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*Analysis of the
New EU Pact on Migration and Asylum*

**A “fresh start”
for human rights violations**

EuroMed Rights

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Executive Summary

On September 23rd 2020, the European Commission published its New EU Pact on Migration and Asylum. This document, presented as a “fresh start” for the management of migration in the EU is in fact a “fresh start” for human rights violations as detailed in the report below. EuroMed Rights had previously reacted to the publication of the pact and had proposed its own submission in response to the consultation launched by the European Commission. The report below proposes a full analysis of the final text of the New EU Pact for Migration and Asylum.

1. A “fresh start” for human rights violations

The New Pact on Migration and Asylum aims at setting the framework of EU and member states migration and asylum policies, in terms of border control, access to asylum, reception conditions and returns, through both policy and legislative instruments. The proposals attempt to normalise what should be exceptional components, such as accelerated border procedures and detention, *de facto* providing a legal framework for illegal practices already in place in some member states (such as an obsession on returns, arbitrary detention and shrinking of asylum space). This will have an impact on the whole Euro-Mediterranean region. This new Pact repeats past mistakes, increases the risks of human rights violations and fails to protect migrants’ and refugees’ rights. The Pact mostly answers the concerns of EU member states who try to avoid their legal responsibilities towards migrants and refugees, prioritising internal solidarity between member states at the expense of solidarity towards migrants and refugees.

2. Screening procedure: limbo at borders

The EU proposes to set up a screening mechanism at its external borders. Concretely, all migrants and asylum seekers would be checked within five days after their arrival on EU territory, for example at border crossing points, in airports’ transit zones or following disembarkation. This means that they would need to prove their identity and would undergo health and security checks, including fingerprinting and facial recognition. Meanwhile, they won’t be officially admitted on EU territory, despite being *de facto* on the land. They will be obliged to remain in detention camps until they have been screened and referred to the relevant procedure, which could also mean being prevented to access the asylum procedure and risk being directly returned. This violates their right to liberty, right to asylum, right to appeal and to legal aid

3. Procedures after screening

The Pact introduces two kinds of procedure: the asylum border procedure and the return border procedure. These procedures would be swift and would take place in the same transit and border areas than the screening.

The accelerated procedure envisioned to speed up the asylum request process will only happen at the detriment of asylum laws and applicants’ rights. The procedure will most likely be done in an arbitrary and discriminatory way, looking at the nationality of the applicant, its recognition rate and whether the country s/he comes from is “safe”, which is a dubious notion. In the frame of the asylum and the return border procedures, the arbitrary deprivation of liberty is a problem *per se*: asylum seekers will not be allowed to exit the border facilities and a proper detention, in a situation which is *de facto* already a detention, could be applied too. Access to justice would be very difficult, and the right to an effective remedy would be strongly reduced for applicants whose border asylum applications had a negative

outcome. The scope of the procedures is clear: implement returns before applicants can even officially enter the national territory.

4. A "solidarity" mechanism excluding migrants, asylum seekers and refugees

This new Pact prioritises internal solidarity between member states at the expense of solidarity towards migrants and refugees. The European Commission's proposal foresees a distorted concept of solidarity, only among member states, at the expense of migrants' and refugees' rights. The commission envisages three situations in which the solidarity mechanism can be triggered: 1) following disembarkations from search and rescue operations, 2) in a migratory pressure scenario and 3) under a crisis mechanism. In the latter, the proposal also envisages the possibility for member states which claim to be in a situation of *force majeure* to extend the registration deadline for a period of four weeks. This would mean suspending the right to asylum for almost a month.

5- A Dublin reform proposal based on the same principles of responsibility for asylum applications

The proposal presented by the Commission on the amendment of the Dublin Regulation is based on its 2016 proposal which failed to reach agreement in the Council. This proposal, despite introducing several positive criteria for Member State responsibility (related to child best interests and family unity for instance), *de facto* maintains the principle of the first country of arrival as responsible for asylum procedures as it is combined with the solidarity mechanism. The principle of first country of arrival as responsible has, on several occasions, led to a situation of limbo for thousands of asylum seekers. It also puts the management of international protection under the responsibility of first-border countries.

1. A “fresh start” for human rights violations

The long-awaited EU Pact on Migration and Asylum, is presented by the European Commission as a “new fresh start” and a novelty. In fact, it replicates and exacerbates past mistakes while raising serious concerns in terms of human rights protection and respect of human dignity.

The “package” is composed of nine instruments, including both policy and legislative proposals, which either amend or complement other previous proposals which are still on the table and yet to be adopted, e.g. the recast of the Return Directive.

The main reasoning behind the pact, as von der Leyen puts it, is to “rebuild mutual trust between member states”, thus prioritising EU internal cohesion at the expense of migrants’ and refugees’ rights. However, several member states already seem quite deceived by the proposal and have strongly polarised political positions.

The pact does present a few “positive” aspects. It facilitates swifter family reunifications and highlights the best interest of the child; it reminds states of their search and rescue obligations and invites member states not to criminalise humanitarian assistance, without proposing a search and rescue European operation. These measures remain to be seen in practice and, for now, are drowned in a sea of repressive and security-based measure. Indeed, the Pact dangerously leans towards a repressive and security-based approach to migration, by including many provisions which largely violate human rights and completely fail to safeguard migrants’ rights and protection needs.

Concerns relate to the expanded use of detention during the pre-screening and border procedures; the lack of proper procedural safeguards, the availability of legal aid, the access to justice and the lack of accountability in the procedures. Concerns also arise regarding the reduction and risk of suspending access to asylum; the disproportionate focus on returns; the expediting of expulsions (with the risk of push-backs and collective expulsions) and the main logic of dehumanising individuals and treating them as parcels to be sent to different countries.

Other concerns include the high risk of chain refoulements (even from so-called “safe third countries”) and the fact that push-backs, including of unaccompanied minors and particularly vulnerable people, could be disguised behind the label of “voluntary returns”. This is particularly worrying in light of recent testimonies such as the practice of violent push-backs of unaccompanied minors from Morocco to Guinea and from Algeria to Niger.

In general, the texts and provisions are unclear and confusing and, at times, contradictory. The concrete implementation, on the ground, of certain measures remains unclear if not unrealistic as is the case in certain country-specific contexts where providing protection is impossible.

The proposals attempt to normalise what should be exceptional components, such as accelerated border procedures and detention, de facto providing a legal framework for illegal practices already in place in some member states (such as push-backs, arbitrary detention and shrinking of asylum space).

In particular, the suspension of asylum applications registration for a maximum of four weeks in a situation of crisis and *force majeure* replicates what happened in Greece in March 2020. The national authorities suspended asylum applications for a month in violation of international and EU law, which seems to have pleased the EU.

The pre-screening mechanism at borders, with the subsequent accelerated border procedures, is likely to replicate the hotspot approach, which already leads to a systematic violation of the rights of migrants (primarily the right to access the asylum procedure and the right to liberty).

These forms of detention, as we saw in Italy, Greece and in Hungarian transit zones, are without any legal basis. No written measures are taken nor validated by a judicial authority. Thus, the sole reason for this deprivation of liberty is non-compliance with rules regarding border crossing. The detention conditions in hotspots are deplorable: overcrowding, no proper hygienic conditions, lack of ventilation, and often no separation between men, women and children.

Another unlawful and worrying practice in these border zones is the fact that the law seems to be “blurred” and different jurisdictions tend to frame these transit zones as “extra-territory” to reduce their legal responsibilities. The notion of extraterritoriality implies a kind of suspension of the law (in fact the creation of a zone outside the law) in which foreign citizens do not seem subject to constitutional guarantees, internal and international standards of protection of fundamental rights.

Despite the declarations stating that the pact will overcome the Dublin impasse, Southern European countries like Italy, Malta, Spain, Greece, Cyprus will remain the primary responsible for managing asylum applications. The main obsession of the pact is to “limit the unauthorised movements of applicants” and strengthen returns. The introduction of the solidarity mechanism – whose logic has proved unsuccessful - will not change the situation despite the positive introduction of criteria identifying the responsibilities of member states’ regarding asylum (e.g. the expanded definition of family, the consideration of the best interests of the child and the recognition of previous qualifications).

The intensification of accelerated border procedures and the arbitrary selection based on nationality and recognition rates are discriminatory and further reduce rights and guarantees, including the access to effective remedies. In addition of being impossible to implement, the mechanism risks reproducing the hotspot approach (such as the “Moria model” or “transit zones” in airports) which would increase human rights violations (particularly regarding the extension of arbitrary detention and the reduction of the right to asylum). Many doubts arise regarding access to information and access to a lawyer. There are also worries when it comes to the real capacity of conducting vulnerability assessment and accessing remedies in such procedures. The speeded-up identification procedure clearly disregards the psychological situation of trauma and stress in which migrants arrive after months of violence, suffering and inhumane treatment. Many also arrive after having risked their life at land and at sea.

The pact also foresees a distorted concept of solidarity which is understood rather among member states than towards migrants and refugees. Solidarity is no longer seen in terms of welcoming and relocating people but in terms of expelling and returning them. For example, under the “solidarity mechanism” the pact introduces a so-called “return sponsorship” system. Under this system, a member state which does not want to take in asylum seekers under relocation takes over the responsibility for returning a person on behalf of another member state. The pact assimilates this “sponsored return” policy to a form of solidarity. This obsession for returns is also represented by the increasingly worrying role played for the coordination of return operations by EU agencies such as Frontex. It also shows in the creation of a new Network on return and readmission and through the appointment of an EU return coordinator. One must wonder why the Pact does not include the appointment of an EU relocation coordinator?

This excessive focus on returns, which has become a real obsession and is dangerously related to asylum, takes place at the detriment of the establishment of effective asylum systems. In the absence of a post-deportation monitoring mechanism to countries that systematically and notoriously violate fundamental rights (such as Egypt), it breaches the principles enshrined in international and European conventions.

Regarding the external dimension, which was presented by Commissioner Schinas as one of the main pillars of the pact (or “floors of the house”), no real novelties or concrete proposals are put forward in the Pact besides the clear obsession on returns and the concept of “safe third country”. The objective there as Commissioner Johansson explained, is to increase cooperation with third countries to facilitate return and readmission through “mutually beneficial” partnerships. The Commission will report on how well

countries cooperate on returns and readmissions. The Commission can also identify any relevant measures to improve cooperation on readmission, including through a new mechanism for using visa processing as leverage, as enshrined in the Visa Code. The Visa Suspension Mechanism provides for the “systematic assessment of visa-free countries against criteria including irregular migration risks and abusive asylum applications”. This could lead to the removal of third countries from the visa-free list, thus applying the logic of negative conditionality.

The concept of “safe third countries” continues to apply by automatically referring asylum seekers coming from a “safe” country to the return procedure as their application is deemed inadmissible. This occurs in violation of the right of individual assessment of asylum applications. The pact does not mention the introduction of a common list of “safe third countries”, thus leaving it at the discretion of member states. However, the Commission wishes that a “greater degree of harmonisation of the safe country of origin and safe third country concepts through EU lists” be reached through continued negotiations.

As EuroMed Rights has repeatedly denounced, this “new” pact is a missed opportunity to truly safeguard and protect migrants’ and refugees’ rights. First of all, although it recommends coordination of rescue operations and invites member states not to criminalise private actors in the provision of humanitarian assistance and search and rescue (SAR) activities, it fails to set up a real EU-led SAR operation. In addition, analysts point to the fact that the Guidance on the facilitation of unauthorised entry (C (2020)6470 final) only invites member states not to criminalise acts which are ‘mandated by law’, which is very different from acts ‘permitted by law’. Activities like providing food, shelter, car lifts or information, all remain excluded when they are not carried out by an official NGO that is ‘mandated’ to carry out such activities. The almost exclusive focus on search and rescue also risks leaving out activities at land and activities which are not directly lifesaving.

Secondly, despite efforts to increase legal pathways and resettlement pledges, scaling up humanitarian admission programmes and expanding community sponsorship schemes (as suggested in the Recommendation on legal pathways (C (2020) 6467 final)), measures really fall short and there are no concrete commitments yet in place.

The positive elements of the reform - a greater consideration of the child and family ties as well as a human-rights monitoring mechanism for the screening procedure - are clearly outnumbered by the majority of changes foreseen by the Pact. These changes would not only represent a further violation of the fundamental rights of migrants and refugees, but would also become problems for most member states which will have to deal with proposals that are often impossible to implement in practice.

2. Screening procedure: limbo at borders

The proposal for a Regulation on screening at the external borders (COM (2020) 612 final) foresees a mandatory screening procedure applying to all third-country nationals present at the external borders, (including at crossing points and transit zones) after disembarkation and apprehended within the territory of a member state. In the latter case, concerns have been raised on the discriminatory practice of racial profiling that this would entail. The screening, which should be concluded within five days (and within a maximum of ten days in exceptional circumstance according to art. 6 COM (2020) 612 final) consists in an identification phase, through a succinct de-briefing form, health and vulnerability checks, security checks (including fingerprinting and the taking of facial image data) via the enhanced version of the Eurodac database.

In terms of health checks and vulnerabilities, “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". There is no specific mention to victims of torture in the Regulation. Requesting "immediately identifiable" and "visible" signs is very problematic, as many vulnerabilities will remain undiscovered (e.g. victims of gender-based violence or trafficking) and some require a lot of time to be identified. Concerning minors, some positive developments have to be highlighted, such as the fact that, in order to achieve swifter family reunifications, "original documentary evidence and DNA testing should not be necessary in cases where the circumstantial evidence is coherent". Also, unaccompanied minors and children under twelve with family members have the right not to be referred to the border procedure. However, this newly introduced threshold for minors (i.e. twelve years of age), sets a very dangerous criterium and precedent, leaving minors between twelve and eighteen in a sort of limbo but concretely considering them as adults.

The locations for the screenings also pose significant concerns as, according to the proposal, the screenings should take place "at or in proximity to the external borders" (art. 6 COM (2020) 612 final). Individuals should not be authorised to enter the territory of the member state and will be obliged to "remain in the designated facilities during the screening" (art. 8). These facilities will thus reproduce closed detention camps, by re-applying the hotspot approach, thus using detention and systematically depriving individuals of their liberty.

Another worrying element relates to the outcomes of the screening and to the referral to the adequate procedure based on the elements gathered in the de-briefing form and on a Eurostat-based average of recognition rates of international protection. This poses several problems in terms of the inadequacy of the de-briefing form to assess the real vulnerability and individual application of the person, including when you consider the situation of psychological stress and trauma which people can be in following violence and inhumane suffering during their perilous journeys. The inadmissibility of an asylum application based on low recognition rates also violates the individual nature of an asylum application. The identification and appointment of "competent authorities" responsible to carry out the screening is also unclear.

The Regulation specifies that the screening is a "mere information-gathering stage" and no legal recourse is possible against the outcomes of the screening (i.e. to refer the applicant to a speed up procedure, rather than the standard one, or to the return). People referred to a return procedure have no access to the asylum procedure, nor to remedy or appeal. Applicants therefore have reduced opportunities to defend their asylum claim or to contest their return.

The accelerated border procedures represent reduced procedural safeguards leading to arbitrariness and discrimination and offer very few guarantees in terms of access to the right of asylum, the right of defence and the right to a fair trial. These speeded-up procedures thus limit the possibilities for foreign nationals to appeal against the decision, with the risk of being immediately subject to return.

The fact that those coming from countries deemed safe are automatically referred to a return procedure leads to a further decline in the guarantees of asylum seekers. It is also in clear violation of the individual assessment of the situation of an applicant for international protection. It may amount to collective expulsions.

The provision to implement a mechanism for monitoring fundamental rights' compliance and investigate human rights' violations (art. 7 COM (2020) 612 final) in relation to the screening, to national rules on detention and to the principle of non-refoulement is a positive move. However, many doubts arise on the true independence, the actual implementation and the scope of application of such a mechanism. The mechanism seems to apply only to the screening and not to other procedures. The provision does not mention existing independent national institutions tasked with monitoring human rights' violations (such as ombudsmen) but it does not exclude their involvement in the monitoring mechanism either. According

to the Regulation, non-governmental organisations *may* be invited by member states to participate in the monitoring.

At the end of the screening, if the person did not apply for international protection and, as a result of the screening process, does not fulfil entry conditions according to the Schengen Borders Code, s/he will be subject to a return decision and directly referred to a return procedure (art. 14 COM (2020) 612 final). Entry may be refused also in cases not related to search and rescue (art. 14 COM (2020) 612 final). The screening ends either when the person is referred to the appropriate procedure or when the deadlines are expired, even if full checks have not been completed (art. 14 COM (2020) 612 final).

No judicial review is foreseen regarding the outcome of the screening, but the substantive decisions taken following the relevant procedure (a return or asylum procedure or a refusal of entry) can be submitted to judicial review and contested before a national judicial authority.

3. Procedures after screening

Depending on the outcome of the screening, migrants will be channelled to different kinds of procedures for requesting international protection. These are twofold: the normal asylum procedure and the asylum border procedure. Additionally, at a member states' discretion, people from "safe countries of origin" or "safe third countries" might be directly deferred to a return procedure.

The introduction of the asylum border procedure and of the return border procedure is the main object of the 'Amended Proposal establishing a common procedure for international protection in the Union', a proposal amending the 2016 Proposal to repeal the Directive 2013/32/EU.

The normal asylum procedure applies mainly to people coming from countries for which the rate of positive asylum decisions is higher than 20%, according to the last available yearly EU-wide average Eurostat data. Moreover, unaccompanied minors and children under twelve 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 prevent them from applying the border procedure. It also applies in cases when the border procedure cannot be applied without detention but its guarantees and conditions are not met. Member states can decide not to apply the border procedure – and therefore to apply the normal procedure - to those who are nationals of a third country which is not seen as sufficiently cooperating for readmissions. Beside the criteria to access to it, the Regulation does not introduce any other change to the normal asylum procedure.

The asylum border procedure applies when the normal asylum procedure does not. This means it applies to persons coming from third countries for which the rate of positive asylum decisions is 20% or lower, to migrants who are found to pose a risk to national security or public order and to those who are found to have misled authorities by presenting false documents or information.

In the event 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. Despite the right to an effective remedy guaranteed by the European Court of Human Rights, applicants 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. As for subsequent applications lodged within one year starting from the decision taken on the previous application, the suspensive effect does not apply if the application has been made in the last stages of the return procedure. Indeed, the application will be considered as not presenting any new element and lodged merely "to frustrate the removal". 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 request.

The whole procedure will have a maximum duration of 12 weeks, starting from the registration and comprising both the outcome of an application and of a potential appeal. In principle, if the procedure is not completed within this time-limit, the applicant will have the right to enter the territory of the member state to complete the asylum procedure.

As soon as the “right to remain” has expired, a border procedure for carrying out the return will be started. The maximum timeframe is also twelve weeks. During this period, people who had already been put in detention during the examination of the asylum border procedure can be held in detention. Those who previously weren’t detained will now be detained in order to prevent unauthorised entry and carry out return. The recast Return Directive, setting the maximum total period of detention to one year, applies in this case.

It is important to highlight that the asylum border procedure and the return border procedure, like the screening, take place in the frame of a pre-entry phase. Even though the procedures are carried out by the national authorities of the member state, applicants are not considered to have entered national territory, as is the case within the normal asylum procedures. This “non-entry” regime highlights an evident lack of justice and available remedies, in line with the “solidarity mechanism”. In both the asylum border procedure and the normal asylum procedure, applicants might be relocated to another member state.

3.1 The right to an effective remedy in the border procedure

Applicants whose border asylum applications had a negative outcome theoretically have the right to an effective remedy. It is worrying to see that this right would be strongly reduced, should the provisions regarding it be approved. According to Directive 2013/32/EU all asylum seekers can access two levels of jurisdiction and some member states allow a third higher level. While the text of the new procedure does not explicitly forbid it (even though it strongly suggests allowing only one single appeal) the whole system comprising the asylum and the return border procedure seems to render it impossible. In fact, according to Directive 2013/32/EU this amended proposal would replace the fact that “member states shall allow applicants to remain in the territory until the time limit within to exercise their right to an effective remedy has expired and, when such a right has been exercised within the limit, pending the outcome of the remedy”. However, the competent authorities can decide that the applicant no longer has a right to remain in the national territory.

In the 2020 proposal, an almost identical formulation is followed by “the applicant shall not have the right to remain (...) where the competent authority has taken one of the following decisions (...)” and such decisions are that the application has been judged unfounded, manifestly unfounded, inadmissible, rejected as implicitly withdrawn or that international protection has been withdrawn. In short, all the negative possible outcomes of an application for international protection. Of course, national courts or tribunals can decide that the applicant has the right to remain, but the perspective has been completely reversed. With the 2013 Directive the general principle is that the applicant can remain, but the court can decide otherwise; with this proposal the applicant is not allowed to remain unless the court takes an opposite decision.

In the case of subsequent applications, the new procedure strongly encourages member states to provide in national law that applicants do not have the right to remain pending the outcome. This is especially the case if the application is considered to having been lodged “merely in order to delay or frustrate the enforcement of a return decision”. In case of an appeal against a decision concerning a subsequent

application, it goes without saying that there is no right to remain, even though the court can rule otherwise.

3.2 Deprivation of liberty and use of detention in the asylum border procedure and in the return border procedure

In the frame of the asylum and the return border procedures, the arbitrary deprivation of liberty is a problem *per se*: asylum seekers will not be allowed to exit the border facilities, meaning that they will be detained in the facility or in a specific area. This condition of deprivation of liberties would apply to all applicants concerned by a border procedure, in what seems to openly contradict the provision of art. 8 of the Reception Conditions Directive: “member states shall not hold a person in detention for the sole reason that he or she is an applicant”.

Besides the detention condition, which is implicit in the asylum border procedure, proper detention (that is detention in a situation which is already of deprivation of liberty) might be applied on individual cases during the process. During the return border procedure, those who were already detained before can continue to be detained, and those who were not can now be detained in compliance with the recast Return Procedure (discussion is ongoing at the European parliament). Again, it must be reminded that these procedures take place in a pre-entry phase: besides the guarantees provided by the two mentioned Directives, member states will apply their national legislations. But how and against whom can an applicant lodge a file regarding a unjust detention if the latter is not taking place in a national territory? It is reasonable to think that the *fictio iuris* for which the applicant has not entered the national territory would not apply in this case, but still the accountability gap is huge. In any case, it is evident that it will be quite difficult for an applicant to find, while staying in the transit area, a lawyer to lodge an appeal against the application of an eventual unjust detention for example.

4. A "solidarity" mechanism excluding migrants, asylum seekers and refugees

In the COM (2020)610 document, The Commission puts the emphasis on a complicated system of solidarity, which is activated in three specific cases. Firstly, when the state is considered "under migratory pressure"; secondly, in the landing procedures following a rescue operation; or thirdly as part of the crisis mechanism. This solidarity is dangerously extended to the concept of return and only serves the interests of member states and not those of migrants and refugees. In addition to the danger of combining the concept of solidarity with that of return, this proposal opens up a risk of prolonged detention, both in the first country of arrival and in the country where the person will be transferred after eight months if the return procedure has not been possible. In the case of a relocation of refugees who have already been integrated in the host country for three years or migrants who have arrived after eight months, the mechanism clearly does not take into account the life course of people, considering them as boxes distributed throughout and preferably shipped outside of Europe.

4.1 Solidarity measures following disembarkations from search and rescue operations

The proposal of the European Commission provides for the establishment of a Migration Management Report where the need of solidarity will be mentioned– specifying the “total number of third-country nationals covered by solidarity measures.”

The new solidarity mechanism provides that the member states can choose among different forms of “solidarity”: relocation, support in return and measures aimed at strengthening the capacity of members states in the field of asylum, reception, return as well as in their externalisation policies:

- **Relocation:** offering reception places for applicants for international protection that are not subject to the border procedures.
- **Return sponsorship:** the sponsoring member states would provide support on return, forced or voluntary, using their programmes and resources, supporting the policy “dialogue” with third countries for pushing them to accept the readmission. The sponsoring member state can choose the nationality of people to be supported for return, based on the readmission agreements signed and the highest possibility of expulsion. However, if a person can be expelled within eight months, the sponsoring member state would transfer said person and continue its efforts to return them “where member states will indicate that they will undertake return sponsorship, they shall also indicate the nationality of third countries for which they are willing to support the return: this is to ensure that sponsorship is used to return third-country nationals for which Member States concerned can bring added value”. It is unclear what the fate of these people will be once they are transferred to the country sponsoring the return: will they be detained again? If so, for how long? Given the discrepancy in treatment from country to country and the absence of monitoring mechanisms, this procedure raises doubts and concerns.

A financial contribution of 10,000 euro will be given per relocated person - including following return sponsorship- and of 12,000 for an unaccompanied minor.

- **Supporting a member state to strengthen the capacities of border management and the external dimension:** this point lacks clarity in the Pact. And yet, it already raises concerns as one can easily imagine support for the implementation of the Italy-Libya or Malta-Libya agreements where solidarity can be interpreted as support to the member states in their policy of externalisation of rescue and support to the so-called Libyan Coast Guard.
- **Supporting a member state in its reception and asylum needs** (very little information available in the Pact)

When the Commission considers that the contributions by member states suffice, the Commission shall adopt an implementing act, establish a solidarity pool to provide support to the disembarkation challenges faced by the member state. In the event most member states want to give support to another member state in its externalisation strategy, the Commission can ask member states to contribute to relocation or return sponsorship instead. During the year, as disembarkations take place, the Commission will use the pool and prepare lists to distribute people to be relocated by the contributing member states. The document also provides that, where the solidarity pools risk being insufficient, the Commission will amend the implementing act setting out an additional number of projected measures for relocation.

The Pact also details a complex mechanism of redistribution that does not seem to take into account the reasons for the failure of the placement mechanism established in 2016. This mechanism turns the very concept of solidarity into a negative one, extending it also to repatriations.

4.2 Solidarity measures in situations of migratory pressure

The assessment of a migratory pressure is made by the European Commission at a member state’s request. When the status of migratory pressure is confirmed, the Commission will identify the overall needs of the member state and indicate the appropriate measures needed to address the situation. It will also detail how other member states shall contribute through measures of relocation, return sponsorship or a combination of such measures. Should the report on migratory pressure indicate a need for other solidarity measures in the field of asylum, reception, return or external dimension, then the contributing

member states may indicate such measures in their Solidarity Response Plans (instead of only relocation or return sponsorship).

In case of “migratory pressure”, relocation will also include beneficiaries of international protection for up to three years from when they were granted international protection. This raises serious concerns regarding the continuity of a person's integrative path in a country, their links with the territory and the degree of voluntariness (unspecified) of a possible transfer.

Within two weeks of the submission of the Solidarity Response Plan, the Commission will adopt an implementing act and set out the solidarity measures to be taken. In the event the solidarity contributions do not correspond to the needs identified in the assessment on migratory pressure, the Commission convenes the Solidarity Forum, which will provide a space for member states to adjust the category of their contribution. In this context, the first arrival country must assure the identification and registration process as well as the security controls.

In the migratory pressure scenario, relocation will also include beneficiaries of international protection for up to the three years (from the moment when they were granted international protection), demonstrating no interest at all in the person's path of integration in a country. The European Commission continues to manage migration like a logistical hub, with “boxes” to move, rather than look at the human lives behind the numbers.

4.3 Crisis mechanism

Intending to make the Union ready to address exceptional situations comparable with the 2015 refugee crisis, the Commission's proposal introduces two new complementary instruments: the Migration Preparedness and Crisis Blueprint and a set of specific rules.

The “Migration Preparedness and Crisis Blueprint”, whose purpose and functioning are described in a Recommendation, is a system to coordinate the migration management in both 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 with the objective of permanently monitoring and anticipating migration flows and situations. As well, the Network should establish implementation guidelines to ensure that the information is efficiently exchanged. 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 by coordinating response measures.

A specific Regulation introduces a set of specific rules that can be applied by member states 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 crisis situation or in the risk of it can submit a reasoned request to the Commission. While waiting for the Commission's response, the member state can already unilaterally extend the five-day deadline for registration to a maximum of ten days, and this provision can be applied for a maximum of fifteen days. Once the Commission has given its authorisation, the member state can apply the derogatory rules set by the Regulation for a maximum of six months, which can be extended up to one year in the case of the asylum and the return crisis management procedures. The derogation to

extend the registration deadline to a maximum total period of ten days is applicable for a period of four weeks, which can be renewed for a maximum total of twelve weeks.

But which are the rules? First of all, member states can derogate from the standard asylum border procedure by applying the asylum crisis management procedure. The difference is that member states can channel to border procedures any applicants of a nationality with an EU-wide asylum positive response rate of 75% or lower (while in the context of normal border procedures the rate is 20%). Moreover, the maximum duration of the procedure – twelve weeks in normal times- is extended with an additional period of eight weeks.

The return crisis management procedure allows the extension of the duration of the procedure by an additional eight weeks. Within this framework, the Regulation introduces the possibility to presume the risk of absconding in individual cases, unless proven otherwise. As for arbitrary deprivation of liberty and detention, in the crisis situation the concern is even more significant than in normal times. The derogations provided for the screening and the asylum and return border procedure allow keeping the applicant in the border facility for a total amount of time which exceeds nine months, in the pre-entry phase situation described above, and in a condition of arbitrary deprivation of liberty. It is important to remember that in a situation of crisis the criteria to channel asylum seekers to the asylum border procedure are wider. Moreover, as for proper detention, in the event of a crisis border return procedure the Regulation introduces the possibility to presume the risk of absconding in individual cases unless proven otherwise. This means detention can be applied with basically no ground.

The compulsory “solidarity” mechanism also applies to crisis situations, with specific rules and a faster procedure. As soon as the Commission has assessed the existence of a situation of crisis 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. Member states choosing return sponsorship will have four months instead than 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 for a maximum of six months the implementation of relocation and return sponsorship, and to four weeks the extension of the deadline for registering applications. It 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 exceptional 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 be in charge of establishing 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 period of application of this provision, which cannot exceed one year, the examination of asylum applications will be resumed. 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.

5- A Dublin reform proposal based on the same principles of responsibility for asylum applications

The proposal presented by the Commission on the amendment of the Dublin Regulation is partially based on its previous 2016 proposal, which was adopted by the European Parliament in November 2017 but failed to reach agreement in the Council. A proposal that - despite introducing several positive criteria for member state responsibility related to child best interests and family unity, combined with the solidarity mechanism – maintains and even reinforces *de facto* the principle of the first country of arrival as responsible for asylum procedures. This proposal, as has been demonstrated on several occasions, leads to a situation of limbo for thousands of asylum seekers and puts the management of international protection on the countries of the first border.

The proposal - whose main objective remains to discourage “unauthorised movements” within the EU – lays out several changes, many of which are taken from the 2016 proposal. Below the main ones:

- The applicant must apply in the member state either of first entry or, in case of legal stay, in that member state, as proposed in 2016. Such an obligation makes clear that an applicant does not have the right to choose the member state of application.
- The first country of arrival must assess the security check. If the assessment shows a “security risk” the member state shall become the country responsible.
- The “applicant” must be present and available for the authorities and respect the transfer decision, even if it is contrary to his life plans, which do not seem to enter into consideration.
- The definition of family members has been extended to include siblings of an applicant and family relations formed after leaving the country of origin but before arrival on the territory of the member state.
- The rules on the evidence required will be more flexible. Formal proof, such as DNA testing or original documentary, should not always be necessary. New criteria related to the possession of a diploma or qualification issued by an educational institution by a member state as proof of links in a territory have also been added.
- Due to the obsession to avoid “unauthorised movements” the clause envisaging a cessation of responsibility after twelve months from entry and the expiry of deadline have been extended to three years. This will result in a shift of responsibility between member states.
- As proposed in 2016, “take back requests” will now be transformed into “take back notifications”, as the responsible member state will be evident from Eurodac. The measure is still related to the European Commission’s obsession to “prevent unauthorised movements”

Conclusions

The European Commission has missed a valuable opportunity to adopt a bold migration and asylum policy and provide a framework that will prevent harmful and illegal practices that have often characterised EU countries' response to migration and asylum. Instead, accelerated border procedures and detention are likely to normalise push-backs, arbitrary detention and shrinking of asylum space.

EuroMed Rights strongly believe that the European Union and its member states must propose a comprehensive EU migration and asylum policy based on the following principles:

- Adopt a humane and rights-based approach to migration and asylum by ensuring real accountability for human rights violations, including the violation of the principle of non-refoulement. This can be done through existing mechanisms such as the European Commission's infringement proceedings and by setting up effective and transparent monitoring and reporting systems and a mechanism of sanctions towards member states violating EU law.
- Address the negative human rights impacts of the externalisation of migration, asylum and border management policies and ensure that member states will not outsource their protection responsibilities and search and rescue obligations.
- Put at the heart of its strategy a real mechanism for protection, inclusion and safe access to the European territory. Such an objective could be achieved by increasing safe and legal pathways to the EU, implementing safe and fair labour migration policies, liberalising visa policies (including for work, studies, family reunion) towards an open movement area across the Mediterranean
- Ensure that the best interests of the child and the gender perspective are taken into account in all migration and asylum policies in line with the EU's Gender Equality and the upcoming EU strategy on the rights of the child.