

POLICY BRIEFING

Brussels, 21 December 2023

STRUCTURAL RACISM IN THE NEW EUROPEAN UNION PACT ON MIGRATION: A DEVASTATING BLOW TO THE RIGHT TO ASYLUM

This policy briefing provides an update on the new EU Pact on Migration and Asylum following the December 2023 trilogue negotiations. For a more comprehensive overview, please refer to the detailed version available [here](#).

During the trilogue discussions that concluded on 20 December 2023, negotiators from the EU Commission, Council, and Parliament engaged in extensive discussions concerning the [five components](#) that make up the EU Pact on Migration and Asylum. Notably, the discussions were followed by an [open letter](#) from over 50 civil society organisations, urging co-legislators to reconsider the Pact in light of the mounting human rights risks.

The European Parliament's initial stance aimed to address some of these risks. However, despite attempts to reach consensus, negotiations reached a deadlock as [Member States](#) were unwilling to compromise on their respective positions. As a result, the Parliament conceded on crucial points, leading to the current outcome — a 2020 Commission proposal, further worsened due to the amendments introduced by the Council.

This development represents a significant setback for the fundamental human right to seek asylum. Here are the main concerns associated with the five key components of the Pact:

1. Screening Regulation

The first file envisions a seven-day procedure that will de facto detain new arrivals to screen them and categorise them into either regular or accelerated border procedures for the processing of their claims.

- Parliament achieved a guarantee that medical and vulnerability assessments must be carried out by qualified medical personnel.

- It was agreed that applicants will have ‘access to the information on [their] screening form — a form of words that potentially leaves individuals with inadequate access to information on their claim.
- Information available so far suggests that the ‘legal fiction’ of non-entry, i.e., whether or not a person in a screening center is considered to be on the territory of the member state, has been included in the text. The scope of the independent monitoring mechanism will not extend to border surveillance activities but only to the screening centres themselves. The Parliament lost the battle on preventing in-territory screening which has been criticised for normalising [racial profiling](#), and on access to security-related databases and the threat this could pose in the wider framework of criminalising movement.
- It was also agreed that unaccompanied minors will be appointed a representative for the screening process.

2. Asylum Procedures Regulation (APR)

The second file covers the system for assessing asylum seekers claims. After screening, people will be funneled into ‘normal’ or ‘accelerated’ border procedures — which will see claims assessed within 12 weeks with the potential for detention and deportation.

- It appears border procedures will be obligatory for all Member States and there will be no exemptions for families with minors — though families with minors will have their assessments prioritised. This is a hardening of last week’s [controversial](#) proposal to lower the age at which a child can be de facto detained to only six.
- Border procedures will be mandatory under these three grounds:
 - misleading the authorities;
 - security;
 - nationalities with 20% or less recognition rate.
- It is likely that unaccompanied minors will be included in border procedures when considered a so-called ‘security risk.’
- No legal representation is envisioned for applicants in the border procedure, only legal advice or counselling.
- The use of the ‘safe third country’ concept (which includes many demonstrably unsafe countries) is expected to proliferate across the bloc to speed up returns.
- The monitoring mechanism in the border procedure will be extremely weak, possibly to be entrusted to the EUAA.
- In terms of procedural safeguards, legal counselling instead of legal assistance in all phases of the procedure and all procedures; non automatic suspensive effect of the appeal for border procedures (excluding for unaccompanied minors), accelerated and inadmissibility (excluding for safe country ground) procedures is the position agreed upon.

3. Regulation on Asylum and Migration Management (RAMM)

The third file defines which Member State is responsible to assess asylum claims, and deals with solidarity contributions to EU-wide migration management.

- The country of first arrival will remain responsible for most claims. Contrary to what was established by the European Court of Justice, children could also be sent back to where they first registered.
- Flexible solidarity as member states will be free to choose solidarity measures, among which relocations, financial contributions (both under AMIF and BMVI) and financial contributions in third countries. Concretely, there are three forms of solidarity that hold equal value: relocation, funding frontline Member States, or funding third countries. This can finance fences, walls, and prison-like structures in Member States. For third countries, the funding could also go to border management activities.
- Mandatory relocation for individuals disembarked after Search and Rescue (SAR) operations in frontline Member States is now unlikely — contradicting plans for ‘fair and equal distributions’ of applicants. Member States are not bound by the Commission’s recommendations on relocations or funding, nor will these be made available to the public to scrutinise.
- For those under RAMM procedures there is no legal representation provided for, only legal counselling as in APR. Furthermore, siblings will not count as family members, which severely limits the possibilities for family reunion. The Council is opposed to reuniting children with family members that are legally residing in the European Union. Meanwhile the Council’s clause for ‘relocations for returns’ as a form of solidarity has been deleted.

4. EURODAC Regulation

The fourth file covers the expansion of the EURODAC to collect more data to detect unauthorised movements. Reform of the Eurodac database is the file closest to conclusion.

- Children from the age of 6 years old will have to comply with biometric data collection. Database access for law enforcement authorities has been expanded, and photographic facial data for people entering Member States will be collected. These provisions violate data protection rights.
- The Council secured a wide range of ‘security flags’ into the EURODAC database during screening, aimed at increasing the overlap between criminal and migration databases.

5. Crisis Regulation

The fifth file covers moments of ‘crisis’, such as an unexpected ‘mass arrival of people.’

- Under APR, individuals from a country with a recognition rate below 20% can be directly admitted to border procedures. In ‘crisis’ situations, this will be expanded to include those with a recognition rate of below between 60% and 70% (threshold not yet agreed). ‘Crises’ are loosely defined, posing risk of states manufacturing crises in order to push more applicants into accelerated border procedures.
- Despite widespread condemnation from a centre-left coalition of political groups (Renew, S&D, the Greens and the Left) on the Instrumentalisation Regulation, concessions have been made to include the concept of ‘instrumentalisation’ in the Crisis Regulation, circumventing Parliament’s rejection. Parliament is fighting for safeguards that explicitly state NGOs cannot be categorised as ‘hostile non-state actors’ involved in instrumentalisation.

Further Negotiations

The deal reached on 20 December 2023 is not the end. It remains a political understanding and has yet to be formally adopted. Further technical negotiations are likely to be necessary in early 2024. Notably, the concessions made by the Parliament go way beyond its original mandate on the proposals.

In its current form, the agreement remains alarming given that a few weeks ago, the European Commission announced steps to tackle hatred in all its forms as part of its [No Place for Hate: A Europe United Against Hatred](#) plan. Additionally, on 5 December 2023, the Parliament and Commission jointly [commemorated](#) the abolition of slave trade, with a strong emphasis on the need to tackle structural racism. As a matter of fact, whenever the subject of structural racism is broached, EU policymakers are quick to refer to the EU Anti-Racism Action Plan as evidence of Europe seriously tackling structural racism.

However, the new Migration Pact is a step in the opposite direction, signaling that those who do not fit imagined stereotypes of Europeanness are unwelcome — not due to Europe's inability to provide protection but solely because of their non-whiteness.

Betraying the Spirit of the EU Anti-Racism Action Plan (and Related Policies and Initiatives)

The [EU Anti-Racism Action Plan](#) (EU ARAP) acknowledges structural and institutional racism and calls for the mainstreaming of racial equality in all EU policies. ARAP also recognises the intersectional impact of racism and the specific vulnerability of migrants and refugees by drawing attention to the risk of rising xenophobia and racism towards this group.[1] Although the new [Equality Task Force](#) has been set up to ensure mainstreaming of equality across all policy areas, the modalities and impact of its work have been questionable, considering the adoption of policies like this Migration Pact which do not ensure equal treatment for migrants. Moreover, since the EU Anti-Racism Action Plan is not a legally binding tool for Member States, more needs to be done to oblige racial equality mainstreaming by Member States (such as setting up a council configuration on equality and adopting a council recommendation on EU ARAP).

In its current form, the Migration Pact racialises migration to Europe and betrays the spirit of the EU Action Plan Against Racism. EU Member States may tell themselves otherwise, but this Pact is designed to keep a particular group of refugees and migrants out of Europe, often those coming from Africa, Asia, the Middle East, Latin and South America, as well as other racialised communities.

In addition to racialising migration to Europe, as underscored in our [initial assessment](#) of the Pact, the new agreement poses further threats and risks to racialised people on the move.

In our previous assessment, four key issues were highlighted:

- The new Pact contrasts the dignified and unified response from EU member states to the displacement of Ukrainian refugees with the activation of the Temporary Protection Directive. The [double standard](#) in this new agreement is glaringly apparent and actively continues the discriminatory approach to granting protection which underscored the differential actions taken by EU member states towards Ukrainian and non-Ukrainian refugees seeking safety from the violence in Ukraine.
- The increased use of border procedures likely means [more pushbacks and detentions](#), disproportionately affecting racialised communities. Borders, shaped by political discourse and anti-immigrant rhetoric, lead to [discriminatory policies](#) impacting migrants from racialised backgrounds. Despite claims of neutrality, these new border procedures will disproportionately affect Muslims, Arabs, Africans, Roma people, and people from Latin/South America, who often struggle to access regular pathways into Europe.

[1] A Union of Equality: EU anti-racism action plan 2020–2025: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025_en, pp2

- Instead of a commitment to a solidarity mechanism based on human rights respect and dignity, this pact encourages member states to trade their responsibility to [relocate migrants in exchange for €20,000](#). The choice of 'mandatory solidarity' hailed as a milestone in this pact, in essence means that solidarity is up for sale. To put it simply, the worth assigned to the life and dignity of a migrant from a racialised background is reduced to a mere €20,000.
- The Pact legitimises the [externalisation and extraterritorialisation of migration](#) to other geographic regions in efforts to prevent refugees and migrants from reaching European shores and encourages the use and abuse of the 'safe third country' concept. Besides, it allows for affluent European countries to exploit the asymmetrical nature of their relationship with countries of origin and transit by exerting pressure on them to prevent asylum seekers and migrants from reaching Europe's borders, and to accept the return of asylum seekers and migrants to their territories.

In addition, the latest agreement on the EU Migration Pact poses further risks to racialised people on the move:

[Article 5 of the Screening Regulation](#) extends the application of screening procedures, making it applicable not only to people apprehended at the borders, but to the territories of Member States. This would have a broad and indiscriminate impact on racialised communities. It would create a hostile environment in which minorities and people of colour - whether they are EU citizens or individuals with regular or irregular residence status - would face heightened risk of being targeted by discriminatory controls and potentially detained without adequate safeguards. As a matter of fact, the findings of the recent FRA report [Being Black in Europe](#) highlight the discriminatory nature of stop and searches with 58% of respondents attributing the latest encounter to racial profiling. Art. 5 of the Screening regulation would exacerbate [racial profiling](#) and endangers the lives of racialised communities.

Also, the [EURODAC regulation](#), which was designed to collect and store migrants' data, is being transformed into an expansive, violent surveillance tool that will treat people seeking protection as crime suspects. This will include children as young as 6 whose fingerprints and facial images will be integrated into the database. This expansion will reinforce [discriminatory and hostile asylum and migration policies](#): increasing deportations, detention, and the broader climate of racialised criminalisation. Collecting data on children, and on other groups including facial images - a technology notoriously error prone, downright racist, and unreliable that threatens the essence of dignity, non-discrimination and privacy rights. Again, EU ARAP recognises the risks of bias in new technologies especially with biometric and facial recognition. In addition, this revamp also facilitates its connection to other existing EU migration and police databases as part of the 'interoperability' initiative designed to increase police identity checks of non-EU nationals, unjustly equating them to criminals and leading to increased racial profiling.

Upcoming EP 2024 Elections

These elections represent a crucial juncture for establishing priorities in the forthcoming policy cycle.

ENAR intends to conduct a campaign rooted in its manifesto and key messages, encouraging its members to actively promote and implement them. Various opportunities will arise to involve policymakers, presenting a significant chance to refocus the existing approach to migration and to ensure it will be challenged during the next mandate. This approach not only embodies racism in Europe and its diverse manifestations but also is a symptom of far-right ideologies gaining traction across the continent.

A Rallying Call for the ENAR Network

Acknowledging the dire situation at hand, there is a need to mobilise the ENAR network to challenge strategically the current migration policies. As a crucial step forward and to lead this work, the members of the Working Group on Migration, Security, and Policing have committed to crafting a new position paper for the ENAR network. This paper is intended to shed light on the complexities of racialised border procedure and its potential impact on vulnerable communities. It will also outline our shared vision and strategic recommendations on how best to approach the subject of racialised migration in the current socio-political landscape.

In addition to this strategic paper on migration, other steps worth exploring include:

Litigation: Challenging the most problematic concept, such as the ‘legal fiction’ of non-entry, as well as proportionality of detention and de facto detention. Sustained litigation against cases of pushbacks remains of vital importance. ENAR is currently supporting a [legal action](#) against the pushback of a racialised French woman. See the Border Violence Monitoring Network [database](#) for other relevant cases.

Implementation: Mapping specific areas where Member States could implement EU law in a more protective way, or go above the minimum standards, and advocating for them to do so at the national level.

Monitoring and Documentation: Especially areas where it is very likely there will be violations due to foreseen impracticalities in locations where the Pact has been piloted, for instance the duration and conditions of the screening and border procedures. Monitoring can help bring evidence for litigation when even these bare minimum safeguards are being breached.