

# Navigating the New Pact on Migration and Asylum in the Shadow of Non-Europe

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# Table of contents

<b>Executive summary</b>	<b>3</b>
<b>Introduction</b>	<b>4</b>
<b>The political agreement and its building blocks</b>	<b>5</b>
<b>Non-Europe in all but the name?</b>	<b>6</b>
<b>Expect more attempts to further externalise EU migration policy</b>	<b>8</b>
<b>Endnotes</b>	<b>9</b>

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# Executive summary

In December 2023, the European Parliament and Council reached a political agreement on the New Pact on Migration and Asylum, moving closer to adopting the reforms. While some called it a political win for European policymakers, paving the way for more common responses, the regulations could herald an 'age of non-Europe' in migration and asylum policy. This is because of the reforms' design, which may consolidate states' power in disregard for Community decision-making. But it is also due to the uncertainty and remaining questions regarding the new system's functioning and impact on the ground.

After years of bickering and recriminations, it is essential to rebuild mutual trust between member states. In this sense, the EU may be better off with the reforms than without them, provided they achieve this objective. However, introducing a new set of regulations will not suffice on its own, without further steps to address the

risks of implementation shortcomings, dysfunctionalities, and fragmentation. This is not the time for complacency. Attention must be devoted to the finalisation of the legislative texts and the development of implementation plans, as well as the identification of systemic and long-term needs, from financial support to monitoring.

But even this may not be enough to prevent a further move away from Brussels, driving migration management into the age of non-Europe. The uncertainty about the reforms' impact may lead member states to push even harder to outsource responsibilities to third countries, outside EU's scrutiny, under the illusion that they will stop migration flows, or remove all obstacles to deportations. Ahead of the June European elections, empty electoral promises may backfire, strengthening far-right and nationalist parties. Instead of solving systemic problems, the Pact's adoption could coincide with the dawn of non-Europe in migration and asylum.

# Introduction

Under pressure to deliver results before the June European elections and spooked by the rise of far-right parties, in December 2023, the European Parliament (EP) and the Council reached what has been called a “historic” political agreement on the New Pact on Migration and Asylum.<sup>1</sup>

The agreement codifies three principles that emerged out of a decade-long EU governance crisis in migration and asylum: first, a Dublin 4.0 system softened by mandatory solidarity, albeit *à la carte*; second, heightened responsibilities for countries at the EU’s external borders; and third, robust border and migration management, including through partnerships with third countries.<sup>2</sup>

While a few dissenting political<sup>3</sup> and civil society<sup>4</sup> voices called it the death of asylum in Europe, Berlin, Paris, and other capitals celebrated the agreement, and so did the EP. In Rome, Prime Minister Giorgia Meloni commented that, at last, “Italy does not feel alone”.<sup>5</sup> Only Hungary<sup>6</sup> and Poland<sup>7</sup> – despite the change in government – openly oppose the constitutive elements of the agreement. Meanwhile, the main EP groups celebrated it as a “common European response to the challenge of migration”<sup>8</sup> paving the way for a “more European migration and asylum system”.<sup>9</sup>

This impression is reinforced by the type of legislation that sets new obligations for dealing with growing numbers of mixed arrivals.<sup>10</sup> The EU will replace current directives with a set of regulations, which is hoped will help address implementation shortcomings.

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There is no doubt that the agreement coincides with a show of unity. Yet, despite the co-legislators coming together, the Pact is set to move the centre of gravity further into migration and asylum policy in European capitals. This was a prerequisite to broker an agreement after years of divisive debates and negotiations and ensure buy-in from member states. But it may come at the cost of Community decision-making and predictability, among others, in relation to responsibility-sharing.

Following the agreement, the focus has shifted to negotiating the technical details of the reforms and finalising the legislative texts, after which the Commission and member states will develop implementation plans.<sup>11</sup> These have the potential to identify and address practical shortcomings. On the other hand, they could lead to divergent application of the new rules. Meanwhile, derogations foreseen in loosely defined ‘crises situations’ may not effectively address their root causes, leading to further fragmentation and disorderly responses.

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Some of these risks could be tackled in the next phases of the reform process. But uncertainty about the reforms’ impact, especially on responsibility-sharing, combined with electoral pressure, will likely push many EU states to outsource their migration management responsibilities to third countries outside EU law and scrutiny – this despite the evidence suggesting that cooperation cannot bring to a halt irregular arrivals or, on its own, increase return rates.<sup>12</sup>

As the Union heads to Parliamentary elections in June, delusional electoral promises could backfire and see an unprecedented rise in support for far-right and nationalist forces capitalising on immigration fears.<sup>13</sup> Instead of solving systemic problems, the new system could coincide with the dawn of the age of non-Europe in migration and asylum policy.

# The political agreement and its building blocks

Following the December political agreement, the legislative texts of the Pact's reforms are currently being finalised under the lead of the Belgian Presidency of the Council of the EU, with several decisive technical details to be ironed out by February. But the December agreement already provides some insights on the building blocks of the new regulations, and how policymakers hope the new rules will make the new system more effective and restore mutual trust between member states.<sup>14</sup> At the same time, it points to some of the thornier issues in the negotiated agreement, and essential practical questions concerning the reforms' future implementation.

Other than the Eurodac Regulation<sup>15</sup> – which amends the rules governing the collection of data on irregular entries and asylum applicants – the political agreement concerns five regulations that will extensively change the current asylum system, while preserving some of its elements:

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The Screening Regulation includes rules that should allow for a health and vulnerability assessment as well as the fast identification of the applicable procedure – e.g. asylum or return procedure – when a person enters the EU without fulfilling the entry conditions.<sup>16</sup> This screening will be carried out in proximity to the EU's external borders or within the member states' territory. While the detection of vulnerability and rapid identification of different categories of persons has long been recognised as necessary in the presence of mixed flows, civil society organisations fear that the discretion left to national authorities to carry out security checks within the territory where they suspect a person has entered the EU irregularly could lead to ethnic profiling.<sup>17</sup>

The Asylum Procedures Regulation (APR) expands and mandates the use of border procedures, corresponding to a specific request of Northern European countries. These should allow a quick assessment of whether asylum applications are unfounded or inadmissible.<sup>18</sup> Border procedures, which could take up to 12 weeks, would happen near EU external borders or transit zones, including for nationalities with low recognition rates. Problematically, there will be no exceptions for underage children and families.<sup>19</sup> In contrast, the reform of the reception conditions rules could lead to stronger safeguards against systematic detention while border procedures take place.<sup>20</sup>

The Regulation on Asylum and Migration Management (RAMM) only slightly amends the grounds for establishing national responsibilities for examining applications for international protection under the current Dublin system, by adding a new but limited diploma criterion.<sup>21</sup> It also introduces a mandatory but flexible solidarity mechanism that is triggered in cases of disproportionate pressure on any member state. Every year, a solidarity pool will be established, allowing EU states to choose between relocation obligations or financial contributions. The latter could either support capacity-building in the EU or actions in non-EU countries with a direct impact on the migration flows towards the EU, including return. Notably, the RAMM specifies a minimum threshold for yearly relocations, fixed at 30,000.

While mandatory solidarity is welcome, cosmetic changes to responsibility-allocation criteria combined with the expanded and mandatory use of border procedures could lead to significant and possibly disproportionate pressure on some states, especially those in Europe's south.<sup>22</sup>

Finally, the Crisis and Instrumentalisation Regulation will establish a framework allowing member states to derogate from ordinary rules in 'crisis situations'.<sup>23</sup> Member states will be authorised to adjust certain rules, for instance, concerning the registration of asylum applications or the asylum border procedure, while making a request for further solidarity measures. Although critical for ensuring legal certainty, the criteria and procedure for establishing a crisis situation are not yet known. What is instead known is that the new law will contain additional derogations in a situation where migrants are considered to be instrumentalised for political purposes, a proposal that the EP initially resisted, only to cave in during the last phase of the political negotiations in December.

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While the exact details and the functioning of the new rules will only become apparent after finalising the legislative texts – and some of the particulars may

prove hard to negotiate – the December agreement undoubtedly amounts to a victory for the Council, as the EP capitulated on most of its priorities.<sup>24</sup> These included not only the rejection of instrumentalisation, but also

the exclusion of families and children from border procedures, a substantial revision of the responsibility-allocation criteria, a fixed 80-20 ratio between relocations and other solidarity measures, among others.<sup>25</sup>

## Non-Europe in all but the name?

The limited concessions obtained by the EP in the negotiations did not prevent EP President Roberta Metsola from celebrating the agreement and highlighting the importance of having a “legislative framework that is the same in all member states”.<sup>26</sup> Her position is partly explained by the change in legal instruments to be introduced: aiming to address poor levels of implementation and widely different practices across the EU, the Pact will replace current directives with new regulations. Directives lay down common goals and are transposed in different legislations in each state. Regulations instead do not need transposition and are expected to be uniformly enforced throughout the EU.

Despite this, the Pact could herald an age of non-Europe in migration policy. This is due to several possible outcomes linked to the finalisation of the legislative texts and their coming into effect, including:

- i) A further move towards member states as the locus of decision-making;
- ii) Divergent implementation;
- iii) Systemic derogations in loosely defined crises scenarios;
- iv) Failure to effectively respond to non-compliance.

While the Pact aimed to improve the effectiveness and fairness of the rules, if the risks associated with these possible outcomes go unaddressed, the reforms could lead to greater unpredictability, fragmentation, uncertainty, and dysfunctionality, further undermining instead of rebuilding mutual trust between member states.

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Looking at each of these possible outcomes in turn, starting with the first one, the Pact seems set on placing decision-making powers firmly in the hands of member states, with the notable exception of Screening and APR – which reduces discretion when it comes to border procedures. National governments, for example, will have some flexibility in choosing solidarity measures. Meanwhile, the EP may have little or no role in determining the exact functioning of annual solidarity contributions and responsibility offsets. It appears that state representatives will be the ones making decisions.

States’ buy-in may be the only way to ensure the effectiveness of the mechanism and persuade them to accept a degree of mandatory solidarity. However, it comes at a cost. Building majorities when decisions must be made and leaving national authorities the final word on solidarity contributions carries the risk of muddling up with political considerations a process that should be based on objective needs alone. At the same time, it crystallises states’ augmented powers at the cost of Community decision-making.

In practice, this could result in a high degree of unpredictability, especially in situations of systemic pressure and crises. In this context, other than ensuring that solidarity contributions reflect actual needs, it will be of the essence to avoid delays or even failures in the execution of solidarity contributions. Without adequate precautions to this end, the greatest ambition of the Pact – to address the lack of balance between responsibility and solidarity, restoring trust as well as public confidence in the EU’s ability to manage migration fairly and effectively – would otherwise become its greatest failure.

Secondly, after finalising the legislative texts, the Commission will have to prepare an implementation plan, followed by national plans by member states, with the EP expected to be on the margins of this process. This may strike as unusual. With directives, EU states can work at a slower pace to finetune their implementation. By contrast, no further discussions are generally needed, or allowed, regarding implementing EU regulations, which are automatically and uniformly applicable.

Looking at the bright side, devising national implementation plans after the Commission’s own assessment could help identify systemic weaknesses early on and operational steps to correct them while also strengthening states’ ownership. Member states’ diverse capacities should be considered, and the operational and

technical support should be properly assessed. Yet, faced with different needs and priorities, the development of national plans could bring politics back into the deliberations. It could also lead to divergent practices, a scenario which the Pact should have, in principle, avoided with stricter obligations.

To address this risk, it will be key to devise realistic plans aligning with overarching norms, including human rights, while pursuing a level playing field between states. At the same time, it will be necessary to ensure effective and continued monitoring to ensure that practical problems can be detected and resolved.

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Aside from this, the role of EU agencies will have to be streamlined in the new system. Most crucially, financial resources will be needed to ensure the correct implementation of the rules, including the EU budget. But this additional step will not be straightforward either. The Commission's Vice-President Margaritis Schinas announced the allocation of an additional €2 billion in EU funds by 2027, focusing on infrastructure and technology for implementing the new border procedures.<sup>27</sup> However, without an impact assessment, and only limited evidence from pilot projects, it is not clear what annual sums would be needed to support EU states. More broadly, the EU is struggling to replenish its budget, and migration could lose out to greater strategic needs *vis-à-vis* Russia's war of aggression against Ukraine.<sup>28</sup>

Insufficient financial resources would only amplify the risk of divergent practices, further politicising the implementation of new rules against a background of empowered and more demanding EU states, and risk a race to the bottom in reception standards especially.<sup>29</sup> This would only increase frustrations, both on the side of member states demanding additional resources to implement the new rules, and those demanding better enforcement of the rules, leading to widening gaps between law and practice.

Thirdly, systemic derogations from the ordinary rules in vaguely defined situations of force majeure, crisis, and instrumentalisation, along with a light procedure to trigger the derogations – once again, with the EP

sitting on the margins – could mean that different sets of rules would apply in different parts of the Union at any given point in time, further illustrating the potential lack of Europe in migration and asylum policy. The risk of a permanent 'state of exception' is concrete, with the possibility of extensive and almost discretionary derogations leading to disorderly border responses, inconsistent application of border procedures and solidarity mechanisms, as well as reduced safeguards against rights violations.<sup>30</sup>

Absent counter-balances and strong oversight mechanisms, other than objective criteria for establishing a crisis or instrumentalisation, this could entail further fragmentation and dysfunctional practices.

Fourthly, questions may also be asked about the European Commission's willingness to enforce the new rules in the future, in case of violations. EU rules should always be uniformly applied, with regulations potentially providing stronger legal grounds to ensure compliance. However, experience suggests that the Commission tends to avoid antagonising national governments with its infringement powers,<sup>31</sup> even where repeated and well-documented violations of the right to asylum occurred.<sup>32</sup>

Following the negotiations of one of the most divisive reform packages in EU history, the Commission will likely feel under pressure to remain lenient towards defiant countries which refuse or those which simply fail to comply with the new legislation, at least at the start. From this vantage point, the choice of introducing regulations will not necessarily lead to greater compliance.

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But considering that the Pact was presented as a "fresh start" on migration and that adequate enforcement of the rules in the future is seen as a precondition for restoring mutual trust, the European Commission will have to exercise more effectively and authoritatively its role of the 'Guardian of the Treaties' while also not alienating member states.<sup>33</sup> Lack of leadership would consolidate a hands-off approach which marked practices in recent years, and would amount to another sign of non-Europe.

# Expect more attempts to further externalise EU migration policy

There are other reasons why the Pact may sanction the age of non-Europe, linked to the external dimension of migration policy. Even if all possible implementation and political pitfalls are addressed, it will take months to define implementation plans and years before the Pact becomes fully operational. Considering this, and the possible outcome of a system that does not solve but aggravates the imbalance between responsibility and solidarity, there may be an even more formidable push to outsource responsibilities to third countries, away from the Union.<sup>34</sup> After all, Northern and Southern European countries, together with Eastern states, will still have a shared interest in outsourcing migration management responsibilities, other than increasing the returns of those who fail to qualify for asylum.

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It is anything but a coincidence that just a few days after the June 2023 Council vote – when member states reached an agreement on the negotiating mandate on the APR and RAMM – a delegation led by the Commission together with the Italian and Dutch governments headed to Tunisia to strike a deal to “combat and reduce” irregular migration flows.<sup>35</sup> And just a few weeks after the agreement on the merged Crisis and Instrumentalisation Regulation in October, Italy and Albania announced a protocol concerning the extra-territorial processing of asylum applications.<sup>36</sup>

Notably, after questions were raised on whether the Protocol with Albania could violate EU rules, the Commission dismissed them by holding that this operational arrangement “falls outside” EU law.<sup>37</sup> In fact, Commission President von der Leyen praised it as “an example of out-of-the-box thinking”, encouraging other member states to do the same.<sup>38</sup>

These deals show that political pressure is upping on governments elected on the delusional promise that they would stop irregular arrivals.<sup>39</sup> They also have a high political and symbolic meaning: they are a sign

of what is to come after the Pact. While the centre of gravity of decision-making is moving towards national capitals, member states will continue to push to outsource responsibilities to third countries, experimenting with legal innovations to remove these arrangements from EU scrutiny.

A further confirmation may come with the next European Council in March, when cooperation with Turkey is expected to take centre stage in the discussion between European heads of government, right before the Parliament and Council prepare to vote the final texts of the Pact’s regulations.<sup>40</sup>

Yet, there are reasons to believe that these outsourcing efforts will either be impractical or not deliver the results that some European governments hope for.<sup>41</sup> Other than continuing to attract criticism for their questionable legal and ethical premises,<sup>42</sup> few countries are willing to enter into such deals.<sup>43</sup> They also require the disbursement of significant financial resources.<sup>44</sup> While they tend to diminish protections, they do not remove all obstacles to deportations.<sup>45</sup> Or, if pursued under the illusion of bringing to a halt all irregular arrivals, they instead redirect migration flows elsewhere.<sup>46</sup>

In the next political cycle, member states should not use the new rules to avoid scrutiny or pursue partnerships with third countries that prioritise short-term migration containment objectives. Instead, they should lay down the conditions for mutually beneficial, balanced and comprehensive partnerships that can effectively address growing global inequalities and lack of opportunities while also fulfilling the development potential of third countries. But this will take time and investments.

In a crucial year for elections, the mantra of using partnerships with third countries to seal Europe’s borders and quickly boost return rates is at risk of backfiring, providing far-right and nationalist forces with further political ammunition to show that the EU remains dysfunctional and weak while national governments do not go far enough.<sup>47</sup> With migration as salient as ever in European voters’ minds and the prospect of these forces making further gains at the June Parliamentary elections, it may already be too late to prevent the age of non-Europe from becoming a reality.<sup>48</sup>



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**NOTES**

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