

Access to Asylum at EU External Borders in the context of the New Pact of Migration and Asylum

Introduction

The New Pact on Migration and Asylum, adopted to reform the Common European Asylum System (CEAS), introduces significant structural and procedural changes to asylum governance (European Commission, 2024). It aims to improve responsibility-sharing among Member States and create a more predictable asylum system, but it also reinforces border containment measures that restrict access to asylum.

Access to asylum refers to the right of individuals fleeing persecution or conflict to seek international protection, in accordance with EU and international law (UNHCR, 1951). In principle, EU Member States are obliged to guarantee the right to seek asylum and to ensure fair and effective procedures for asylum applicants (EUAA, 2024). The CEAS provides the legal framework for asylum procedures, reception conditions, and responsibility-sharing among Member States. However, recent years have seen a shift towards externalisation of asylum responsibilities, with increased cooperation between the EU and third countries to curb migration flows (Amnesty International, 2023).

At EU external borders, these asylum procedures involve screening, registration, and assessment of asylum claims. However, restrictive border policies, combined with increased securitisation, have significantly limited the ability of asylum seekers to access protection (ECRE, 2021). Reports of pushbacks, arbitrary detention, and inadequate reception conditions raise concerns about compliance with fundamental rights and non-refoulement obligations (Human Rights

Watch, 2023). The aim of this brief paper is to explore how the new Pact on Migration affects access to asylum at EU external borders and how this is reflected on the human rights of people seeking refuge in the EU. Key concerns include the expanded use of detention at external borders, the fast-tracked asylum processing under the Screening Regulation and the introduction of mandatory border procedures under the Crisis and Force Majeure Regulation (PICUM, 2024).

The Expansion of Border Detention under the Pact and the obstacle to access to asylum

A key change under the Pact is the mandatory implementation of border procedures for certain categories of asylum seekers (European Commission, 2024). Under Article 45, asylum seekers falling into these categories must undergo fast-tracked asylum and return procedures at designated border facilities, which in practice often function as closed detention centers (ECRE, 2021). These categories include asylum seekers from countries with a recognition rate below 20%, meaning nationality alone becomes a deciding factor in whether someone is detained, significantly restricting their ability to access fair asylum procedures and individualised assessments (Human Rights Watch, 2023). The reliance on nationality as a key determinant raises concerns about discriminatory treatment, undermining the principle that each claim should be evaluated on its own merits.

Another category includes individuals deemed a security or public order risk, a classification that remains vague and open to interpretation, increasing the risk of arbitrary detention without sufficient justification or due process (European Parliamentary Research Service, 2023). This lack of clear criteria means that individuals with valid protection claims may be detained without proper assessment. Additionally, applicants accused of misleading authorities—including individuals who have lost their identity documents or used false documents to enter the EU—are also subjected to the fast-track procedure. This provision risks penalising those who flee persecution, forced displacement, or human trafficking, despite the fact that many asylum seekers are unable to obtain official documentation before fleeing (PICUM, 2024).

Although detention under border procedures is not explicitly automatic, the default requirement under Article 54(1) obligates asylum seekers to remain at external borders, transit zones, or designated locations (European Commission, 2024). In practical terms, this results in a de facto deprivation of liberty, making it significantly harder for asylum seekers to access legal assistance, appeal negative decisions, or receive adequate reception conditions. While EU asylum law states that detention should only be used as a last resort and be subject to individual assessment (EUAA, 2024), the systemic deficiencies in border facilities—such as overcrowding, inadequate legal aid, and lack of independent monitoring—create serious obstacles to effective asylum access (Médecins Sans Frontières, 2023).

Furthermore, while detention is theoretically limited to a maximum of 12 weeks, experience from Greece, Hungary, and Italy suggests that prolonged detention often extends beyond legal time limits due to delays in asylum processing and lack of enforcement mechanisms to ensure compliance with procedural safeguards (Amnesty International, 2023). As a result, border procedures facilitate an expansion of detention, making it harder for asylum seekers to secure their rights and challenging the fundamental principle that asylum should remain accessible even in crisis situations (Oxford Refugee Studies Centre, 2023).

The Fiction of Non-Entry

One of the most concerning aspects of the new border procedures framework is the "fiction of non-entry" principle (Article 43(2)), which allows EU Member States to treat asylum seekers as if they had not formally entered their territory, even when they are physically present (ECRE, 2021). This mechanism has severe implications for asylum seekers' rights, as it delays their legal recognition under EU law and restricts their ability to access protections granted to individuals on EU soil. By allowing governments to justify detaining asylum seekers at external borders, transit zones, or detention facilities for up to 12 weeks under the claim that they are preventing unauthorized entry, this principle creates a legal loophole that limits access to asylum.

It denies asylum seekers the full legal protections granted to individuals present within a Member State's territory, including the right to move freely, access social services, and receive adequate reception conditions (Statewatch, 2023). Furthermore, detention becomes a default measure rather than an exception, as Member States can claim that individuals in border procedures have not technically entered their country and thus do not fall under normal detention safeguards (Frontex, 2023). As a result, asylum seekers may be held in prolonged detention without the same legal remedies available to those already recognized as being on EU soil (European Parliamentary Research Service, 2023).

Therefore, the expansion of border detention and the introduction of the "fiction of non-entry" principle under the new Pact create systemic barriers to asylum in the EU. By placing asylum seekers in restrictive border procedures, limiting their legal recognition, and accelerating processing timelines, the Pact reduces asylum seekers' ability to access fair procedures and meaningful legal recourse. These measures undermine fundamental asylum rights, making it harder for individuals in need of international protection to seek safety in the EU. Rather than ensuring orderly migration management, these restrictive policies risk exacerbating human rights violations and eroding the EU's commitments under international law.

Screening Regulation

The Screening Regulation applies to migrants entering in an unauthorised manner, asylum seekers entering without authorisation and persons disembarked after a search and rescue operation. This categorisation suggests the elimination of a fine line existing in EU and international law that distinguishes persons seeking international protection from other migrants. As envisaged in the 1951 UN Convention Relating to the Status of Refugees, persons who seek protection are subject to special treatment and entry and stay requirements in the host country that override the regular entry requirements of the Schengen Border Code (Jakulevičienė, 2020). This crucial legal distinction seems to be disregarded by the Screening Regulation by equating asylum with all other unauthorised migrants, exposing them to restrictive border procedures and potentially risking refoulement.

Asylum seekers are channelled into fast-track procedures if their claims are deemed abusive, misleading or withholding information, they constitute a public or security threat or simply based on nationality and having a low recognition rate for international protection. This approach is highly concerning, as it could result in the automatic exclusion of asylum seekers of nationalities with a low recognition rate failing to evaluate the individual circumstances leading to persecution. For example, people who have travelled through "safe countries" like Tunisia, Egypt, or Turkey before reaching Europe may have their asylum claims rejected without considering the individual persecution they may face. This poses a direct violation of Article 33 of the 1951 Refugee Convention and Article 3 of the European Convention on Human Rights (ECHR), both of which prohibit the return of individuals to countries where they may face torture, persecution, or serious harm (UNHCR, 1951; ECHR, 2000).

Such processes have been widely criticised for placing applicants at serious disadvantage, given the limited to no access to legal assistance and representation at border crossings. Moreover, the strict deadlines imposed under the regulation are expected to

exacerbate the unfairness in the system. For instance, the asylum border procedure is limited to 12 weeks, during which all administrative and judicial processes—such as appealing a negative asylum decision—must be completed (PICUM, 2024). Given the well-documented backlog of asylum cases in many Member States, this timeframe is unrealistic and could lead to rushed decisions without a fair assessment of applicants' need for protection and thus increased risk of refoulement.

Crisis and Force Majeure Regulation

The Crisis Regulation is yet another concerning aspect of the new Pact, as it introduces significant restrictions on access to asylum under the guise of emergency measures. The regulation allows member states to derogate from asylum law procedures in periods of crisis. By the term crisis, it refers to cases of instrumentalisation or force majeure; the deliberate use of migration by a third country to destabilise the EU and unforeseeable events beyond member states' control like pandemics or natural disasters, respectively (Neidhardt 2024). While framed as a last-resort mechanism to ensure preparedness and resilience, it grants member states substantial discretionary power to invoke emergency measures at the expense of fundamental rights.

One of the key ways in which access to asylum is curtailed is through delayed registration. Under the crisis framework, member states can postpone registering asylum applications for up to four weeks (ECRE, 2021). Since registration is essential for securing rights such as reception conditions and legal protections against refoulement, this delay effectively leaves asylum seekers in a legal limbo, limiting their ability to access basic services and safeguards.

Furthermore, the new measures allow member states to modify the criteria for border procedures (Council of the EU, 2025). This means they can either limit the number of applications processed at the border or extend

the procedure to cover all applications, provided that special safeguards are in place for vulnerable groups. Member states may also be relieved of their responsibility to take back asylum seekers from other EU countries, an obligation that applies under normal circumstances.

Another critical concern is the vague definition of force majeure, which permits member states to derogate from asylum obligations under circumstances they deem “abnormal” and “unforeseeable.” Given the political sensitivity of migration, this broad discretion opens the door for misuse. The text refers to “mass arrivals” but does not define the threshold or conditions that would qualify an influx as such. Certain states have previously attempted to invoke force majeure to justify restrictive measures, and the regulation legitimizes this practice by allowing states to self-declare emergencies with minimal oversight (ECRE, 2021).

Additionally, the instrumentalisation clause further erodes asylum rights by permitting derogations when migration is perceived as a political tool. This provision lacks precise criteria and is vulnerable to political interpretation, potentially enabling member states to label certain asylum seekers as instruments of hostile actors rather than individuals in need of protection.

Conclusion

The New Pact on Migration and Asylum introduces significant changes to the way asylum applications are handled at the EU’s external borders. While it claims to create a more predictable and fair system, it also reinforces restrictive measures that limit access to asylum. The Pact expands the use of mandatory border procedures, accelerates deportation processes, and increases reliance on detention-like facilities.

These measures increase the risk of arbitrary detention, refoulement, and reduced legal safeguards for asylum seekers, particularly those arriving irregularly (Frontex Fundamental Rights Report, 2023). Instead of

ensuring a rights-based approach to migration management, the Pact prioritises deterrence and control over fundamental rights, undermining effective access to asylum in practice (EPC, 2024). It thus raises concerns about fundamental rights, procedural fairness, and compliance with international protection obligations.

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