

## EU Pact on Migration and Asylum

### - Practical considerations for fair and fast border procedures and solidarity in the European Union -

#### Background

The asylum system in the Europe Union (EU) has increasingly faced challenges over the past years and, as a result, has become increasingly unsatisfactory, for States and persons seeking international protection. This is mainly for the following reasons:

- (1) Access to territory for purposes of seeking asylum is no longer adequately safeguarded in practice and sometimes in law, in particular at the EU external borders, and remains ad hoc in the context of search-and-rescue operations in the Mediterranean and disembarkation.
- (2) Lengthy asylum procedures because of overburdened systems, systemic deficiencies, capacity constraints, at times inadequate national legal frameworks or practical impediments to the effective use of prioritization approaches, accelerated and simplified procedures. Such inefficiencies create incentives for persons without international protection needs to use the asylum system.
- (3) Multiple irregular onward movements within the EU where effective international protection is generally available in all EU Member States (MS), with only a small proportion being triggered by family reunion or other legitimate reasons, result in inefficiencies, administrative duplication, delays and significant costs, as well as additional demands on reception capacities and asylum systems in different countries.
- (4) Reliance on intra-EU solidarity by frontline States as a single solution, unmatched by the discretionary approach by other EU MS result in a deadlock and bargaining over access to territory (see 1).
- (5) Prospects for durable solutions, notably for voluntary repatriation as well as local integration, for those found to be in need of international protection in Europe remain limited.
- (6) Alternative protection mechanisms and procedures offering a tailored response to persons with specific needs without an international protection claim are not adequately accessible and linked in with the asylum system, contributing to inefficiencies of the asylum system.
- (7) Impediments to the return and inefficient return procedures for persons not in need of international protection result in clogged up systems.
- (8) Legal pathways to the EU remain limited, leaving the asylum pathway as the main option for people on the move without international protection needs, for whom other viable pathways befitting their profile, in particular adequate labour migration schemes, would be needed.

As a result, approaches to access to territory and asylum have increasingly been defined by deterrence policies, including push-backs and an expanded use of detention, a surge in unilateralism by States, a gradual shrinking of the protection space for persons in need of international protection and an erosion of the institution of asylum. At times, this is accompanied by a growing anti-refugee/migrant rhetoric.

#### Fair and fast border procedures

Current discussions around the introduction of border procedures in frontline MS at the EU external borders, including a mandatory pre-screening of persons arriving irregularly, build on a fiction of non-entry to facilitate eventual returns. However, international legal obligations of States remain applicable despite this artificial construct. When a State is presented with an asylum request at its borders, it is required under international law to provide admission at least on a temporary basis to examine the claim, as the right to seek asylum and the non-refoulement principle would otherwise be rendered meaningless.

In UNHCR's view, efficient border procedures that maintain fairness safeguards and adhere to international and EU law, including the principle of non-refoulement, are possible. To this effect, UNHCR proposes a three-step border procedure resulting in relocation or return, with a focus on in-merits procedures in lieu of admissibility procedures. This model for border procedures is proposed based on the understanding that the asylum system in its entirety, i.e. at entry and exit points, needs to be practical, fair and efficient, and delivering swift and clear results. This paper therefore takes a "whole of system" approach that considers efficiency and fairness of the asylum procedure as well as the return of individuals not in need of international protection.

The proposed border procedure requires coherence in the implementation as well as a predictable intra-EU relocation system. The absence of coherent implementation and compliance with a solidarity mechanism can have significant implications for the efficiency of the system. Therefore, an independent monitoring framework coupled with immediate sanctions for non-compliance will be essential components for the success of the system.

### Applicable principles framing the border procedure proposal

The following are the main applicable principles framing the proposal:

**Guaranteeing reliable access to territory:** While States have the legitimate right to control their borders, this must be done in a protection-sensitive manner to ensure that persons wishing to seek asylum are given access to asylum procedures and are protected against refoulement. Effective independent border monitoring at the EU external borders is critical to ensure such access and prevent push-backs. Where push-backs are reported, these should be timely investigated.

**Maintaining fairness, efficiency and in-merit border procedures:** Procedural safeguards need to apply equally to all asylum-seekers, irrespective of the type of procedure they undergo and its location. UNHCR also continues to emphasize the importance of in-merit procedures in lieu of admissibility considerations related to safe third country concepts, as the latter tend to create procedural inefficiencies and shift the burden to non-EU countries, with potentially lesser asylum system capacity, resulting in an overall eroding effect on the international asylum system. Caseload analysis and triaging for the effective use of accelerated and simplified procedures is, in UNHCR's view, the more efficient and suitable approach.

**Considering specific needs:** Reception conditions should be safe and adequate for all arrivals. A vulnerability screening and assessment integrated in the border procedure can therefore ensure that specific needs are identified early on to allow for need-specific reception and particular procedural considerations, as accelerated border procedures for manifestly unfounded cases would not be suitable for particular specific needs profiles.

**Ensuring detention-related safeguards:** Border procedures may imply the use of movement restrictions and detention. In UNHCR's view, detention of asylum-seekers should not be used by default or mandatorily for all arrivals, but rather remain the exception. Minimal periods in detention are permissible at the outset to carry out initial identity and security checks in cases where identity is undetermined or disputed, or there are indications of security risks. It is also permissible for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection to facilitate effective triaging as a basis for channelling cases into the different processing streams. For cases triaged as manifestly unfounded, detention beyond this period may be legitimate for up to four weeks from the lodging of the asylum claim with the applicable safeguards as established by the EU Court of Justice and the European Court of Human Rights. Where detention is applied for a legitimate purpose, it needs to be provided for by law, based on an individual decision, be strictly necessary and proportional, timebound and regularly reviewed. Detention should never apply to minors. Alternatives to detention, e.g. temporary movement restrictions, are generally preferable and possible in border procedures as per current practice in several EU+ MS.

**Strengthening coordination and solidarity:** Border procedures without a responsibility-sharing mechanism create undue pressures on frontline MS and are unlikely to yield desired outcomes. Therefore, a mandatory mechanism based on clear criteria is proposed. Furthermore, return-related coordination needs to be systematized and enhanced among EU MS in order to overcome identified impediments to the return of persons found not to be in need of international protection to their countries of origin.

### Practical outline of the border procedure proposal

UNHCR proposes a border procedure comprised of an arrival procedure (step 1), followed by the asylum initiation procedure (step 2) with a link to relocation or return (step 3), which is illustrated in a [flow chart](#) in the annex:

#### Step 1: Arrival procedure:

- Upon arrival, identification of asylum-seekers (including Eurodac registration), followed by identity, health and security screenings among irregular arrivals shall take place at designated border crossing points at the EU external borders.
- It is important to bear in mind that asylum-seekers must not be penalized for their irregular arrival nor are they required to submit travel or identity documents as a precondition for their admission to the territory and asylum procedure.
- The seizure and search of personal electronic devices to verify identity, travel routes and the substance of an asylum application need to be provided for by law, follow a legitimate purpose and be necessary and proportionate to achieve that specific purpose, while ensuring that appropriate procedural safeguards are in place and respected in practice. However, this should not become routine part of the arrival procedure.
- An initial vulnerability screening shall be carried out to identify specific needs for the purpose of ensuring need-adequate reception conditions. At this stage, family links in particular EU MS should also be identified for eventual family reunion.
- The capacity to identify specific needs among persons not seeking international protection at an early stage of the procedure and to counsel and direct them to alternative protection mechanisms and procedures allowing tailored responses to their needs can contribute to more effective and efficient asylum procedures. It can further identify potential impediments to their removal, where compelling reasons within the scope of applicable international and regional human rights law exist.
- At the end of this procedure, asylum-seekers shall be admitted to the territory and referred to the reception facility and asylum authorities.

#### Step 2: Asylum initiation procedure:

- Based on the initial vulnerability screening, a more holistic assessment shall be carried out by competent personnel (medical/psycho-social) with a view to identify more complex specific needs that bear relevance for the asylum procedure, such as in the case of unaccompanied children, victims of trauma or trafficking and person with mental disabilities, for whom the use of accelerated procedures in manifestly unfounded cases at the border would not be suitable. They should therefore be exempted from these procedures. For minors, age assessments should only be conducted exceptionally when serious doubts over the self-reported minority exist.
- Following the vulnerability assessment, the asylum claims and their key elements shall be registered and triaged in manifestly unfounded, manifestly well-founded and complex cases based on a regular monitoring and analysis of caseloads, considering country of origin, risk profiles and degree of homogeneity in overall protection rates. A claim is manifestly unfounded when it is clearly not related to the criteria for refugee status and subsidiary forms of protection or which are clearly fraudulent or abusive.

- In the border procedure, three types of decisions shall be taken by the competent authority:
  - a) Transfer for the purpose of family reunion regardless of the nature of the claim.
  - b) Relocation decisions for manifestly well-founded and complex cases (including the above-mentioned profiles with specific needs with relevance for procedures). Effective links with an EU MS, as well as best interests in the case of unaccompanied children, should be main considerations to guide the relocation decision and allocation, in addition to the prevailing absorption capacity in EU MS and their contributions to the intra-EU solidarity mechanism (e.g. by hosting border procedures). Such relocation decisions should be subject to review within the applicable jurisdiction – limiting access to judicial review to the relocation country is not in accordance with international law and may result in repeated back-and-forth transfers of cases;
  - c) Decisions on manifestly unfounded cases, with the exception of those with family links in an EU MS, in conjunction with a motivated return decision, also considering potential compelling reasons inhibiting the removal. As these cases will be channelled into the return procedure, respective applicants need to have access to an effective remedy to challenge the joint decision.

### Step 3: Relocation or return procedure:

#### *Step 3a: Relocation*

- Manifestly-well founded and complex cases exceeding the allocation quota for the frontline MS shall be referred into a mandatory relocation scheme and ensuing accelerated/simplified or regular asylum procedure respectively in the EU MS of relocation.
- To ensure swift access to protection and required services, manifestly well-founded cases and complex cases involving unaccompanied minors, traumatized and trafficked individuals, as well as persons with mental disabilities should be prioritized for relocation, whenever waiting times emerge, and for adjudication in the relocation country.

#### *Step 3b: Return*

- Manifestly unfounded cases, except those with family links in the EU, shall be adjudicated in the border procedure in an accelerated manner and if confirmed as unfounded, the respective decision is joined with the return decision and the concerned individuals are channelled into the return procedure with the relevant procedural safeguards, i.e. the right to an effective remedy and legal assistance. This requires to adequately capacitate the appeals body to avoid a bottleneck.
- Asylum applications in another EU MS by persons who received a final negative in-merits decision in the border procedure or in the EU MS of relocation and who irregularly moved onwards, shall be handled as subsequent applications in the applicable two-step approach (1. preliminary examination for new elements or findings related to the qualification; 2. further examination only if new elements or findings significantly add to the likelihood of qualifying for international protection), while an appeal shall not have automatic suspensive effect. Such onward movers shall be entitled to material reception conditions only for the duration of this procedure, followed by support for their return to the responsible MS in case of a final negative decision on the subsequent application.
- Voluntary return options should be provided to this group of individuals to facilitate effective return procedures. IOM and FRONTEX, amongst others, can play an important role in this regard.
- Impediments to (voluntary and forced) return should be monitored and analysed on an ongoing basis to feed into any return coordination group among EU MS that may be established, in which relevant stakeholders such as FRONTEX or IOM may partake as well. This can inform concerted cooperation between the EU and countries of origin on systemic impediments, as well as potential relocations of manifestly unfounded cases to other EU MS with a better predisposition toward the country of origin to address a prevailing impediment to return.

### Elements facilitating the implementation of the proposed border procedure

1. Throughout the border procedure, it is essential that new arrivals are provided with a genuine opportunity to express their interest to seek asylum. To this effect, authorities involved at all steps have a duty to inquire about a possible intent to seek asylum. Furthermore, arrivals need to have access to accurate information about the right to seek asylum and what this entails.
2. The border procedure as proposed will involve different actors, including the border, asylum and reception authorities, and in case of relocation, also other EU MS' respective authorities. The implementation of the border procedure would therefore be greatly facilitated by digitization and an interoperable data system that allows the use by all involved authorities within one country and to safely share the necessary data with a relocation country while considering applicable data protection requirements.
3. UNHCR and other stakeholders, such as NGOs and lawyers, should have unhindered access to the border reception and processing facilities to ensure the provision of independent legal aid and other services, and – for mandate holders – to conduct monitoring visits.
4. In view of the multitude of involved authorities and other entities in the proposed border procedure, an “under one roof” approach may be best suited to allow for maximum information exchange and collaboration between different entities. In particular, the inclusion of NGOs/civil society in the design and running of such reception facilities from the onset is generally beneficial to States.

### UNHCR's role & partnerships

UNHCR can offer to support the implementation of such border procedures in the following ways:

- Support the EC and EU MS in developing or coordinating the set-up of the steps of the proposed border procedures in line with international and EU standards and provide necessary technical expertise for ensuring an appropriate process flow, such as for caseload analysis and ensuing triaging for purposes of accelerated procedures.
- Support the development of specific tools, drawing on available good practice examples, for vulnerability screenings and assessments as part of the border procedure; and provide related capacity-building for the authorities engaged in steps 1 and 2.
- Provide technical advice on available and suitable alternatives to detention in the border context.
- Monitor the reception and, where in use, detention situation of asylum-seekers and provide general information on international protection/access to procedures to arrivals as well as individual counselling.
- Provide on-the-job coaching, training and capacity-building for authorities on caseload triaging and quality assurance support in the implementation of the asylum initiation procedures.
- Support best interests' procedures for unaccompanied children for the purposes of relocation.
- Through its monitoring role, identify lessons learned with authorities and other stakeholders for follow-up in order to improve the system and reinforce quality assurance, including through resource mobilization.
- Support the development of monitoring benchmarks and indicators for the quality assurance of the border procedure.
- Support the analysis of return impediments.

Other stakeholders, in particular EASO, FRONTEX and IOM can play an essential role in the implementation of the proposed border procedures as well. In particular, FRONTEX could train the responsible border authorities with a view to ensure access to the territory and asylum procedures of persons wishing to seek asylum, as well as their registration. EASO, in collaboration with UNHCR, could assist with a harmonized approach to the vulnerability screening and assessment, caseload monitoring and analysis for triaging, as well as offer support to frontline EU MS in the implementation of the asylum initiation and relocation procedures. FRONTEX and IOM are important partners to facilitate the implementation of returns.

### Relevant references

UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union, 25 July 2018, available at: <https://www.refworld.org/docid/5b589eef4.html>

UNHCR's Recommendations for the Croatian and German Presidencies of the Council of the European Union (EU), 9 January 2020, available at: <https://www.refworld.org/docid/5dee08387.html>

UNHCR Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers, September 2019, available at: <https://www.refworld.org/docid/5d8a255d4.html>

UNHCR Preliminary Legal Observations on the Seizure and Search of Electronic Devices of Asylum-Seekers, 4 August 2017, available at: <https://www.refworld.org/docid/59a5231b4.html>

UNHCR Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas or "International" Zones at Airports, 17 January 2019, available at: <https://www.refworld.org/docid/5c4730a44.html>

**Annex: Border procedures – Flow chart**

