new Pact envisages to repeal. In the new Regulation's proposal, the Commission will establish whether to apply the immediate protection status to a specific group of people. In this case, Member States may suspend the examination of applications of persons concerned and grant them immediate protection, which would qualify them to enjoy the economic and social rights that apply to beneficiaries of subsidiary protection. At the end of the application of this provision, which cannot exceed one year, the examination of asylum applications will resume. In case the concerned persons are relocated to another Member State, the immediate protection will cease, and the person will start a procedure for international protection.

1.2. [The crisis situation: a simulation on Greece](#)

With its 861,630 arrivals in 2015, Greece is the European country that was most affected by the "European refugee crisis". The declared aim of the crisis mechanism foreseen by the new Pact is to set up a legislative framework that would provide a structured approach should a situation similar to 2015 occur again. Therefore, it is interesting to assess what would happen in Greece should a comparable situation occur by applying the crisis mechanisms to the 2015 data.

As it was done for the Spanish and the Italian case, the first element to consider is the capacity of migration detention facilities because these are where asylum seekers would be kept during the border procedures. Since the aim is to explain what would happen should a similar situation occur *in the future*, this simulation will use the most recent data and information on such facilities.

Similarly to Spain and Italy, Greece has both official and informal migration detention facilities. The official detention infrastructures are the **Pre-removal detention centres (PRDC)**. These centres are closer to proper prisons, with cells, razor blade wire and high fences. While the situation can vary much from centre to centre, detainees suffer from a lack of basic services, and life conditions are deplorable. In particular, the hygienic situation in some centres has been described as "potentially amounting to inhuman and degrading treatment", the access to healthcare is almost totally lacking. Frequent cases of violence and harassment by the guards have been reported.

The other type of centres where asylum seekers can be deprived of their liberty of movement are the **Reception and Identification Centres (RIC), also known as hotspots**, the greatest majority of which are on the Eastern Aegean Islands. The sadly famous Moria camp on Lesbos is one of them. People hosted in these facilities are not officially detained, but since they are not allowed to leave the islands they are *de facto* detained. Life conditions, however, have been described as appalling: access to food, water, sanitation and healthcare is precarious or even inexistent, and the environment is threatening, especially for women and girls, with few protections from sexual harassment and gender-based violence.

These facilities are so horribly overcrowded that many people live in tents or makeshift shelters akin to "slums" located in the area next to the proper hotspot. To give an idea, the occupancy rates at the end of 2019 ranged from 290% in Leros to 1200% in Samos. After her visit to the hotspots of Lesbos and Samos, in October 2019, the Council of Europe (CoE) Commissioner for Human Rights said that **"this no longer has anything to do with the reception of asylum seekers. This has become a struggle for survival"**.³⁹ There is no available information on the average length of detention in both PRDC and hotspots, but we do have data on their combined **maximum capacity: 11,101 places**.

While numbers are less significant, asylum seekers can also be detained in **police stations and at Athens' airport**. Conditions in these facilities are also worrying: the access to medical services is lacking, no sanitary products or clothing are provided, food is insufficient and detainees do not have access to interpretation. While data on their capacity are not available, in 2019 the number of persons detained in this kind of facility was 1,021. Even though these facilities should not be used for any detention exceeding 24 hours, third-country nationals were reportedly detained for several months. Due to the lack of accurate data, these will not be taken into consideration for this simulation.

As for the number of arrivals, it was mentioned **in 2015 that Greece had 861,630 asylum seekers who arrived by sea and land**. As for the most common nationalities of arrival, Greece's profile is different from Spain and Italy: most of the asylum seekers come from countries with a high recognition rate: Syria (56%), Afghanistan (24%), Iraq (10%).⁴⁰

On this basis, we can estimate that **in 2015 the crisis asylum and return border procedures would have applied to 377,394 (43,8%) asylum seekers**.⁴¹

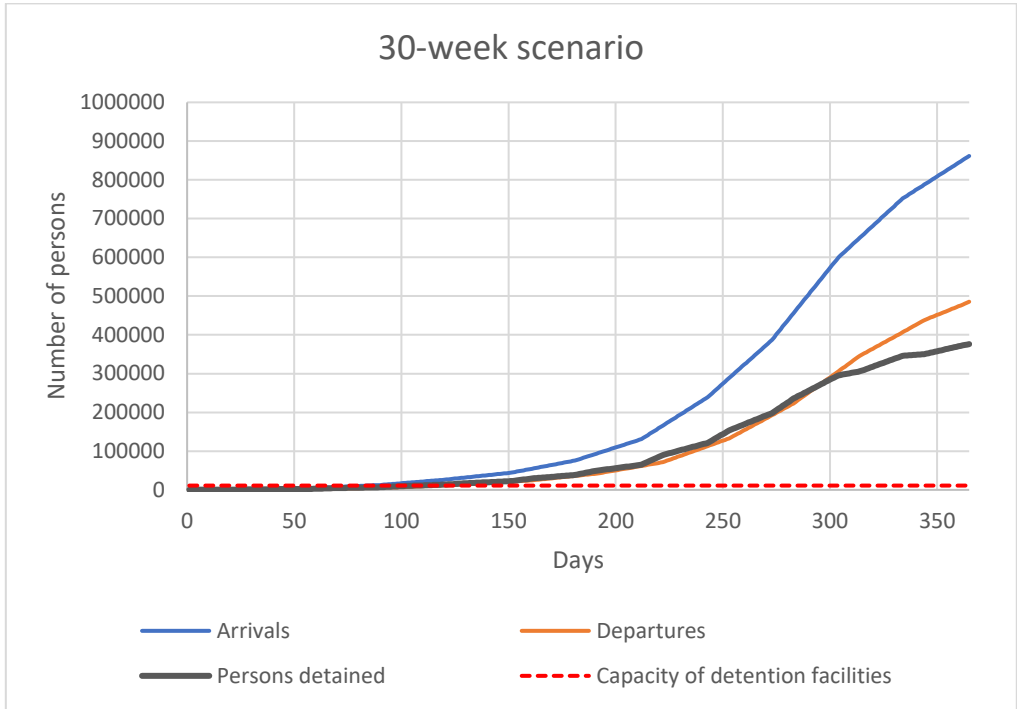
As in the previous simulations, there are two potential scenarios. In both, all asylum seekers spend ten days in detention to undergo the screening procedure. In the first scenario, all asylum seekers who have been channelled to the asylum border procedure stay in detention for 30 weeks. 30 is the median number between 20 (the maximum time limit for the asylum border procedure) and 40 (the maximum time limit for the asylum plus the return border procedure). In the second scenario, all remain in detention for 40 weeks, which is the maximum possible time limit according to the proposal.

³⁹ All information and data on migration detention facilities in Greece can be found in ["Locked up and excluded. Informal and illegal detention in Spain, Greece, Italy and Germany"](#), Migreurop, September 2020.

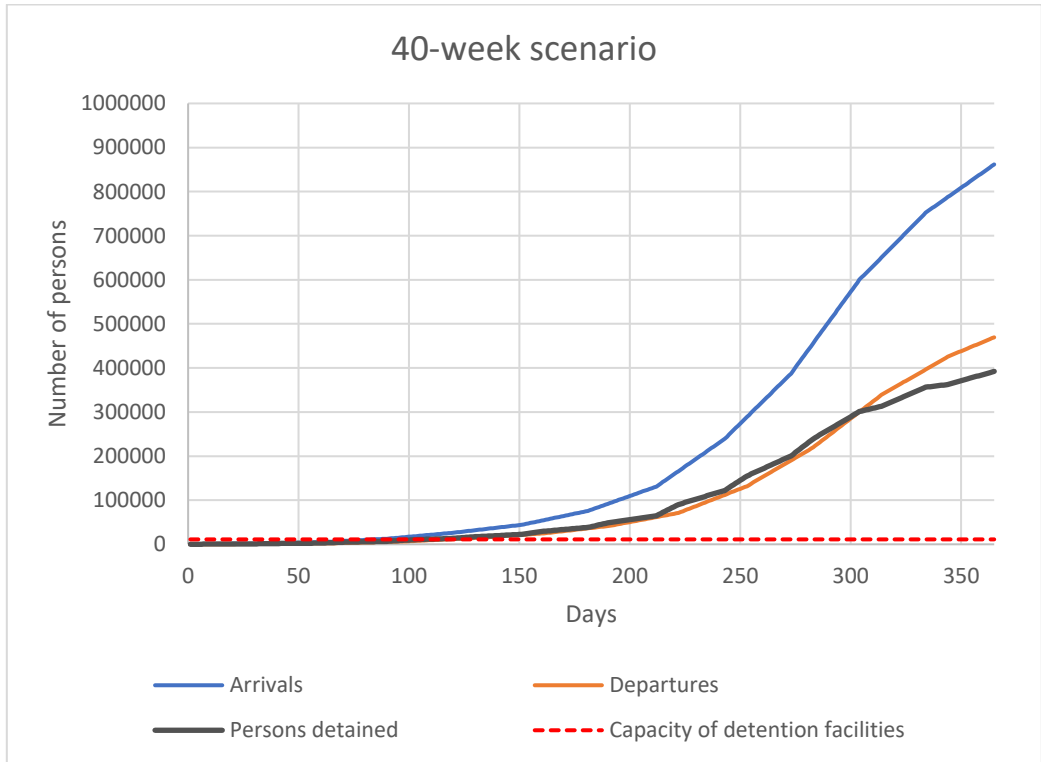
⁴⁰ AIDA/ECRE [Asylum Country Report on Greece](#), 2020 update.

⁴¹ The full set of data can be found in the Annex at the end of this study.

TAB 7: A simulation on Greece /30-week scenario



TAB 8: A simulation on Greece /40-week scenario



The figures speak for themselves: if the crisis mechanism were in force in a 2015-like situation, **376,109 or 392,273** (respectively in the 30- and 40-week scenarios) **people would be kept in *de facto* or actual detention facilities at the same moment. And yet their capacity is of 11,101 places.**

It can be argued that the immediate protection status could have been granted to Syrian nationals, in this situation. However, this would not have changed the detention situation because Syrians, with their 95% recognition rate scored in the previous year, would have been the only ones, together with Eritreans, to have the right to be channelled through a normal asylum procedure.

Complete data on the average time of asylum procedures in Greece are not available. However, **in 2019, the average time between the applicant's expression of intention to apply for asylum and the applicant's interview in 2019 was between 10 and 11 months.**⁴² Again, it seems unrealistic that Greece could process asylum applications in 20 weeks while respecting procedural safeguards. In general, **it appears that this Regulation would only worsen the management of the "crisis" rather than improve it.**

As for the costs of the procedures, the Regulation only states that "due to the nature of this proposal (...), it is not possible to estimate a priori the possible budgetary impact" and reassures that it will be possible to cover it with the new MFF for the period 2021-2027. In this regard, doubts have already been raised in previous sections

1.3. [The relocation mechanism: a predictable failure](#)

A situation like the one illustrated above should, according to the EC proposal, benefit from the "solidarity mechanism" described earlier. But would this "solidarity" really relieve a country like Greece from the burden of managing a similar "crisis"?

Relocation is the first of the three options among which other EU countries would be able to choose. However, there are several reasons to believe that not many Member States would volunteer.

The first reason is that **many Member States have already declared that they do not intend to do relocations:** [Austrian Chancellor](#) Sebastian Kurz said it the day after the EC proposal was presented, promptly followed by the countries of the "[Visegrad Four](#)": Czech Republic, Hungary, Poland and Slovakia. The [Estonian Minister of Interior](#) said that his country would instead do other forms of solidarity, as will do the other [Baltic countries](#).

The second reason we cannot expect the relocation system to work well is that **a similar experiment had already been done in the past, between 2015 and 2017 and on a smaller scale, and has not proved very successful.** In fact, in May 2015, the EC presented the [European Agenda on Migration](#) 2015-2020, a comprehensive document addressing migration management in the short, medium and long term.

⁴² AIDA/ECRE [Country Report on Greece](#), 2019 Update.

This text introduced the "hotspot approach"⁴³ and already anticipated the possibility to activate a relocation mechanism, later regulated by Council decisions [2015/1523](#) and [2015/1601](#). According to the EU plan, up to 34,953 asylum seekers would have been relocated from Italy and up to 63,302 from Greece. The timeframe for applying for such relocations lasted from September 2015 to September 2017 and concerned asylum seekers who had arrived between 24 March 2015 and 26 September 2017. According to Council decision 2015/1523 other Member States could choose the number of asylum seekers to relocate within their territory, while Council decision 2015/1601 set mandatory quotas. Eventually, Italy and Greece had relocated from their territory only 12,692 and 21,999 third nationals, respectively, amounting to around one-third of the total planned. In comparison, between late March 2015 and late September 2017, Greece had approximately 1,043,450 arrivals⁴⁴, and Italy around 430,530.⁴⁵ In practice, relocation from Italy were only 3% and from Greece only 2% of those who arrived in the timespan allowed to apply for the programme. Poland, Hungary and the Czech Republic refused to relocate any asylum seeker and were recently required to fulfil their obligation by the [Court of Justice of the EU](#) in April 2020. There were no consequences for Member States which relocated a very low percentage of what was foreseen by their mandatory quota, like Austria (2,2%), Bulgaria (4,6%) or Slovakia (1,7%).⁴⁶

The functioning and the criteria for carrying out the relocations were different than what the Pact foresees now. For example, relocations quotas were mandatory while they would be optional in the Pact. In 2015, only asylum seekers with a recognition rate higher than 75% could be considered for relocation, while now this criterion would not apply. However, this experience clearly shows that even when relocation was mandatory, the result was much lower than the expected one, mainly because there was no real sanctions mechanism for Member States that did not fully comply with their obligations. Therefore, there is no reason to believe that a system that makes relocation optional would work. Moreover, **the financial compensation for relocation is the same foreseen for return sponsorship**, a circumstance which doesn't constitute an incentive to opt for relocation.

There is another element that the 2015-2017 relocation experience highlights: **individuals found to represent "a danger for national security or public order" could not be relocated** then. Now, under the new Pact, they could be refused on this basis by the relocating Member State. This rather vague definition can lend itself to abusive usage. For example, around 2017, some Eritrean citizens who had landed in Italy were refused relocations by Finland, Norway and the Netherlands because they had served the army in Eritrea. The compulsory and unlimited military service in Eritrea is the main reason why many of its nationals are forced to flee their country. Yet, the reason qualifying them as potential beneficiaries of international protection prevented them from being relocated.⁴⁷

⁴³ The hotspot approach provides that after arrival asylum seekers are brought to specific centres, the hotspots, where they are identified before they are either transferred in normal reception centres in order to cast their application for international protection or notified with an expulsion order. As it was seen earlier, in the chapters of this research discussing informal detention centres in Italy and Greece, these centres are still operational, present many criticalities and their functioning somehow anticipate some aspects of the new set of border procedures foreseen by the Pact.

⁴⁴ UNHCR [2015](#) and [2016-2017](#).

⁴⁵ [Italian Ministry of Interiors](#).

⁴⁶ A full analysis of the relocation experience can be found in ["Should I stay or should I go?"](#) A Buon Diritto, 2018 (only in Italian).

⁴⁷ These cases have been reported in A Buon Diritto's report mentioned above.

It should be noted that the identification as a **potential risk for national security and public order is also one of the criteria for the deferral to the border procedures**. Given the short time for assessing this circumstance during the screening, it is clear that this could lead to further abuses.

The last, unfortunate element to be highlighted is that **the new Pact doesn't take into consideration the will of the person who is a candidate to relocate**, much like in 2015. At least, in 2015, asylum seekers could choose whether they wanted to take part in the programme, even though they could not pick their final destination. Now, with the new Pact, they wouldn't even be able to make this decision: **they could be sent wherever it is decided for them**, with no consideration of the eventual networks they might have in a specific country or of their life projects. This approach reaches its culmination with the provision for which, in the framework of the solidarity measures in a situation of migratory pressure, Member States would be able to relocate to another country a beneficiary of international protection within 3 years from the moment the status was granted. Three years, which should be summed up with the time spent in the country before obtaining the status, is an incredibly long time, during which a person could easily have learnt the language, found a job, created a network of personal relationships.

This approach is dangerous not only because it treats people ["like parcels to be sorted"](#), but also because it represents an obstacle to integration and reduces the positive contribution these individuals could bring to society and the economy of their new country.

1.4. [The return sponsorship and the external dimension](#)

a) Return sponsorship and capacity building

The second form of solidarity that Member States could choose is the return sponsorship. **The fact that returns are listed under the definition of "solidarity" is already problematic *per se*** since it is clear that this solidarity is not intended as solidarity towards migrants and refugees, as one would expect while reading a document on migration and asylum.

Moreover, given a closer look, it appears clear that returns are not only one among three "solidarity" options but the central option. In fact, in the Pact the word "relocation" is often used indistinctly for both relocations and returns, meaning that relocations pledges can sometimes hide returns.⁴⁸ As it will be discussed later, the third form of solidarity - capacity building - also plays a role in carrying out returns or preventing asylum seekers from landing on European shores. Looking even closer, it seems that the whole set of border procedures was built on the need of carrying out faster returns, with its fictional non-entry status and the integrated return border procedure. In addition, the Pact foresees the appointment of an EU Return Coordinator, while no potential EU Relocation Coordinator is mentioned. In other words, as previously denounced by EuroMed Rights, [returns are the true obsession of the new EU Pact](#) on Migration and Asylum.

⁴⁸ Cf. Crisis Regulation, recital 10, p. 20: "the scope of the relocation should include all categories of applicants for international protection, including (...) irregular migrants. Furthermore, a Member State that provides sponsorship should transfer the illegally staying third-country national (...) if the person concerned does not return (...)".

The way these returns – voluntary or forced - would be carried out is highly problematic. First, within the framework of the solidarity mechanism, the sponsoring Member State has either four or eight months to carry out the procedure. After this time, the concerned persons would be transferred to the national territory of the sponsoring country. The latter then being able to continue its efforts to return them. **It is unclear what the fate of these people would be: would they be detained again?** For how long would their detention be allowed? Given the discrepancy in treatments from country to country and the absence of monitoring mechanisms, this procedure raises many doubts and concerns.

Second, sponsoring Member States would be able to choose the nationality of individuals they wish to return. **They are encouraged, in practice, to use their existing bilateral agreements with third countries to carry out returns** from other Member States, with no need of creating a common European framework for readmissions. A Senegalese national who has lived some time in Morocco before arriving in Italy, for example, could be returned there from Italy based on a bilateral agreement between France and Morocco. In fact, nowhere does the Pact state that returns have to be carried out to the country of origin instead of to a country of transit: in fact, it could easily lead to chain refoulements.

These **readmission agreements, protocols, and arrangements that some EU countries have with countries of origin or transit are often informal and have rarely been scrutinised by national parliaments. They therefore lack transparency and accountability.** Data and information on how returns are carried out are frequently not or only partially available, and monitoring mechanisms are often totally or partially lacking.⁴⁹ These aspects of the return procedure are by no means addressed by the Pact. Furthermore, as a perverse effect, this system could eventually **encourage EU countries to strengthen their links avec des partenaires historiques to increase returns:** Belgium, for example, could lead all EU return operations to Congo or France to Algeria.

A third, worrying aspect of returns is linked **to the concept of “safe third country” of origin or of transit.** In certain countries, such a concept can constitute a reason for considering an application for international protection as inadmissible, therefore for deferring its nationals to the return procedure directly after the screening or denying a protection status at a further stage of the asylum procedure. This concept is particularly dangerous for two reasons: firstly because there is no harmonisation among Member States about which third countries should be considered as “safe” to date and secondly because according to international asylum conventions, all applicants have the right to have their applications individually assessed, without prejudice to their nationality. “The application of the concept [of safe country] would *a priori* preclude a whole group of asylum-seekers from refugee status (...) this would be inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the Status of Refugees” highlighted in this regard the [UN High Commissioner for Refugees](#).

⁴⁹ In this regard, reference is made to EuroMed Rights’ report [“Return Mania. Mapping policies and practices in the EuroMed region”](#) and in particular to its [introduction](#).

Finally, the main reasons why this emphasis on returns is alarming is that **there is evidence that returns carried out by EU Member States more often than not lead to serious violations of human rights**. They lead to massive use of detention, often violate the principle of non-refoulement, generate chain refoulements, deprive returnees of the right to an effective remedy and may expose them to the risk of further persecutions⁵⁰. The Pact fails to address these risks. Even though the obligation of establishing a monitoring mechanism during the screening is a positive development, it is very regrettable that the scope of such mechanism was not extended to the pre-return and post-return phase. **Only a monitoring mechanism that can operate across borders in an independent and transparent way, in which civil society can be a key actor, could ensure that no fundamental right violations occur** when returns are carried out.

The last element which is part of this framework is the third solidarity option: **“capacity building, operational support or measures in the external dimension”**. The Pact doesn’t give further explanations, leaving space for a wide variety of possibilities. The “measures in the external dimensions” seem to be the most problematic element: solidary Member States could for instance **support other States in establishing agreements with third countries of origin or of transit, to increase readmissions of or to prevent asylum seekers from arriving in Europe**. One example of such agreements could be the Memorandum of Understanding between Italy and Libya, signed in 2017 and later reconfirmed in 2020. According to the Memorandum, Italy has been funding and giving operation support to the Libyan Coastguard to prevent arrivals to Italy, despite evidence of systematic human rights violations endured by migrants and asylum seekers in Libya and the complicity of Coastguard officers themselves in perpetrating such abuses. It would be deplorable if the result of this third option would end up encouraging these kinds of agreements.

b) The conditionality of visa and humanitarian aid

A critical angle of the external dimension in which the Pact is inscribed is the **conditionality of visa and humanitarian aid on migration management and readmission agreements**. This aspect is not concretely addressed in the proposal. Still, it relies on another set of tools: the Visa Code and the 2021-2027 MFF, and in particular the Neighbourhood, Development and International Cooperation Instrument (NDICI), which is the main EU financial tool for development and cooperation with its partners.

It should be reminded that this approach is not new and can be found in several attempts to establish “partnerships” with third countries (Morocco and Tunisia for instance). Since the adoption, in 2015, of the [Valletta Action Plan](#) and the creation of the [EU Emergency Trust Fund for Africa](#) (EUTF), the **development budget has been used for border control related projects and as leverage for readmission agreements and strengthening capacities to prevent departures**. Furthermore, the countries which received more funding under the EUTF were those of origin and transit of migrants and not the poorest or those that could benefit more from development aid. As well, young men – the individuals who are most likely to migrate - have benefited from more targeted projects rather than more vulnerable individuals.⁵¹

The revised Visa Code, which entered into force in February 2020, seamlessly fits in this logic: “Depending on the level of cooperation of a third country with Member States on the readmission of irregular migrants,

⁵⁰ Cf. EuroMed Rights’ report [“Return Mania. Mapping policies and practices in the EuroMed region”](#).

⁵¹ [2020 MEDAM Assessment Report](#), p. 30.

assessed based on relevant and objective data [a series of articles] shall not apply to applicants or categories of applicants who are nationals of a third country that is considered not to be cooperating sufficiently..."([Visa Code](#), Art. 25.a.1). In short, **the granting of visa, fees and processing times can now legally depend on how much a third country is cooperating on readmissions.**

The new 2021-2027 MFF did nothing but confirm this approach: first, **budget allocations for repatriation and border management have been exponentially increased at the expense of resources dedicated to strengthening the common asylum system, legal pathways, integration and relocation.**⁵² Secondly, with its [Communication](#) on a renewed partnership with the Southern Neighbourhood, the EU announced the reestablishment of a performance-based approach, also known as "more for more principle", in its development aid funding. In fact, Art. 17 of the [NDICI Regulation proposal](#) provides that indicatively 10% of the budget for the Southern Neighbourhood shall be dedicated to rewarding the progress of partners in a series of thematic areas, including human rights and the rule of law, but also migration cooperation. **This double conditionality is quite dangerous and seriously undermines EU credibility:** how can the EU keep asking partners countries to respect human rights while financially supporting regimes that commit systematic human rights abuses avec pour seule justification of their relevance for migration-management objectives?

Conclusion

The research hypothesis of this study was that **the new Pact on Migration and Asylum is not only unworthy but infeasible, doesn't take into consideration the reality of migration policies and practices in the different EU countries, and won't create any proper solidarity system among Member States.** Countries of first arrival would keep having the "burden" of asylum seekers arriving in Europe, and migrants and asylum seekers will have their fundamental rights, including the right to asylum, diminished.

The mandatory border procedures will discriminate asylum seekers on the basis on their nationality, leading to a **huge recourse to deprivation of liberty**, and can't be implemented without depriving those who are subject to it of their fundamental rights and **the due procedural safeguards** in their applications. The actual duration of procedures is so far from the 12 weeks envisaged by the proposal that there is no doubt that their outcome in this frame would be a farce, a simulacrum of a real procedure for international protection. As the simulations on Spain, Italy and Greece showed, **countries of first arrival do not have the means** to implement these provisions. In a normal situation, Spain would have to multiply by 6/7 times and Italy by 7/8 times their actual formal and informal migration detention facilities. In a situation comparable to 2015, Greece would need to multiply by 34/35 times its informal and formal migrant detention centres. **No countries of first arrival nor asylum seekers would benefit from these new procedures.**

⁵² [Funding the border](#), ARCI, chapter 1.

One hardly sees how the system of European solidarity will work as well. There is no chance that other Member States will do relocations if they are not obliged to do so, and Spain, Italy, Malta, Greece and Cyprus are well aware of it. In March 2021, the five countries published a [joint declaration](#) to denounce that the new Pact still puts undue pressure on countries of first arrival, while the solidarity mechanism is too uncertain. From a human rights perspective, it is very worrying to observe that **the only element the European Commission is committed to improving is returns**, without advancing any proposal ensuring that they will be carried out in a dignified way or that returnees will not face further persecution. It is also alarming to see how the EU is increasingly moving its budget from protection and integration to border management and externalisation of migration management policies. **The aim, in the end, seems to be protecting Europe from refugees more than protecting migrants and refugees in need.**

On this basis, the following recommendations are proposed.

Recommendations to the European Parliament and the Council of the EU

On the screening and the asylum and return border procedures

- The **pre-entry phase** in which the screening and the border procedures are carried out constitutes a dangerous *fictio iuris* depriving applicants for international protection of their fundamental rights and preventing them from enjoying basic procedural safeguards. Applicants subject to border procedures should be recognised as having entered the EU territory.
- Whereas the **screening procedures have not been completed within 5 days** (or 10, in a crisis situation) applicants should be deferred to the normal asylum procedure.
- The **assessment of vulnerabilities should not be limited** to the frame of the screening procedures, but doit be potentially carried out also while the asylum procedure is ongoing.
- **Age verification procedures** should be standardised at EU level. In line with recommendations from relevant international agencies and medical experts, nonmedical methods should always be preferred.
- **Border procedures should be considered as an optional tool** and not as a mandatory practice to be used in normal times.
- Applicants should have the **right to an effective et suspensive remedy against the outcome of the screening.**
- The **“risk for national security or public order”** criterium for channelling through the border procedures or for preventing from relocation should be further clarified with a comprehensive, accurate, common EU definition.
- **No country should be defined as “safe”**, and all applicants for international protection should enjoy the right of having their application individually assessed, with no prejudice to their nationality.

- The **recognition rate of the country of origin or transit should not constitute a criterium** for deferring to different asylum procedures, as it constitutes a discriminatory prejudice based on nationality.
- **In no case should children under 18 undergo the border procedures.**
- **The use of deprivation of liberty in asylum procedures should be considered only a last resort and not part of a standard procedure.**
- When detention is applied in the context of border procedures, **it should be validated by a judge and applicants should enjoy all the rights connected to the deprivation of liberty.**
- **No detention should be allowed** where detention conditions are not compatible with human dignity. Health and psychological care, access to interpretation, legal information and assistance by NGOs should always be provided.
- When border procedures are applied, all applicants should enjoy the **right to an effective remedy, including the right to remain in the territory** pending the outcome of the remedy.
- **Controls at EU internal borders** should not be strengthened with the new border procedures.
- **Civil society organisations and other independent monitoring actors** should always be granted the right to access migration detention facilities.

On asylum and migration management

- **The principle of the first country of arrival should be definitely overcome** in favour of a more flexible mechanism, which takes into account the life projects and existing networks of the applicant. Beneficiaries of international protection should be granted freedom of movement in the Schengen area.

On relocations

- **Relocation and return sponsorship** should not be interchangeable.
- **Financial compensation for relocation** should be higher than the one for return sponsorship.
- A system of **mandatory quotas for relocation** among EU Member States should be established.
- **A sanctioning mechanism** should be put in place for Member States not fulfilling their obligations as for relocations.
- An **EU Coordinator for Relocations** should be appointed.
- **No relocation** should be carried out **without the consent** of the concerned person.

On the return sponsorship

- Clear rules providing a **maximum timeframe and standard condition for detention in the frame of returns** should be established at the EU level.
- **Official data on returns** should be public and available.
- **Returns** should anyway be considered as the **last available resort**.
- **No return quotas should be imposed**.

On other forms of solidarity

- When “solidarity” takes the form of **measures in the external dimension**, such measure should not aim at preventing asylum seekers from arriving in Europe or at establishing non-informal agreements with third countries on the subject of migration management and readmissions.

On the crisis mechanism and *force majeure* situation

- The **definition** of a “crisis situation” should be clarified.
- **All observations related to the border procedures apply** even stronger to the crisis management border procedures.
- The Crisis Regulation’s **provision allowing Member States to freeze asylum application** registration for four weeks in a *force majeure* situation should be deleted.
- In general, the crisis mechanism seems not to be functional to improve the management of a crisis situation. The mechanism could be enhanced by **strengthening the provisions on the solidarity mechanism** and **rendering optional the use of border procedures**.

On conditionality of visa, humanitarian aid and EU budget

- **Visa granting** should not be linked to **readmissions**. Art 25.a.1 of the Visa Code should be deleted.
- **Development aid funding under the NDICI Instrument should not be used as leverage** to obtain special migration management performances from third countries.
- **The EU migration budget** should be reviewed to **increase allocations to strengthen the common asylum system, legal pathways, integration and relocation**.

On positive aspects that should be improved:

- **The scope of the monitoring mechanism should be extended** to the asylum and return border procedures, and to the pre-return and the post-return phase, for both voluntary and forced returns. The monitoring mechanism should be able to operate across borders in an independent and transparent way. **Civil society should access all places where search and rescue operations, border procedures, and returns are carried out and be key actors** of the monitoring mechanism to ensure that fundamental rights are respected.
- The Search and Rescue Recommendation scope should be extended and transformed into a Regulation introducing a cooperation system among Member States to **ensure a permanent and effective European Search and Rescue mission** in the Mediterranean.
- Provisions in the Search and Rescue Recommendation concerning the need to **avoid criminalisation of those who provide humanitarian assistance to migrants and asylum seekers in distress at sea** should be extended and **transformed into a binding framework**.
- The scope of the Recommendation on Legal Pathways should be extended and transformed into a Regulation to **establish a more concrete framework for providing legal pathways for those in need of international protection**.

Bibliography

When needed, specific references are in the text of this study as footnotes. The aim of this bibliography is instead to provide an overview of all the reports, studies and articles that have been used, were a source of inspiration or could be so in future to conduct other studies on this issue.

Previous EuroMed Rights pieces of analysis on the new Pact on Migration and Asylum and on returns

- Analysis of the New EU Pact on Migration and Asylum. [A “fresh start” for human rights violations](#) (October 2020)
- [New Pact, Wrong Impact](#). How the EU Pact on Migration disadvantages both Italy and asylum seekers (November 2020)
- [Fresh start, Renewed Risks](#). The external dimension of the EU Pact on Migration and Asylum (January 2021).
- [Return mania](#). Mapping policies and practices in the EuroMed region (April 2021)

Other analysis on the new Pact on Migration and Asylum

- ASGI- [Il nuovo Patto europeo su migrazione e asilo](#). Le criticità alla luce del contesto italiano (January 2021)
- Border Monitoring Violence Network – [New Pact on Migration. Policy Analysis](#) (November 2020)
- Caritas – [Analysis of the EU Pact on Migration and Asylum](#) (December 2020)
- CONCORD - [Reaction to the New Pact on Migration and Asylum](#) (October 2020)
- ECRE – Thematic analysis on [RAMM](#), [RAMM](#) (note), [Crisis Regulation](#), [Crisis Regulation](#) (note), [Asylum procedures Regulation](#), [Asylum Procedure Regulation](#) (note), [Screening Regulation](#), [Externalisation](#).
- Picum - [More detention, fewer safeguards. How the new EU Pact on Migration and Asylum creates new loopholes to ignore human rights obligations](#) (October 2020)
- Volti delle Migrazioni/ Focsiv - [La governance delle migrazioni nell’Unione Europea: il Nuovo Patto sulle Migrazioni e l’Asilo](#) (January 2021)

On the border procedures and related detention

- AIDA-ECRE Country reports on [Spain](#), [Italy](#) and [Greece](#)
- ASGI, CILD, IndieWatch, Action Aid, [“Considerazioni a cura del progetto In limine relative all’attuale funzionamento del centro hotspot di Lampedusa alla luce delle violazioni riscontrate dalla Corte nella sentenza Khlaifia e altri c. Italia”](#), June 2018

- European Parliamentary Research Service. [Asylum procedures at the border. European Implementation Assessment](#) (November 2020)
- Migreurop- [Locked up and excluded](#) : Informal and illegal detention in Spain, Greece, Italy and Germany” (September 2020)
- [Report on the implementation of Article 43 of Directive 2013/32/EU](#) of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (January 2021)
- Medici per i Diritti Umani – [Bad Reception](#). A New Trauma for Refugees (October 2020)

On age verification procedures

- Refugee Law Initiative - [Age assessment and the protection of minor asylum seekers: time for a harmonised approach in the EU](#) (August 2020)

On financial implications of the Pact

- EU Migration Law blog - [Financial Implications of the New Pact on Migration and Asylum](#): Will the Next MFF Cover the Costs? (January 2021)

On externalisation of EU migration policy and conditionality of development aid

- ActionAid - [The Big Wall](#) (2021)
- ARCI – [Funding the border](#). Funds and strategies to stop migration (December 2020)
- MEDAM – 2020 Assessment Report, chapter 3: [Conditionality for readmission cooperation](#)

On a monitoring mechanism

- ENNHRI - [Opinion on Independent Human Rights Monitoring Mechanisms at Borders](#) under the EU Pact on Migration and Asylum (March 2021)

ANNEX: Tables of data

Arrivals by sea and by land in Spain - 2020		Arrivals by sea in Italy - 2020		Arrivals by sea and by land in Greece 2015	
January	2,402	January	1,342	January	1,690
February	2,155	February	1,211	February	2,945
March	1,198	March	241	March	7,634
April	500	April	671	April	13,132
May	1,268	May	1,654	May	18,445
June	1,099	June	1,831	June	30,718
July	2,543	July	7,063	July	51,951
August	2,926	August	5,327	August	107,843
September	5,264	September	4,386	September	156,457
October	8,138	October	3,477	October	210,824
November	9,815	November	5,360	November	151,249
December	4,553	December	1,591	December	108,742
TOTAL	41,861	TOTAL	34,154	TOTAL	861,630

Most common nationalities of arrival in Spain - 2020 until September				Most common nationalities of arrival in Italy - 2020			
	Total number	%	2019 Rr		Total number	%	2019 Rr
Algeria	7,644	39	6,3	Tunisia	12,883	38	4
Morocco	3,925	20	8	Bangladesh	4,141	12	6
Mali	2,436	13	15	Cote d'Ivoire	1,950	6	17
Guinea	1,464	8	16,5	Algeria	1,458	4	6
Cote d'Ivoire	1,282	7	17	Pakistan	1,400	4	10
Senegal	924	5	6	Egypt	1,264	4	12
Tunisia	279	1	4	Sudan	1,125	3	53
Syria	258	1	84	Morocco	1,030	3	8
Others	1,143	6		Afghanistan	1,009	3	46
Arrivals until September 2020			19,355	Iran	970	3	32
				Others	6,924	20	
				Total	34,154		

Most common nationalities of arrival in Greece - 2015			
Country	Total number	%	2014 Rr
Syria	483,730	56	95
Afghanistan	210,221	24	57
Iraq	88,382	10	68
Pakistan	23,462	3	19
Somalia	4,294	0,5	62
Eritrea	947	0,1	88
Others	51,101	6	

Sources. Spain: [UNHCR](#). Italy: [Italian Ministry of Interiors](#). Greece: [UNHCR](#).

The recognition rate (Rr) has been calculated by the author on the basis of available [Eurostat data on first instance decisions on applications](#).

All percentages have been rounded. Data on arrivals and most common nationality in Greece in 2015 are not perfectly consistent already in the source.

About **unaccompanied minors**, data on Spain in 2020 are not available: the same percentage of [2019](#) (10%) has therefore been applied to 2020. As for Italy, 2020 data are available on the website of the [Ministry of Interiors](#). As for Greece, precise data for 2015 were not available, but according to [2016](#) unaccompanied children came mainly from Syria, a country with a very high recognition rate, whose nationals would anyway not be subjects to border procedures. The numbers of unaccompanied children were also very low: for this reason, they have not been taken into account for the simulation on Greece.