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European Union: New Pact on Migration and Asylum

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European Union: New Pact on Migration and Asylum

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SUMMARY On September 23, 2020, the European Commission adopted a Communication on a New Pact on Migration and Asylum which consists of five different legislative proposals and several additional policy proposals. The co-legislators of the European Union (EU), the Council of the European Union (Council), and the European Parliament (EP), reached a provisional political agreement on the legislative proposals on December 20, 2023. A final adoption is expected for April 2024. The political agreement was positively welcomed by the EU institutions but has raised some criticism from civil society.

I. Introduction

On September 23, 2020, the European Commission adopted a Communication on a New Pact on Migration and Asylum which consists of five different legislative proposals and several additional policy proposals.[1] The co-legislators of the European Union (EU)—the Council of the European Union (Council) and the European Parliament (EP)—reached a provisional political agreement on the legislative proposals on December 20, 2023.[2] These informal discussions, called "trilogues," are meant to speed up the formal legislative process.

The technical details of the legislative proposals will be specified in the coming weeks, so that the proposals can be formally discussed and adopted by the Council and the EP. They must approve an identical text in up to three readings.[3] A final adoption is expected for April 2024. The final versions of the legislative proposals will be published in the Official Journal of the EU and generally enter into force 20 days after their publication unless otherwise specified. Because the final versions of the regulations have not yet been adopted, information regarding their potential content is available only from the press releases on the provisional agreement and might change during the final negotiations.

II. Content of the Legislative Proposals

The New Pact on Migration and Asylum proposed by the European Commission consists of five different legislative proposals, namely a Screening Regulation,[4] a Revision of the Eurodac

[1] *Communication from the Commission on a New Pact on Migration and Asylum*, COM(2020) 609 final (Sept. 23, 2020), https://perma.cc/PU2E-XR9V.

[2] Press Release, Council, The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System (Dec. 20, 2023), https://perma.cc/DD3W-WD89.

[3] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), art. 294, 2016 O.J. (C 202) 1, https://perma.cc/53SN-M92C.

[4] Proposal of the European Parliament and of the Council for a Regulation Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226,

Regulation,[5] a Revision of the Asylum Procedures Regulation (APR),[6] an Asylum Migration Management Regulation,[7] and a Crisis and Force Majeure Regulation.[8]

An EU regulation is binding in its entirety and directly applicable in the EU member states.[9]

A. Screening Regulation

1. Content

The Screening Regulation would set up uniform requirements and procedures for the pre-entry screening of certain third-country nationals at the external borders of the EU member states and persons apprehended on EU territory who have escaped external border controls. The press release announcing the political agreement between the EP and the Council states that the screening will include identification, health and security checks, fingerprinting, and registration in the Eurodac database. The maximum period for the prescreening is seven days.[10]

Persons undergoing the screening process would have to remain at the disposal of the authorities at the screening location outside of the member state in question and may be placed in detention. The Screening Regulation would require member states to establish an independent mechanism to monitor the observance of fundamental rights during the screening process and an eventual detention.[11]

2. Amendments Proposed by the Council

The Council published its mandate for negotiations with the European Parliament on June 22, 2022, and proposed several amendments to the initial Commission proposal.[12] In particular, it

(EU) 2018/1240 and (EU) 2019/817 (Screening Regulation), COM(2020) 612 final (Sept. 23, 2020), https://perma.cc/4SZZ-WPN2.

[5] Amended Proposal for a Regulation of the European Parliament and of the Council on the Establishment of 'Eurodac', COM(2020) 614 final (Sept. 23, 2020), https://perma.cc/M2FH-25CV.

[6] Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, COM(2020) 611 final (Sept. 23, 2020), https://perma.cc/6RFC-MY7P.

[7] Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final (Sept. 23, 2020), https://perma.cc/ASB3-6B5G.

[8] Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum, COM(2020) 613 final (Sept. 23, 2020), https://perma.cc/N7BS-SXJK.

[9] TFEU, art. 288, para. 2.

[10] Press Release, supra note 2.

[11] Id.

[12] Mandate for Negotiations with the European Parliament, file no. 2020/0278(COD) (June 22, 2022), https://perma.cc/3L2U-DLHM.

focused on the applicants remaining at the disposal of the authorities during the screening process and the vulnerability checks.

The Commission's proposal stated in article 4 that persons undergoing prescreening are not allowed to enter the territory of the member state in question. The Council added that, to prevent the risk of absconding or security or public health risks, those persons must remain at the disposal of the authorities.[13] It emphasized that idea by inserting a new article 6a that reiterates that people undergoing screening must remain at the disposal of the authorities during the screening and cooperate. The Council would allow member states to introduce penalties for noncompliance with these obligations.[14] Furthermore, the Council provided more details with regard to vulnerability and preliminary health checks, whereas the Commission proposal simply referred to the general principle set out in the EU Reception Conditions Directive that the special situation of vulnerable persons must be taken into account.[15] In particular, the Council added that vulnerability checks must be conducted by a screening authority trained for that purpose, which may be assisted by nongovernmental organizations (NGOs) and, where relevant, by medical staff.[16]

3. Amendments Proposed by the EP

Like the Council, the EP amended the Commission proposal.[17] With regard to the subject matter of the Screening Regulation, it emphasized that the prescreening should include mandatory and not optional preliminary health and vulnerability checks to identify people in need of additional help or who would pose a threat to public health.[18]

Furthermore, the EP added provisions to ensure compliance with EU and international law during border surveillance and the screening procedure, in particular focusing on rights derived from the EU Charter and the Geneva Convention.[19] For that purpose, the EP report stressed that member states should set up an independent monitoring mechanism to issue recommendations to member states. The EP provides details on its tasks, working methods, access to documents and locations, and involvement of third parties, such as human rights organizations, among other things.[20] The EP also adds a provision that persons undergoing screening must have access to a standard of living that guarantees their subsistence, protects their physical and mental health, and respects their fundamental rights derived from the EU Charter.[21]

[13] Id. at 20, art. 4.

[14] Id. at 23, art. 6a.

[15] Id. at 26, art. 9; Reception Conditions Directive, art. 21, 2013 O.J. (L 180) 96, https://perma.cc/FZ9S-GM72.

[16] Mandate for Negotiations with the European Parliament, supra note 12, at 26, art. 9, para. 2.

[17] EP, Report, file no. A9-0149/2023 (Apr. 14, 2023), https://perma.cc/2C7Z-HF9C.

[18] Id. amendment 58, art. 1, para. 3.

[19] Id. amendments 60, 61.

[20] Id. amendments 103-109.

[21] Id. amendment 96.

The Commission proposal provided that persons who are being screened are not authorized to enter the territory of the member states. The EP adds a "legal fiction of non-entry," meaning no matter where the screening is conducted, the individual is being treated as not having entered the country until the screening is finished.[22] The report states that the screening may be conducted at "any appropriate and adequate location within the territory of a Member State to be designated by that Member State, including at or in proximity to the external borders."[23] The Commission proposal assumed that the screening would generally be conducted at or in proximity to the external borders. Regarding the time limit to conclude the screening procedure, the EP report states that the procedure should not exceed five days, which can be extended to 10 days in a situation of crisis.[24]

The EP report added a ban on intrusive biometric surveillance technologies, predictive analytics, and biometric categorization during the screening process or in or around the reception facilities to the proposal.[25] In particular, the EP would prohibit the use of lie detectors and long-range listening systems.

In addition, the EP would add the possibility to detain an individual on a case-by-case basis during the screening process if there are no other less coercive measures.[26]

Lastly, the EP would like to emphasize the rights of the child during the screening procedure and added a specific provision to guarantee that the best interests of the child are a primary consideration.[27] In particular, member states would have to appoint a qualified representative for unaccompanied minors to represent and assist them.[28]

4. Potential Impact and Criticism

The International Rescue Committee (IRC) criticized the short period set aside for the prescreening.[29] In particular, the IRC stated that experience from Greece shows that such a short time frame is unrealistic and will cause people to spend more time in detention. Furthermore, in the opinion of the ICR, it could lead to false vulnerability assessments without the right to appeal the decision.[30] Lastly, the IRC contends that the "legal fiction of non-entry" proposed by the EP could result in reduced safeguards and an increased likelihood of mass detention at the borders.[31]

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[22] Id. amendment 76.

[23] Id. amendment 92.

[24] Id. amendments 94, 95.

[25] Id. amendment 98.

[26] Id. amendment 97.

[27] Id. amendment 133.

[28] Id.

[29] IRC, *What Is the EU Pact on Migration and Asylum?* (Oct. 27, 2023, last updated on Dec. 21, 2023), https://perma.cc/GZ3F-KVZH.

[30] Id.

[31] Id.

B. Revision of the Eurodac Regulation

1. Content

The Commission proposal would expand the scope of the Eurodac Regulation by allowing the use of its fingerprinting database to identify irregular migrants, storing more personal data, lowering the age for fingerprinting to six years from the previous 14 years, allowing the collection of identity information together with the biometric data, and extending the data storage period.

The changes that the co-legislators agreed on according to the press release would allow the monitoring of individual asylum seekers, instead of applications. The EP and Council are hoping that this will help identify persons lodging multiple applications. Furthermore, the change would allow for easier identification of the member state responsible for processing an asylum application and tracing secondary movements.[32]

Eurodac would be expanded to contain additional biometric data, such as facial images. In addition to asylum seekers, the database would cover persons who are staying in a country illegally, those who have entered the EU irregularly, and persons who disembarked following search and rescue (SAR) operations at sea. The age limit for the collection of biometric data would be lowered to six years in accordance with the Commission proposal.[33]

Another expansion would be the registration of persons benefiting from temporary protection in Eurodac rather than in ad-hoc registration systems. This new provision, however, would not apply to Ukrainian refugees enjoying temporary protection under the current scheme. Furthermore, persons participating in a resettlement program would be registered in Eurodac.[34]

The EP and Council also agreed that it could be recorded in Eurodac that a person might pose a threat to a country's internal security. Moreover, they agreed with the Commission proposal to allow law enforcement authorities to consult Eurodac to prevent, detect, or investigate serious offenses, such as terrorist offenses, without the need to check national databases or automated fingerprinting identification systems of other member states.[35]

2. Amendments Proposed by the Council

The Council adopted its negotiating mandate on June 22, 2022.[36] It agreed with most of the reforms presented by the Commission but proposed some additional amendments. In particular, it proposed to expand Eurodac's personal scope to beneficiaries of temporary protection in

[32] Press Release, supra note 2.

[33] Id.

[34] Id.

[35] Id.

[36] Mandate for Negotiations with the European Parliament, file no. 2016/0132(COD) (June 22, 2022), https://perma.cc/E4SR-9TTM.

accordance with the Temporary Protection Directive.[37] Furthermore, regarding persons apprehended in connection with a SAR operation, member states would be required to register them in Eurodac as well. Both categories of people would be included in the statistical data.[38] Lastly, the Council added that persons who apply for asylum (international protection) at the same time or immediately following their apprehension in connection with an irregular border crossing or an illegal stay in a member state, disembarkation following an SAR operation, or registration as a beneficiary of temporary protection must, nonetheless, be registered in Eurodac.[39]

3. Amendments Proposed by the EP

Likewise, the EP proposed amendments and clarifications to the Commission proposal.[40] Some of the most relevant changes are as follows. It added a fundamental rights clause to ensure compliance with the EU Charter, including the right to respect for one's private life, the protection of personal data, the right to asylum and non-refoulment, and the prohibition of torture, inhuman or degrading treatment.[41] Furthermore, it introduced several provisions to safeguard the rights of children.[42] In particular, it noted that the best interest of the child must be the primary consideration when applying the Eurodac Regulation and that children may never be detained to determine or verify their identity or collect their biometric data.[43]

Furthermore, the EP added a new article on access to Eurodac by the European Border and Coast Guard (EBCG) Standing Corps Teams and Asylum Support Teams deployed by the EU Asylum Agency (EUAA) to collect and transmit biometric and alphanumeric data in the system when requested to do so by the member states hosting the operation. The EBCG would act on behalf and under the instructions of the competent authorities of the host member state when processing data.[44]

In addition, the European Parliament added that the collection of biometric data should take place in a "protection-sensitive manner."[45]

Lastly, the EP removed all references to the inclusion of persons disembarked following a SAR operation as a distinct category in Eurodac.[46]

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[37] Id. at 42. Temporary Protection Directive, 2001 O.J. (L 212) 12, https://perma.cc/MCB2-AAAW.

[38] Mandate for Negotiations with the European Parliament, supra note 36, at 18-19.

[39] Id. at 25.

[40] EP, Updated Mandate (Feb. 10, 2023), file no. PE661.979v01-00, https://perma.cc/DZH7-HGBT.

[41] Id. amendment 20.

[42] Id. amendments 21-23.

[43] Id. amendments 21, 23.

[44] Id. amendment 37.

[45] Id. amendments 62, 73, 78.

[46] Id. amendments 2, 42, 45, 48, 90, 93.

4. Potential Impact and Criticism

Commentators have agreed with the EP's deletion of including persons disembarked following a SAR operation as a distinct category, because having such statistical data "could also reinforce policies seeking to increase scrutiny and overall policing, and criminalise or suppress the work of SAR NGO vessels providing humanitarian assistance."[47] Furthermore, there are concerns that it "may be used to inform punitive and unlawful border control policies that prevent individuals from seeking protection and expose them to risks of non-refoulement and violations of their rights to life and human dignity."[48] Lastly, it has been argued that having these people as a distinct category could violate article 3 of the Geneva Convention which prohibits discrimination against refugees.[49]

Furthermore, the registration of beneficiaries of temporary protection except for Ukrainians is seen as problematic, in particular because it might create discrimination among different groups of third-country nationals.[50]

The inclusion of fundamental rights clauses to ensure the respect of human dignity, fundamental rights, and rights of children have been welcomed.[51] Likewise, allowing access to Eurodac for members of EBCG is seen as a positive addition as it is in line with the provisions in the Schengen Information System.[52] However, it has been pointed out that EBCG officers should receive training and liability issues should be addressed.[53]

Lastly, the addition of the EP to collect biometric data in a "protection-sensitive manner" has been criticized as vague.[54]

C. Revision of the Asylum Procedures Regulation

1. Content

The proposal would revise the Asylum Procedures Regulation (APR) to make asylum, return, and border procedures quicker and more effective. The co-legislators agreed that they would streamline asylum procedures, introduce mandatory border procedures to quickly assess at the EU's external borders whether applications are unfounded or inadmissible and not allow those people to enter the territory of a member state, establish an adequate capacity for member states, and authorize member states to reject applicants if they come from a safe country as determined

[47] Novi Vavoula, ECRE Working Paper 19, *Focus on Eurodac: Disentangled from the 'Package Approach' But Is It Fit to Fly?,* (Apr. 2023), at 6, https://perma.cc/7P54-SLXH.

[48] Id. at 7.

[49] Id. at 15.

[50] Id. at 9-14, in particular at 14.

[51] Id. at 16.

[52] Id. at 17.

[53] Id. at 18.

[54] Id. at 21.

by a strict set of criteria.[55] The adequate capacity limit for the EU would be set at 30,000, whereas the capacity limit for individual member states would be determined according to a formula that takes account of the number of irregular border crossings and refusals of entry over a three-year period. No member state would be required to examine more applications than four times its respective adequate capacity limit in a year.[56]

2. Amendments Proposed by the Council

The Council presented its General Approach on June 13, 2023, and proposed a series of amendments to the Commission proposal.[57] The main amendments can be summarized as follows. The Council would introduce a new part to regulate cooperation between member states, meaning authorities processing applications could receive assistance from the authorities of another member state for that purpose.[58] Furthermore, it proposed to expand the guarantees for minors and unaccompanied minors, in particular organizing a personal interview for a minor, taking into account the age and maturity of that minor, and providing assistance to unaccompanied minors to protect their rights.[59] In addition, it inserted a provision that applications could be made and lodged on behalf of an adult requiring assistance to exercise legal capacity ("dependent adults") by an adult responsible for him or her.[60]

It would also require member states to issue a return decision where an application is rejected as inadmissible, unfounded, or manifestly unfounded regarding both refugee status and subsidiary protection status, or as implicitly or explicitly withdrawn.[61]

It would specify some aspects of the asylum border procedure, such as who should be regarded as a "family member" of the applicant to maintain family unity.[62] Furthermore, the Council added specifics about the term "adequate capacity," meaning 30,000 at EU level and capacity at member state level to be determined in a Commission implementing act. It would also require the Commission to set the maximum number of applications a member state is required to examine in the border procedure per year.[63]

It refined the "safe country concept," stating that a third country that has ratified and respects the Geneva Convention should be considered as ensuring effective protection. It added that a third country that has not ratified the Geneva Convention could only be considered safe if a minimum set of enumerated criteria were met, including authorization to remain on the territory of the third

[55] Press Release, supra note 2.

[56] Id.

[57] Council, General Approach, file no. 2016/0224(COD) (June 13, 2023), https://perma.cc/GGX2-DENJ.

[58] Id. at 59.

[59] Id. at 82-84.

[60] Id. at 101.

[61] Id. at 112.

[62] Id. at 125, 126.

[63] Id. at 127.

country, access to means of subsistence sufficient to maintain an adequate standard of living with regard to the overall situation of the hosting third country, access to emergency healthcare and essential treatment of illnesses, and access to elementary education.[64]

Lastly, the Council included details on the concept of "first country of asylum."[65] It provided that a third country may only be considered a first country of asylum for an applicant when, in that country,

- the applicant´s life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion,
- the applicant faces no real risk of serious harm,
- the applicant is protected against refoulement and against removal, in violation of the right to protection from torture and cruel, inhuman or degrading treatment or punishment as laid down in international law, and
- the applicant has enjoyed effective protection before traveling to the Union and he or she can still avail himself or herself of that protection.[66]

3. Amendments Proposed by the EP

The EP published its latest amended proposal on April 20, 2023.[67] Some of the most notable changes to the Commission's proposal can be summarized as follows. It emphasized that member states may only issue a return decision provided the applicant does not fulfill the conditions to apply for a residence permit or other authorization offering a right to stay and if the return decision does not violate the principle of non-refoulement, other fundamental rights, or other EU or international law obligations.[68]

Furthermore, the EP proposed that member states not apply, or cease to apply, the border procedure in six different scenarios, such as when the grounds for rejecting an application as inadmissible or for applying the accelerated examination procedure are not applicable or are no longer applicable; when the applicant is an unaccompanied minor, a minor below the age of twelve, or a vulnerable person; if there are medical reasons; or when the guarantees and conditions for detention as provided for in the Reception Conditions Directive are not met or are no longer met and the border procedure cannot be applied to the applicant concerned without detention.[69]

[64] Id. at 141.

[65] Id. at 142.

[66] Id.

[67] EP, Updated Mandate, file no. PE697.689v01-00 (Apr. 20, 2023), https://perma.cc/3YZ3-KX8F.

[68] Id. amendment 34.

[69] Id. amendment 42; Reception Conditions Directive, 2013 O.J. (L 180) 96, https://perma.cc/5TQY-TCAE.

Additionally, it introduced a further limit to detention practice, stating that any restriction of an applicant's freedom of movement or any application of detention as part of the border procedure must be in accordance with the Reception Conditions Directive and that minors should not be detained.[70]

It added a provision allowing member states to request assistance from the EU if the EUAA considers the availability and capacity of personnel of the member state insufficient.[71]

The EP also proposed that member states establish and implement an independent monitoring mechanism or designate an existing independent mechanism to supervise compliance with EU and international law during the border procedure, and it listed the specific aspects to be covered by the monitoring mechanism.[72] Furthermore, it suggested that member states involve relevant third parties, such as national human rights institutions or NGOs, in the management and operation of the monitoring mechanism, and let them participate in the mechanism, as well as maintain close links with data protection authorities.[73]

Lastly, it added the possibility to appeal decisions in border procedures through written submissions and underlined the supporting role of EU agencies in ensuring the proper implementation and functioning of the APR.[74]

4. Potential Impact and Criticism

Like the criticism voiced regarding the Screening Regulation, the IRC is concerned that people subject to the border procedure would still be considered not to have officially entered EU territory.[75] Furthermore, the IRC fears that the border procedure would divide refugees into two classes based on their nationality and risk overlooking people's individual reasons for fleeing their country.[76]

In the opinion of the IRC, the implementation of the Screening Regulation and the APR creates a "danger that those seeking protection will have to remain in limbo, stuck in detention-like conditions for much longer than originally planned. This would . . . also result in a backlog in the asylum centers which are likely to be quickly overcrowded."[77]

[70] EP, supra note 67, amendment 52.

[71] Id. amendment 79.

[72] Id. amendment 114, 125.

[73] Id. amendment 118.

[74] Id. amendment 87, 107

[75] IRC, supra note 29.

[76] Id.

[77] Id.

D. Asylum Migration Management Regulation

1. Content

The Asylum Migration Management Regulation (AMMR) would replace the 2013 Dublin Regulation and introduce changes to the existing procedure for determining the EU member state responsible for examining an asylum application and a new solidarity mechanism to ensure fair burden sharing, as well as set out a common framework for the management of asylum and migration in the EU.[78]

According to the press release, the AMMR would clarify and streamline the transfer rules of the Dublin Regulation. Asylum seekers would be obligated to submit their applications in the member state of their initial entry or legal stay. However, under specific conditions, another member state may assume responsibility for processing an asylum claim, such as if an applicant possesses a diploma from an EU member state education institution issued within the last six years.[79]

Moreover, the criteria for reuniting applicants with their family members would be expanded to include individuals who have acquired either an EU long-term residence permit or citizenship and to newborn children.[80]

Member states would be required to implement national strategies to ensure the capacity for an effective asylum and migration system, and the Commission would also formulate its own five-year European Asylum and Migration Management Strategy.[81]

The AMMR would restrict the grounds for transferring or shifting responsibility among member states, reducing the options for applicants to choose the member state for submitting their claims to discourage secondary movements. It would increase the time limits for the duration of a country's responsibility to deal with an application to 20 months from the current 12 months and establish a simple, swifter take-back notification.[82]

The new solidarity mechanism would combine mandatory solidarity for strained member states with flexibility regarding contributions.[83] Contributions would include relocations, financial support, or alternative measures. An EU solidarity coordinator would oversee implementation. The minimum annual number for relocations would be set at 30,000, while the minimum annual number for financial contributions would be fixed at 600 million euros (about US$653 million). Responsibility offsets would be available as a second-level solidarity measure in case not enough

[78] Consolidated Version of Dublin III Regulation, 2013 O.J. (L 180) 31, https://perma.cc/93EW-G63Q.

[79] Press Release, supra note 2.

[80] Id.

[81] Id.

[82] Id.

[83] Id.

relocations are pledged. This voluntary arrangement would become mandatory if relocation pledges fall short of 60% of total needs.[84]

2. Amendments Proposed by the Council

The Council adopted its General Approach on June 13, 2023.[85] The main changes proposed can be summarized as follows. It requested that the Commission establish a template for member states to ensure that their national strategies are comparable on specific core elements, such as contingency planning.[86]

It added a provision to set up a Permanent EU Migration Support Toolbox composed of at least operational and technical assistance by the relevant EU agencies such as the EUAA in accordance with their mandates, return actions, enhanced diplomatic and political outreach, coordinated communication strategies, and cooperation with third countries to facilitate return and readmission, among other things.[87]

Furthermore, it inserted a provision requiring the Commission to adopt a European Migration Management Report that considers any possible developments in terms of migratory flows toward the EU, including their rapid evolution. The report would assess the situation along all migratory routes and in all member states and serve as "an early warning and awareness tool for the Union in the area of migration and asylum, and that provides a strategic situational picture."[88]

It also proposed that the Commission adopt a yearly recommendation regarding the solidarity pool based on the European Migration Management Report. The recommendation should "identify the measures from the Permanent EU Toolbox necessary to address the migratory situation in the upcoming year in a balanced and effective manner that reflects the needs of the Member States under migratory pressure." The recommendation would also set annual numbers for relocations and for financial contributions at the EU level, which would at a minimum be 30,000 for relocations and €600 million for financial contributions.[89]

It introduced an exception to the general rule set out in the Commission proposal that if third-country nationals enter a member state through another member state for which they do not need a visa, that member state is responsible for examining the application for international protection. It specified that if applicants are registered in another member state, in which their need to have a visa is also waived, that other member state would be responsible for examining the application instead.[90]

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[84] Id.

[85] Council, General Approach, file no. 2020/0279(COD) (June 13, 2023), https://perma.cc/PQ4G-5F6V.

[86] Id. at 43, art. 6, para. 7.

[87] Id. at 44, art. 6a.

[88] Id. at 46, art. 7a.

[89] Id. at 53, art. 7c.

[90] Id. at 76, art. 22, para 2.

In addition, it modified when a country ceases to be responsible for an applicant in a border procedure. It specified that if a member state rejects an application of asylum protection as inadmissible or unfounded or if the application is implicitly or explicitly withdrawn, the country's responsibility for that person would end after 15 months.[91]

It also proposed detailed additional provisions on the solidary mechanism, in particular the establishment of a "solidary pool" by the Council each year in an implementing act. The solidarity pool would be the main solidarity tool, consisting of relocation, financial contributions, and alternative solidarity measures. It also added provisions on the use of the solidarity pool, its operationalization, reductions of solidarity contributions, and responsibility offsets, among other suggestions.[92]

3. Amendments Proposed by the EP

The EP proposed a series of changes to the Commission proposal in its report published on April 14, 2023.[93] The main points are as follows. It would require the Commission to adopt a five-year European Asylum and Migration Management Strategy setting out the strategic approach to ensure access to asylum procedures and the functioning and implementation of asylum and migration policies at the EU level, and to publish an annual situational report on the asylum, reception, and migratory situation.[94]

It rephrased the article on cooperation with third countries on asylum, border, and migration management. It provided that the EU and the member states "promote and build tailor-made and mutually beneficial partnerships and close cooperation with relevant third countries." The cooperation is intended to promote legal migration and well-managed mobility for third country nationals; support partners hosting large numbers of migrants and refugees; strengthen bilateral, regional, and international partnerships; address drivers of irregular migration, and support effective policies respectful of human rights, among other objectives.[95]

It also added several provisions on the responsibility of member states to examine an application. It stated that if an applicant has resided legally for at least two years in a member state with a valid residence permit, that member state will be responsible for examining his or her application for international protection.[96] Furthermore, like the Council, it stated that if a third-country national enters a member state through a member state in which the need for a visa is waived, that member state would be responsible for examining the application.[97]

[91] Id. at 83, art. 27, para. 1aa.

[92] Id. at 112-128, arts. 44a-44k.

[93] EP, Report, file no. A9-0152/2023 (Apr. 14, 2023), https://perma.cc/W2ES-VUAD.

[94] Id. amendments 121, 122.

[95] Id. amendment 139.

[96] Id. amendment 231.

[97] Id. amendment 233.

It added that, regarding family reunification, member states should apply a special procedure to ensure a "swift family reunification and access to the asylum procedure" where it is deemed that the applicant is likely to have the right to family reunification.[98]

Like the Council, the EP proposed amendments to the solidarity mechanism. However, in the EP proposal, the Commission would establish the annual solidarity pool. It would consist of the total number of required relocations, the total number of required relocations allocated for applicants arriving by sea, and the total need for capacity-building measures. This information would be discussed in a special forum, the Solidarity Forum.[99]

Lastly, it specified that EU bodies, offices, and agencies in the field of asylum, border, and migration management would support member states and the European Commission, by, for example, providing analyses, expertise, and operational support.[100]

4. Potential Impact and Criticism

Comments immediately following the agreement between the two co-legislators praised one aspect of the discussed regulation in particular: the adoption of rules for solidarity and responsibility sharing.

According to the Migration Policy Institute, the agreed proposal "translates member states' verbal commitment to responsibility sharing and solidarity into an actual legal obligation. And that is something that many Member States across the bloc see as a milestone" as it represents the first set of rules to support them in their effort to deal with migration and asylum requests.[101] However, it remains to be seen whether it will work in practice. The authors concluded that "[t]he pact's ultimate success will require an again united European Union to design the implementation plans and to support these with sufficient financial resources; capacity (e.g. boosting the capacity of the EU Agency for Asylum and Frontex); smart innovations, such as the sound use of digital tools; and monitoring mechanisms that among other things ensure fundamental rights are preserved. It will also require swift and resolute action if Member States deviate from the agreed course."[102]

However, the agreement on the AMMR was also criticized. The IRC stated that the first country of entry principle would force people to stay in EU border countries waiting for their request to be approved, often in precarious situations, and that those border member states would be responsible even longer than they currently are.[103] It also regretted that the expansion of the term "family" suggested by the Commission was not kept in the final agreement. Lastly, even though the IRC applauded the establishment of a mandatory solidarity mechanism in general, it voiced

[98] Id. amendment 250.

[99] Id. amendment 351.

[100] Id. amendment 435.

[101] Hanne Beirens & Camille Le Coz, *One Phase Closes for the New Pact on Migration and Asylum. Now Another Begins*, Migration Pol'y Inst. (Dec. 2023), https://perma.cc/GG8V-TBAZ.

[102] Id.

[103] ICR, supra note 29.

concerns about the lack of strict definitions or limits, potentially diverting funds to border surveillance or activities outside the EU, rather than improving protection or reception programs.[104]

E. Crisis and Force Majeure Regulation

1. Content

The Crisis and Force Majeure Regulation would replace the 2001 Temporary Protection Directive, which was activated for the first time in February 2022 to address the mass influx of displaced persons from Ukraine.[105] It would allow derogations from and adaptions to the procedural rules and solidarity mechanism established in the AMMR to respond to situations of crisis and force majeure. It would set out shortened time frames and simplified procedures to trigger the solidarity mechanism, broaden the scope for relocation, and amend the rules for return sponsorship by other member states.[106] It would also allow the application of the border procedure to third-country nationals and stateless persons whose EU-wide first instance recognition rate is 75% or lower and extend the maximum duration of the border procedure for both asylum and return procedures by an additional six weeks.[107] Certain applicants, such people from a specific country of origin, could be granted prima facie protection.[108]

According to the Council press release, the Crisis and Force Majeure Regulation would also contain provisions on dealing with the impact of a situation where migrants are instrumentalized for political purpose to destabilize the EU and its member states. Humanitarian aid operation would not fall under that category.[109]

A member state in crisis would have to make a reasoned request to the Commission. The Commission would assess the situation and adopt a decision on the presence or otherwise of a crisis situation within two weeks. The member state in question would also make a proposal to the Council on solidarity measures and derogations.[110]

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[104] Id.

[105] Temporary Protection Directive, 2001 O.J. (L 212) 12, https://perma.cc/MCB2-AAAW.

[106] Crisis and Force Majeure Regulation, at 3.

[107] Press Release, EP, Provisional Deal on New EU Rules to Respond to Migratory Crises (Dec. 20, 2023), https://perma.cc/V2ZM-UPCH.

[108] Id.

[109] Id.

[110] Id.

2. Amendments Proposed by the Council

The Council adopted its negotiating mandate for discussions with the EP on October 4, 2023.[111] It emphasized that the exceptional situation of crisis includes the instrumentalization of migrants.[112]

It stated that the registration of applications for international protection should be completed within an extended period of four weeks and that such applications at the border could be examined for a maximum duration of 20 weeks.[113]

It also suggested that, in situations in which the mass influx is of such extraordinary scale and intensity that it may create a serious risk of significant deficiencies in the treatment of applicants for international protection, a member state may be relieved of its obligation to take back an applicant or a third-country national or stateless person.[114]

Furthermore, it added that member states facing a crisis situation may request solidarity contributions from other EU countries, such as the relocation of asylum-seekers or beneficiaries of international protection, responsibility offsets, or financial contributions or alternative solidarity measures.[115]

3. Amendments Proposed by the EP

The EP provided its own amendments to the Commission proposal.[116] In particular, it would emphasize that the rules in the regulation are temporary and limited and should be used only to respond to a crisis situation.[117] The existence of a crisis situation would have to be confirmed by the Commission in consultation with the member state affected and relevant EU agencies.[118] The indicators for a crisis situation are set out in detail. The Commission would decide which support mechanisms are appropriate if a crisis situation exists, such as relocation contributions or mandatory relocations.[119] The Commission would have to continuously monitor the situation and adopt a delegated act if the crisis situation has ended.[120] Member states would have to include ways to deal with a crisis situation in their national strategies required in accordance with the AMMR.[121]

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[111] Council, Mandate for Negotiations with the European Parliament, file no. 2020/0277(COD (Oct. 4, 2023), https://perma.cc/7EMG-W5JF.

[112] Id. at 31.

[113] Id. at 11.

[114] Id. at 41.

[115] Id. at 45.

[116] EP, Report, file no. A9-0127/2023 (Apr. 5, 2023), https://perma.cc/6E3A-7XW2.

[117] Id. amendment 68, art. 1, para. 1b.

[118] Id. amendment 71, para. 1b.

[119] Id. amendment 72, art. 1c.

[120] Id. amendment 73, art. 1d.

[121] Id. amendment 74, art. 1e.

The EP also proposed that the EU Relocation Coordinator, appointed according to the AMMR, should coordinate all mandatory relocation efforts, focusing on vulnerable persons and beneficiaries of prima facie international protection.[122] In addition, the EU Relocation Coordinator would share best practices and verify any meaningful links with certain member states for persons eligible for relocation, among other tasks.[123]

Furthermore, the EP report added more provisions on funding and financial contributions to member states. It provided that funding should be allocated to local and regional authorities and organizations for integration measures following relocation and that member states dealing with a crisis situation should receive emergency funding to construct, maintain, and renovate reception facilities.[124] Furthermore, it suggested that member states should receive an additional €10,000 (about US$10,900) for each applicant for, or beneficiary of, international protection transferred from another member state or their family members.[125] For unaccompanied minors, the amount would be raised to €12,000 (about US$13,000).

Lastly, the EP focused on vulnerable applicants, such as children and their family members, and suggested that they be excluded from the asylum crisis management border procedure.[126]

4. Potential Impact and Criticism

A briefing published by the Research Services of the EP in January 2024 points out that even though the Commission considers the regulation a "solid response to needs on the ground while also catering to different situations," others have criticized the narrow personal scope of immediate protection as compared to temporary protection.[127]

Eve Geddie, director of Amnesty International's European Institutions Office, expressed her concerns immediately after the agreement between the EP and the Council was announced.[128] She stated that the agreement would allow "countries to opt out of a broad range of EU asylum rules in times of increased arrivals and in case of so-called 'instrumentalisation' of migrants or 'force majeure.'"[129] In her opinion, these exemptions have the practical effect of breaching

[122] Id. amendment 79, art. 2d.

[123] Id.

[124] Id. amendment 84, art. 2i.

[125] Id. amendment 126, art. 20a.

[126] Id. amendments 32, 87.

[127] Anita Orav, *Briefing. EU Legislation in Progress. Crisis and Force Majeure Regulation* (Jan. 2024), at 4, https://perma.cc/W6XL-VVD7, Meltem Ineli-Ciger, *What a Difference Two Decades Make? The Shift from Temporary to Immediate Protection in the New European Pact on Asylum and Migration*, EU Migration Law Blog (Nov. 11, 2020), https://perma.cc/SZK9-WDS2.

[128] Amnesty Int'l, *EU: Migration Pact Agreement Will Lead to a "Surge in Suffering"* (Dec. 20, 2023), https://perma.cc/P2YV-K6UM.

[129] Id.

international obligations under refugee and international human rights law and ultimately risk normalizing disproportionate emergency measures.[130]

[130] Id.