

Border Procedures under the EU Pact on Migration and Asylum: Fundamental Rights Compliant?

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In this comment, the Migration and Asylum subcommittee of the Young Meijers Committee respond to the adoption of the EU Pact on Migration and Asylum, which is due to take effect on 12 June 2026. The Pact introduces a set of new rules aimed at managing migration and establishing a common asylum system at EU level. This comment discusses two key facets of the Pact — the Screening Regulation and the Asylum Procedures Regulation — assessing how the provisions of these regulations will affect the fundamental rights of asylum seekers.

The Pact is analysed through the lens of three core rights: the prohibition of refoulement, the right to asylum, and the right to an effective remedy, as laid down in Article 33 of the 1951 Refugee Convention and Articles 18 and 47 of the Charter of Fundamental Rights of the European Union.

The CJEU and the ECHR have underlined the importance of these rights and stated essential procedural and substantive safeguards for their protection. This comment analyses the extent to which the new regulations are compliant with these protections and the corresponding implications for asylum seekers seeking international protection at the external borders.

This research first sets out the legal framework of the Pact's Screening and Asylum Procedures regulations. Subsequently, it addresses the barriers asylum seekers will encounter when requesting international protection at the external border under the new rules. These elements are brought together with an overview of the barriers faced by asylum seekers since the adoption of the Pact, noting that the Pact will exaggerate the hurdles that asylum seekers will face at the external border to apply for asylum. The overview outlines possible avenues for legal remedies to ensure effective access to protection and the realisation of the rights of migrants.

In light of this examination, several recommendations are posed. Crucially, this comment calls for the Pact to be recentred around the individual and their specific protection needs, rather than migration control. This means asylum claims must be examined on an individual basis and on their own merits, instead of using generalised indicators such as recognition rates linked to nationality. Further, it is recommended that vulnerable groups should be excluded from border and accelerated procedures, and the suspensive effect of appeals should be restored, to ensure that the Pact is fundamental rights compliant.

Border Procedures under the EU Pact on Migration and Asylum: Fundamental Rights Compliant?

The Young Meijers Committee has taken note of the adoption of the EU Pact on Migration and Asylum (“the Pact”), which introduces a set of new rules aimed at managing migration and establishing a common asylum system at EU level.¹ The Pact is organised into ten building blocks and is accompanied by legislative texts intended to speed up and simplify asylum procedures and to enhance border controls. Particular emphasis is placed on the management of migration at the EU’s external borders, as reflected in the negotiation phase of the Pact.²

A particular novelty of the recent legislation is the so-called pre-entry phase, consisting of screening procedures, an expanded use of asylum border procedures and, where applicable, return border procedures for rejected asylum seekers. The pre-entry phase intends to create a more seamless link between these stages and prevent secondary movements. This comment will focus on the Screening Regulation (“SR”) and the Asylum Procedures Regulation (“APR”) which introduce a pre-entry screening phase and a more extensive and sometimes mandatory border/accelerated procedure.³ Essential aspects of the pre-entry phase focus on the amended border procedure, which is now compulsory for certain categories of migrants. Additionally, it appears to adopt a legal doctrinal approach concerning the new definition of asylum seekers, highlighting their status as individuals lacking authorisation to enter the Member State. This legal construction of non-authorisation has been referred to as “fiction of non-entry”: migrants may be seen physically present on the territory of a Member State without their lawful presence being recognised.⁴

This comment analyses the Pact through the lens of three core rights: the prohibition of refoulement, the right to asylum and the right to an effective remedy, as laid down in Article 33 of the 1951 Refugee Convention and Articles 18 and 47 of the Charter of Fundamental Rights of the European Union (“EU Charter”). The Court of Justice of the European Union (“CJEU”) and the European Court of Human Rights (“ECtHR”) have underlined the importance of these rights and stated essential procedural and substantive safeguards for their protection. Building on this, the Comment analyses the extent to which the new screening and border procedures may perpetuate existing barriers or create new obstacles for asylum seekers seeking international protection at the external borders. NGOs, human rights advocates,

¹ European Commission, “Managing migration responsibly,” https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/story-von-der-leyen-commission/managing-migration-responsibly_en

² COM(2020) 612 final.

³ These instruments operate in conjunction with other EU legislation, including the Schengen Borders Code and the Return Directive, resulting in a complex legal framework.

⁴ Kelly Soderstrom, ‘Flexible Borders: The Fiction of Non-Entry and Asylum Seekers in Germany’ (CONREP Blog, 17 July 2019); European Parliamentary Research Service (EPRS), Legal fiction of non-entry in EU asylum policy (Briefing, February 2024)

lawyers and academics have already expressed concerns about the Pact's increased focus on securitisation,⁵ and about the potential implications on migrants' fundamental rights when seeking international protection.⁶

The comment is structured as follows: the first section sets out the legal framework of the Pact's Screening and Asylum Procedures regulations. Subsequently, the comment addresses the barriers asylum seekers may encounter when requesting international protection at the external border under the new rules. These elements are brought together to provide an overview of the barriers faced by asylum seekers since the adoption of the Pact. The overview outlines possible avenues for legal remedies to ensure effective access to protection and the realisation of the rights of migrants.

1.1. The Screening Procedure

The Pact introduces screening of third-country nationals at the external borders. The objective is to streamline the asylum and return procedures and ensure that migrants are referred as quickly as possible to the appropriate procedure by the competent authorities. The screening is intended to ensure that third-country nationals can only enter if they are explicitly authorised to do so.⁷

According to the SR the screening shall apply to *all* third-country nationals who:

- a) have crossed an external border without authorization, or who do not fulfill the entry conditions as laid down in Article 6 of the Schengen Borders Code ("SBC"). The absence of a travel document with an entry stamp might be an indicator that the holder does not fulfill the entry conditions;⁸
- b) applied for international protection during border checks;
- c) have disembarked after a search and rescue operation;⁹ or
- d) are already staying irregularly within the EU territory and cannot prove that they have been subject to control at external borders before.¹⁰ This also means that the third-country national should not already have been subjected to the screening in a Member State.¹¹

⁵ Article 1 SR, for one, states the following: "the objective shall be [...] to strengthen the control of third-country nationals crossing the external borders"

⁶ See, for instance, the report by FRA: <https://fra.europa.eu/en/news/2024/investigations-rights-violations-eu-borders-remain-ineffective>; Chetail, V., & Ferolla Vallandro do Valle, M. 23 May 2024. "The Asylum Procedure Regulation and the Erosion of Refugee's Rights." Via: <https://eumigrationlawblog.eu/the-asylum-procedure-regulation-and-the-erosion-of-refugees-rights/>; ECRE 2020 "Relying on a fiction: new amendments to the asylum procedures regulation". Via: <https://ecre.org/wp-content/uploads/2020/12/Policy-Note-29.pdf>.

⁷ COM(2020) 612 final; see also e.g. Carrera, S. September 2020. "Whose Pact?" CEPS Policy Insights, No. 2020-22.

⁸ Recital 18 SR.

⁹ Article 5 SR

¹⁰ Article 1 SR

¹¹ See also: Recital 18 and Article 7 SR

Once it becomes clear during the screening that the third-country national fulfils the entry conditions set out in Article 6 SBC, the screening will come to an end.¹²

Article 18(1) SR, read together with Article 6(5)(c) SBC, provides for the possibility to allow a person who does not comply with the conditions for entry to nonetheless enter the territory on humanitarian grounds, grounds of national interest, or because of international obligations. Article 3 SR further states that Member States must act in full compliance with relevant EU law, including the EU Charter, and relevant international obligations, such as the prohibition of refoulement under the 1951 Refugee Convention.

The screening procedure involves six elements: preliminary health and vulnerability checks “with a view to identifying any needs for immediate care or isolation on public health grounds”; identification or verification of identity based on information in European databases; registration of biometric data in the databases; security checks; a screening form; and referral to the asylum or return procedure.

The screening takes place in an appropriate location at or near the external border,¹³ with the possibility to conduct the screening in other locations within the territory of the Member State. The screening must be conducted promptly and may not exceed seven days from the moment of apprehension,¹⁴ or three days where the person was already present on the territory before becoming subject to the screening. During this period, the third-country national is not authorised to enter the territory,¹⁵ which is referred to as the ‘legal fiction of non-entry’.¹⁶ The Regulation does not provide guidance on how this regime of non-entry is to be upheld. Member States must identify appropriate locations for the screening process, and individuals have the obligation to remain available to the competent authorities throughout the procedure. The emphasis is on the prevention of any risk of absconding or potential threats to internal security or public health resulting from such absconding.

The SR provides that organisations and persons offering advice and counselling shall have effective access to third-country nationals during the screening procedure. Article 8(6) SR allows Member States to impose limitations on such access under national law to ensure national security or public order, or where necessary for the administrative management of a border crossing point or a screening facility,

¹² Article 5(3) SR

¹³ Article 8(1) SR

¹⁴ Article 8(3) SR and Recital 22

¹⁵ Article 6 SR

¹⁶ European Parliamentary Research Service (EPRS), *Legal fiction of non-entry in EU asylum policy* (Briefing, February 2024); Kelly Soderstrom, ‘An Analysis of the Fiction of Non-Entry as Appears in the Screening Regulation’ (European Council on Refugees and Exiles, September 2022; Molinari, Caterina. (2022). “The Borders of the Law: Legal Fictions, Elusive Borders, Migrants’ Rights.

provided that access is not severely restricted or rendered impossible. NGOs may also be involved in vulnerability screenings,¹⁷ the provision of information,¹⁸ and fundamental rights monitoring.¹⁹

After the screening, the individual is given a form with the outcome of the screening and is then transferred to the appropriate procedure.²⁰ This can be either: i) the regular asylum procedure; ii) the asylum border procedure or an accelerated procedure; or iii) the return procedure.

1.2. The Border Procedure

The Asylum Procedure Directive (2013/32/EU) precedes the new APR. The Directive already contained the possibility of subjecting migrants to a border procedure (Article 43). With the new Regulation, however, the border procedure and its conditions are more extensively regulated in Articles 43-54. The APR also introduces the application of an accelerated procedure in Article 42 APR.

An especially contentious topic during the negotiation phase was the question of a *mandatory* border procedure.²¹ Member States in favour of the obligation to apply the border procedure viewed it as an important tool for migration management, especially for third-country nationals coming from countries with a low recognition rate. Others, especially Member States who are located at the external border directly (such as Greece and Italy), pointed to a multitude of challenges such as difficulties in fast allocation of applications to examination in the border procedure, the need to keep applicants at the border during the procedure, problems in connection with appeal procedures, as well as concerns relating to resources for infrastructure, staff and equipment for examining asylum cases at the border. The outcome of the new APR is a compromise. The APR makes a distinction between the *option* to apply the border procedure on the one hand, and the *obligation* in certain cases to apply the border procedure on the other hand.²²

Following the screening procedure, provided the applicant is not allowed to enter the EU territory and does not meet the entry requirements under the SBC, a Member State *may* examine an application in a border procedure. According to Article 43, the border procedure can take place following:

- a) an application made at an external border crossing point or in a transit zone;

¹⁷ Article 12(3) SR

¹⁸ Article 11(4) SR

¹⁹ (Article 10 SR

²⁰ Article 13 SR

²¹ Apatzidou, V. 19 July 2024. "The Complex Landscape of Asylum Border Procedures in the new Asylum Procedures Regulation," *European Law Blog*. <https://doi.org/10.21428/9885764c.9f89d03b>.

²² See: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:611:FIN>

In this context, the APR requires Member States to ensure that a certain number of people are in the border procedure. The Commission is determining the exact national allocations. The Regulation permits the use of optional and mandatory criteria to extend the range of cases eligible for border processing, thereby helping Member States to increase their capacity.

- b) apprehension in connection with an unauthorised crossing of the external border;
- c) disembarkation in the territory of a Member State after a search and rescue operation; and
- d) relocation from another Member State. Excluded from the border procedure are individuals apprehended within the territory of a Member State under Article 7 of the Screening Regulation who apply for international protection.

A significant new development is that in certain cases the APR makes the asylum border procedure mandatory. Article 45(1) combined with article 42(1) under (c), (f) or (j) APR stipulates that the use of the border procedure is *mandatory* when:

- a) the applicant has misled the authorities by, for example, presenting false documents or withholding important information that would have negatively affected the applicant's decision;
- b) the applicant can, for serious reasons, be considered a danger to the national security or public order of the Member State;
- c) the applicant has the nationality or is a habitual resident of a third country where the proportion of positive decisions regarding applications for international protection is 20% or lower. The 20% recognition rate will be calculated based on the latest available Union-wide average Eurostat data, unless there has been a significant change in the third country since the publication of the relevant Eurostat data or if the applicant belongs to a category of persons for whom the 20% recognition rate cannot be considered representative for that person's particular protection needs.

Notably, all applications considered in the border procedure are accelerated, whilst the scope of the accelerated procedure is wider, encompassing categories where acceleration occurs in the regular procedure instead of the border procedure. This has significant consequences for asylum seekers, as will be addressed more elaborately later in this comment.²³ Even unaccompanied minors and minors under 12 years old with their family members can be subject to the accelerated border procedure when they are considered a threat to national security or public order under national law.²⁴

Similar to conditions under the screening procedure, applicants are legally not authorised to enter the territory of the Member State during the asylum border procedure. Generally, applicants must reside at or in proximity to the external border or transit zones, or in other designated areas within the territory, considering the specific geographical constraints of that Member State.²⁵

²³ Article 42 APR

²⁴ Article 42(3), point (b) securitisation.

²⁵ Article 43(2) and 54 APR

The asylum border procedure follows the same procedure as the regular asylum procedure (an official interview, counselling and information for asylum seekers, as well as a review of any special needs), albeit with special features due to the principle of acceleration. The asylum border procedure shall be as short as possible and not exceed a total of twelve weeks.²⁶ These twelve weeks start from the moment of the registration of the application for international protection. During this period, a fair examination of the claim, as well as any potential appeal, shall be completed by the competent authorities. If an application is denied during this process, the applicants will be moved to a return border procedure, where they can stay for an additional twelve weeks.²⁷ Of note is that there is no suspensive effect pending the outcome of the higher appeal.²⁸ This means that someone can be removed from the territory while still awaiting a decision on their case.

Lastly, both the Screening Regulation and the Asylum Procedures Regulation require Member States to establish an independent monitoring mechanism to ensure fundamental rights compliance during the screening of new arrivals and when assessing asylum claims at the external border, including non-refoulement and detention rules.²⁹

2. Barriers for Asylum Seekers in Accessing Protection at the External Border

The features of the new Pact mainly revolve around a prioritisation of speed, localisation and de-territorialisation, introduced to control (irregular) migration and pursue an agenda that is focused on securitisation rather than on the fundamental rights of migrants and international protection. Even though the regulations mention that measures need to be in full compliance with the 1951 Refugee Convention, the EU Charter, the European Convention on Human Rights (“ECHR”) and other relevant international law such as the Convention on the Rights of Child (“CRC”), the Pact’s more restrictive approach towards irregular migration and the Member States’ wide discretion severely impact upon the fundamental rights of migrants.³⁰

In this comment, we address how fundamental rights such as the right to asylum, the right to an effective remedy, and the principle of non-refoulement are affected by the new regulations. We have chosen to focus on these fundamental rights due to their importance in ascertaining whether the new regulations under the Pact have sufficient safeguards and guarantees for migrants to seek asylum and have their

²⁶ Article 51(2) APR

²⁷ Article 4(2) of the Return Border Procedure Regulation

²⁸ Article 68 APR

²⁹ Article 10 SR and Article 43(3) APR

³⁰ Article 78 TFEU but also in the Regulations themselves, see e.g. Article 3 SR and Recital 58 APR.

application assessed adequately.³¹ In other words, when seeking to analyse whether the screening procedure and border procedures introduce new or perpetuate existing barriers for asylum seekers at the external border, we have to look at whether there is a risk they will be sent back to a country where they will face a real risk of persecution or serious damage without a proper assessment of their claims; and, as such, whether the measures violate their right to seek asylum and be protected in another country. The EU and its Member States should commit themselves to carrying out the pre-entry phase under these obligations. However, the abovementioned new and special procedures of the pre-entry phase may jeopardise fundamental rights in several ways, as will be elaborated upon in this section.

2.1. Principle of non-refoulement

The principle of non-refoulement stems from Article 33 of the 1951 Refugee Convention and forms the cornerstone of the Common European Asylum System (“CEAS”).³² In the EU Charter, the principle of non-refoulement is stipulated in Article 19. The CJEU has reiterated that the CEAS is based on the full and inclusive application of the 1951 Refugee Convention and the guarantee that nobody will be sent back to a place where they risk being persecuted on Refugee Convention grounds.³³ As mentioned above, the SR and APR underline the principle of non-refoulement.³⁴ The principle of non-refoulement is also firmly entrenched in ECtHR-jurisprudence,³⁵ having been read in to Article 3 ECHR in *Soering v UK*.³⁶

The principle of non-refoulement ensures that individuals are not expelled or returned to territories where their life or freedom would be threatened.³⁷ Both the ECtHR and the CJEU ruled that non-refoulement requires effective access to asylum procedures, a rigorous and individualised assessment of risk, and safeguards to prevent wrongful removal.³⁸

³¹ Apatzidou, Vasiliki. 2024. “The Complex Landscape of Asylum Border Procedures in the new Asylum Procedures Regulation”, in *European Law Blog*.

³² Article 78(1) TFEU.

³³ Joined cases C-411/10 and C-493/10, N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, 21 December 2011, para. 75.

³⁴ RC 58 of the APR states the following: “*The purpose of the border procedure for asylum and return should be to quickly assess in principle at the external borders whether applications are unfounded or inadmissible and to swiftly return those with no right to stay, in a manner that fully respects the principle of non-refoulement, while ensuring that those with well-founded claims are channelled into the regular procedure and provided quick access to international protection*” The APR further stipulates in Article 37 that Member States must issue return decisions that comply with Return Directive and the principle of non-refoulement.

³⁵ ECtHR in *Soering v. United Kingdom*, Appl. 14038/88, 7 July 1989; ECtHR, *Chahal v. UK*, Appl. 22414/93, 15 Nov. 1996, para. 80.

³⁶ European Union Agency for Fundamental Rights, *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law* (FRA, December 2016) <https://fra.europa.eu/en/publication/2016/scope-principle-non-refoulement-contemporary-border-management-evolving-areas-law>

³⁷ Khaitan & Krishan 2022

³⁸ ECtHR in *T.K. and Others v Lithuania*, Appl. 55978/20, 22 June 2022 (FINAL).

The ECtHR has emphasised the obligation to establish adequate and effective procedures for determining protection needs, including a thorough examination of whether removal would expose the individual to torture or inhuman or degrading treatment, as well as affording the effective opportunity to present relevant claims and evidence. The efficiency and fairness of asylum procedures and compliance with the principle of non-refoulement depends on the applicant's ability to access and engage with those procedures.³⁹ In *M.S.S. v. Belgium and Greece*,⁴⁰ the Court stated that deficiencies in the asylum procedures of Member States may result in indirect refoulement, as applicants may be subjected to an inadequate examination or removal process. More recently, in *M.A. and Z.R. v. Cyprus*, and *A.R.E. v. Greece*, the Court reaffirmed that effective asylum procedures, access to legal assistance, and remedies with suspensive effect are integral components of non-refoulement protection. The case law focusses more on the examination of the risk rather than the risk itself.

The new legislation on the screening and border procedures conflicts with the principle of non-refoulement in several ways. Practices such as the use of pre-entry screening, the fiction of non-entry, and the systematic reliance on border procedures risk delaying or preventing the registration of asylum claims and the identification of protection needs.

- I. The pre-entry phase, in practice, may **incentivise pushbacks**, as Member States may seek to avoid the obligations associated with screening and subsequent border procedures. The ECtHR has consistently ruled that pushbacks and the absence of an individual assessment violate Article 3 of the ECHR and Article 4 Prot. No. 4,⁴² which requires States to ensure effective access to adequate asylum procedures and that living conditions meet standards in the receiving state.⁴³ The CJEU stated in *X v. Staatssecretaris*,⁴⁴ that the practice of pushbacks is incompatible with the principle of non-refoulement if it means that persons seeking international protection are sent by the determining authorities to a third country on whose territory they incur the risk of persecution.⁴⁵

³⁹ Barbara Mikołajczyk, 'The Maze of Legal Support in the New Pact on Migration and Asylum' (EU Migration Law Blog, 3 June 2024) <https://eumigrationlawblog.eu/the-maze-of-legal-support-in-the-new-pact-on-migration-and-asylum/>

⁴⁰ ECtHR in *M.S.S. v. Belgium and Greece*, Appl. 30696/09, 12 January 2011.

⁴¹ Belgium violated Article 3 of the ECHR because it transferred asylum seekers back to Greece, despite multiple reports demonstrating widespread human rights violations by the Greek authorities. These violations included the ineffective and improper assessment of asylum applications, which consequently exposed applicants to the risk of ill-treatment in Greece and of being returned to their country of origin, where their lives might be in danger. It means a person might be sent to a second State that could return them to persecution and human rights violations. See, CCRP GC No. 31, para 12; CAT, General Comment No. 1, paras. 2, 3; CAT, *S.M.R. and M.M.R. v. Sweden*, para. 9.8. See ECtHR *M.S.S. v. Belgium and Greece*, Appl. 30696/09, 21 Jan. 2011; confirmed in *Tarakhel v. Switzerland*, Appl. 29217/12, 4 Nov. 2014.

⁴² ECtHR, *Hirsi Jamaa and Others v. Italy*, no. 27765/09, judgment of 23 February 2012; *N.D. and N.T. v. Spain (GC)*, nos. 8675/15 and 8697/15, judgment of 13 February 2020; *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17, judgment of 23 July 2020.

⁴³ ECtHR, *M. K. and others v. Poland*, para. 179, ECtHR, *Ilias and Ahmed v. Hungary*, 21 November 2019, para. 131. ECtHR, *M.S.S. v. Belgium and Greece*, paras 344-360.

⁴⁴ CJEU in *X. v. Staatssecretaris*, C-392/22, ECLI:EU:C:2024:195, 29 February 2024.

⁴⁵ *X v. Staatssecretaris*, para. 53

- II. The Pact establishes a **regime of non-entry** during the pre-entry phase, whereby third-country nationals are not considered legally admitted despite their physical presence and subjection to the jurisdiction of the host state. While States retain sovereignty over admission, the principle of non-refoulement applies as soon as jurisdiction is exercised, including at borders. Although a restrictive reading limits non-refoulement to the right to enter an administrative border,⁴⁶ Article 33(1) Refugee Convention 1951 prohibits refoulement “in any manner whatsoever”. Access to territory and procedures therefore derive from non-refoulement obligations. According to this perspective, the **Pact's attempt to decouple jurisdiction from admission claims.**⁴⁷ Under the prevailing perspective, non-refoulement entails a minimum duty to temporarily admit or a presence that is sufficient to ensure an effective refugee determination procedure.
- III. The screening phase, which is limited to a maximum of seven days, is primarily designed for identification and channeling to the right procedure. However, its limited timeframe and simplified assessment mean that it **may fail to detect protection needs, vulnerabilities or implicit asylum claims.** This is particularly problematic given the obligation to identify individuals at risk of persecution or serious harm as soon as state jurisdiction is exercised.
- IV. In this context, the screening **risks blurring the legal distinction** between asylum seekers and migrants who have come to the EU irregularly for different purposes such as economic migrants. Subjecting asylum seekers and other migrants to the same procedures may increase the likelihood of **misclassification of the next procedural step.** This causes tension with the principle of non-refoulement, requiring the identification and assessment of protection risks at the earliest stage. The principle of non-refoulement requires that States fulfil their duty of a thorough risk assessment of individuals who may face a real risk of persecution or serious harm if returned. Although screening is presented as a neutral measure, it operates as a decisive gateway to exclusion. The procedure concludes with a screening form, rather than a reviewable decision, and provides **no direct remedy** despite its role in directing individuals into fast-track border procedures or return pathways. Information collected during screening may be used to accelerate the rejection of asylum applications, thereby creating a direct **link between a preliminary process and removal decisions.** This procedural structure contradicts ECtHR case law, which requires an individualised assessment of risk prior to any return.

⁴⁶ Noll 2005, 548

⁴⁷ Graf & Katsoni 2021, 155; Kälin et al. 2011, 1363; Gammeltoft-Hansen and Hathaway 2015, 238; Wallace, Rebecca M.M. "Chapter 17: The principle of non-refoulement in international refugee law". *Research Handbook on International Law and Migration*. Cheltenham, UK: Edward Elgar Publishing, 2014.

- V. The border procedure introduces a **set of elements that differ significantly from standard asylum procedures**,⁴⁸ and relies heavily on **accelerated asylum processing**. By markedly reducing the elements of the asylum procedure and time available for third-country nationals to present their claims, there is a risk of **rushed assessments of protection needs**. The border procedure has a maximum duration of twelve weeks, covering all stages of the process. By contrast, other accelerated procedures under the APR likewise have a maximum duration of twelve weeks, but do not include the appeal stage. Prioritising speed within the border procedure risks undermining the quality of decision-making, increasing the likelihood of errors and unjustified rejections, and ultimately favouring efficiency and migration control over essential procedural safeguards. These concerns are compounded by the APR's approach to appeals and the right to remain. The Regulation removes **the automatic suspensive effect of appeals**. Where applicants are deported before a court has ruled on their appeal, the risk of violations of non-refoulement is particularly acute. The APR exacerbates this risk further by formalising the joint adoption of asylum rejection and return decisions at the border (Article 37). This procedural coupling reflects the underlying logic of the Pact: that irregular entry, followed by a negative asylum decision, should trigger immediate return. Although asylum and return decisions are formally distinct, their **temporal and procedural linkage** could circumvent non-refoulement obligations by compressing or displacing the comprehensive fundamental rights assessment required before removal.

Taken together, the Pact's pre-entry regime creates a cumulative risk of refoulement. Screening without remedies, fast-track border procedures with reduced safeguards and the concept of non-entry work together to reduce the level of protection at the time when individuals are most vulnerable. While none of these elements formally violate non-refoulement in isolation, their combined effect risks undermining its practical effectiveness.

2.2. Right to asylum

Whilst Article 19 EU Charter incorporates the principle of non-refoulement, Article 18 EU Charter provides a right to asylum. The principle of non-refoulement does not translate into an explicit right to (enjoy or seek) asylum. Individuals do have a right to leave their country, but the right to enter another country belongs to the sovereignty of the state.⁴⁹ The right to asylum under the EU Charter does,

⁴⁸ It is characterised by a presumption of inadmissibility, suspensive effects and quantitative thresholds, such as the '20% rule', which is likely to substantially increase the use of the border procedure. It includes **fewer appeals opportunities**, reduced legal assistance and NGO access. See, Evelien Brouwer, Giuseppe Campesi, Sergio Carrera, Roberto Cortinovis, Evangelia Karageorgiou, Jens Vedsted-Hansen and Lina Vosyliute, 'The European Commission's Legislative Proposals in the New Pact on Migration and Asylum' (Study, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, European Parliament, PE 697.130, 2021) 68.

⁴⁹ As stressed numerous of times by the ECtHR in its case law, such as *Soering v. United Kingdom*.

however, go beyond the prohibition of refoulement and is therefore a suitable venue to pursue legal action: The right to asylum includes admission to fair and effective processes for determining one's refugee status and international protection needs, formulated as a right of individuals rather than a constraint on States' interests.

The CJEU has recently started to give more clarity on the meaning of Article 18 of the EU Charter. In *X v. Staatssecretaris*,⁵⁰ the CJEU stated that the ability to access the asylum procedure is one of the cornerstones of the CEAS, and more specifically constitutes part of Article 18 of the EU Charter. Any third country national has the right to make an application for international protection, including at the external border. Even if the person is staying illegally on the territory and irrespective of the prospects of success of the claim, the right to make an application must be recognized by the authorities.⁵¹ In this regard, the practice of pushbacks is incompatible with the fundamental elements of the CEAS, as it forms a barrier to the asylum seekers' right to make an application for international protection.⁵² Furthermore, in *Kinsa* the CJEU has recently held that measures against migrant smuggling cannot compromise the right to seek asylum.⁵³ Excessive criminalisation could deter individuals from applying for international protection, which could jeopardise the effectiveness of Article 18 EU Charter. Measures introduced or taken by Member States cannot have the effect of preventing the individual from applying for international protection, even when the individual has entered the territory irregularly.

The features of the Pact's screening, border and accelerated procedure - the legal fiction of non-entry, quick assessments of the asylum claim, higher likelihoods of *de facto* detentions, easier deportations, reduced access to legal assistance or NGOs and fewer opportunities to appeal a decision - go against the right to asylum recognised in the Charter and by the CJEU.

- I. The legal fiction of non-entry specifically has already been implemented by States in the past to curtail migrants' rights. Asylum seekers will be systematically hindered from fully accessing the rights and safeguards they would have under the 'normal' asylum procedure. The fiction of non-entry essentially establishes a differential and exceptional regime in which some migrants are only 'semi-included',⁵⁴ which impacts the fundamental right of migrants to asylum. Applying the notion increases the use of detention and reduces the application of reception and other standards. In practice, the Pact uses this fiction to justify limited freedom of movement,

⁵⁰ CJEU in *X. v. Staatssecretaris*, C-392/22, ECLI:EU:C:2024:195, 29 February 2024.

⁵¹ Para. 51, *X v. Staatssecretaris*.

⁵² Para. 52, *X. v. Staatssecretaris*

⁵³ CJEU in *Kinsa*, C-460/23, ECLI:EU:C:2025:392, 3 June 2025.

⁵⁴ Sommer, H.2025. "Denials of Existence: Discursive Strategies Legitimising the Fiction of Non-Entry," *movements*, 8(1); Apatzidou, Vasiliki (2023): The Normalization of Denial of Legal Safeguards in the proposed Asylum and Migration Legislation. European Law Blog of 02.03.2023. URL: europeanlawblog.eu.

accelerated decision-making and speedy return, thereby reducing the level of protection available to asylum seekers during the process.

- II. The screening phase marks the first point of contact between asylum seekers and the authorities of Member States. During this period, individuals are identified, registered, and undergo security and health checks. While individuals may express a wish to apply for asylum, the primary focus of screening is migration management and risk assessment rather than protection needs. The right to asylum is at risk of becoming a preliminary filtering exercise rather than an individual assessment.
- III. Applicants who are deemed to fall within certain categories, such as those from countries with low recognition rates, are directed towards border asylum procedures. The introduction of a low recognition rate of 20% in the APR mandates the referral to the border procedure, which is problematic from the view of one's right to asylum under EU law. As mentioned, the CJEU ruled in *X. v. Staatssecretaris* that the prospects of success should be irrelevant.⁵⁵ Rather, the right to asylum requires that each case be assessed individually and on its own merits.

Furthermore, a 20%-rule risks leading to discriminatory practices, which is strictly prohibited by Article 21 EU Charter. With the introduction of this recognition rate in the APR, not the individual's case but one's nationality becomes relevant for the determination of the applicable procedure, which goes against the spirit of the CEAS and the Refugee Convention more generally. Finally, recognition rates vary among Member States.

- IV. Finally, the border procedure is characterised by strict time limits. While efficiency is a legitimate objective, the compression of procedural timelines poses a significant challenge to the effective exercise of the right to asylum by restricting applicants' ability to gather evidence, obtain legal assistance and prepare their claim. This is particularly problematic given the complexity of asylum claims, which often require detailed credibility assessments and country-of-origin analysis.

2.3. *Effective remedies*

Article 47 of the EU Charter encompasses the right to an effective remedy, which aims to ensure that in case of violation of the rights and freedoms guaranteed by EU law, everyone has the right to an effective remedy before a tribunal. This entails a fair and public hearing within a reasonable timeframe. Moreover, everyone should have access to legal advice, a defence and representation. For those who

⁵⁵ CJEU in *X. v. Staatssecretaris*, C-392/22, ECLI:EU:C:2024:195, 29 February 2024.

lack sufficient resources, legal aid shall be made available to ensure effective access to justice. The right to an effective remedy is also contained in Article 13 of the ECHR, concerning complaints of substantive violations of Convention provisions. These provisions play an important role in the interpretation of this right. EU law, however, more extensively protects the right to an effective remedy.⁵⁶ Importantly, the CJEU has stressed that access to a legal remedy must truly be effective rather than remain illusory in practice.⁵⁷

In the pre-entry phase, Article 67 APR stipulates the right to an effective remedy against decisions taken on the asylum seekers' application. It mentions that decisions taken during the administrative procedure may be appealed before a domestic court or tribunal; that the examination of the appeal must be 'a full and ex nunc examination of both facts and points of law';⁵⁸ and that, generally, appeals have suspensive effect for as long as the applicant has the right to remain in the Member State's territory.⁵⁹

The new rules on the screening and border procedures, however, conflict with the right to an effective remedy.

- I. Although the APR states that border procedures must enable 'a complete and fair examination of the claims', the whole pre-entry phase is designed to be fast. **Short time frames compromise the ability of asylum seekers** to prepare their case thoroughly, as they need to find a legal adviser, discuss the case with this adviser, decide on strategy and gather the necessary evidence. In cases where applicants are, for instance, traumatised, more time is often necessary but will be unavailable under the new regulations. Decisions may be made before applicants have had the opportunity to present their claims adequately, and subsequent appeals lack automatic suspensive effect. What is envisaged here in terms of remedy seems **largely formal** rather than substantive.

The screening phase determines whether the applicant will be referred by the authorities to either the asylum, the border or the return procedure. The appropriate procedure and possible vulnerabilities of the claimant must become clear within a short timeframe of a matter of days. It is doubtful whether the authorities will have a good picture of the asylum seekers, their needs and the basis of their claim. In *I.M. v. France*,⁶⁰ the ECtHR already ruled that a time-limit of five days to lodge an asylum application offered insufficient procedural protection against refoulement and was therefore contrary to Articles 3 and 13 ECHR. In fact, in cases where the

⁵⁶ See explanation Article 47 EU Charter: <https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial>

⁵⁷ E.g. CJEU in *Torubarov* (C-556/17) on 'judicial pingpong' and the possibility for the national court to substitute its own decision for the decision of the national administrative body.

⁵⁸ Article 67(3) APR

⁵⁹ Article 68(1) APR

⁶⁰ ECtHR in *I.M. v. France*, Appl. 9152/09, 2 May 2012 (FINAL), para. 144.

applicant's vulnerability might not be immediately visible - such as human trafficking - the individual is likely to be referred to a procedure without adequate support or their special needs and safeguards met.⁶¹ Moreover, evidence about the hotspot approach indicated that vulnerable people often reside in overcrowded facilities without access to services and proper medical care.⁶²

- II. Concerning the form presented after the initial screening, the Screening Regulation contains no option for a judicial review. This means that only the decision of the subsequent procedure (e.g. the outcome of the border asylum procedure) can be legally challenged. The Commission has justified this by referring to the screening process as merely an “information-gathering stage [...] which does not entail any decision affecting the rights of the person concerned” (2020, 12). Yet, contrary to the Commission's position, the **screening does play a crucial role in determining the subsequent procedures** and ultimately, the processing and outcome of asylum applications. Importantly, the form determines whether someone will be subjected to the legal fiction of non-entry or is admitted to the ‘ordinary’ asylum procedure with all the accompanying rights and safeguards.
- III. The reduction of time-limits concerning the border procedure is further visible in the appeals procedure. Article 67 APR determines that Member States must give applicants a minimum of twelve weeks including a maximum of one month to appeal; yet, where the application has been processed under the accelerated procedure, the appeal must be lodged within five to ten days. This **short amount of time** is supposedly sufficient to adequately prepare the appeal. Article 68(3) APR determines further that there will not be a suspensive effect under these special procedures. This means that an **individual may be deported before a decision on their appeal is taken**. It is up to the applicant to demonstrate that a lack of suspensive effect would harm the principle of non-refoulement. This is contrary to what the ECtHR has previously ruled. The Court stated that a person should have access to a remedy with automatic suspensive effect when there is a possibility that removal would expose the applicant to irreversible harm.⁶³ Indeed, the right to an effective remedy requires automatic suspensive effect against an alleged violation of Article 3 ECHR. The CJEU has also reaffirmed this in *Abdida*.⁶⁴

⁶¹ See on rights of vulnerable groups: Gazi, T. 2021. “The New Pact on Migration and Asylum: Supporting or Constraining Rights of Vulnerable Groups.” European Papers.

⁶² Fundamental Rights Agency, ‘Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy’ (2016) and Fundamental Rights Agency, ‘Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy’ (2019); IRC, ‘The Cruelty of Containment: The Mental Health Toll of the EU’s ‘Hotspot’ Approach on the Greek Islands’ (2020) reliefweb.int.

⁶³ *M.K. and Others v. Poland*, paras. 143-144

⁶⁴ CJEU, *Abdida*, C-562/13, 18 December 2014, paras. 52-53.

IV. Access to legal assistance seems to be limited in the pre-entry phase and can, when the individual is considered to pose a threat to national security, even be withheld. In the screening and border procedures, **asylum applicants are placed at a serious procedural disadvantage**, because lawyers, NGOs and courts do not have the same access to the border as in regular procedures.

3. Conclusions

The Pact marks a significant shift toward a migration management agenda focused on securitisation, speed, and deterrence rather than the protection of fundamental rights and international protection. It aims to strengthen control over third-country nationals crossing external borders through streamlined and simplified procedures. In this comment, we have explained the multiple tensions that emerge from the Pact's legislative framework. The newly introduced pre-entry phase is another tool to deny entry and put fundamental rights at risk. Asylum seekers are subject to different rules and standards, often more restrictive compared to individuals who are in the normal asylum procedure.

It becomes apparent that the pre-entry phase does not explicitly differentiate between unauthorised migrants and third-country nationals seeking protection. By containing refugees at the external borders, it subjects asylum seekers to the same migration control.⁶⁵ This blurs the fine line between an asylum seeker, who is subject to specific protection needs according to the 1951 Refugee Convention, and other migrants, as both undergo the same screening.⁶⁶ Further, even if individuals manage to access the asylum system through screening, they might be directed to asylum border procedures, which provide less comprehensive procedural guarantees.⁶⁷ In this context, migrants from countries with low recognition may not receive sufficient protection.

Furthermore, the "*legal fiction of non-entry*", a legal construct under which individuals physically present on EU territory are treated as if they have not yet entered, is used to limit access to the rights and safeguards typically available under standard asylum procedures. This creates a "semi-included" status for migrants, which facilitates detention and speedier deportations while operating as a form of externalised migration control.

⁶⁵ Vincent Chetail, 'Looking beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System' (2016) *European Journal of Human Rights*

⁶⁶ ⁶⁶ European Council on Refugees and Exiles (ECRE), *Comments on the Regulation of the European Parliament and of the Council Introducing the Screening of Third-Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817* (ECRE, February 2025); Lyra Jakulevičienė, 'EU Screening Regulation: Closing Gaps in Border Control While Opening New Protection Challenges?' (EU Migration Law Blog, 28 June 2024); Lyra Jakulevičienė, 'Re-decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders' (EU Migration Law Blog, 27 October 2020)

⁶⁷ ⁶⁷ Elspeth Guild and Vasiliki Apatzidou, 'EU Pact Instruments on Asylum and Minimum Human Rights Standards' (EU Migration Law Blog, 21 October 2024)

The Pact builds on prior measures such as the ‘legal fiction of non-entry’ as well as the ‘hotspot’ approach and the border procedure already present in the APD. Evidence of state practice, however, has already indicated that these measures have gone hand in hand with curtailing migrants’ (fundamental) rights. Rather than normalising such measures, the EU and Member States need to prevent asylum seekers from being cut off from access to procedures, services and adequate reception conditions. An approach that is centred around rights and international protection rather than on security and the state’s interests is needed.

We draw the overall conclusion that the Pact will exaggerate the barriers that asylum seekers will face at the external border to apply for asylum. From the particular viewpoint of the principle of non-refoulement, the right to asylum, and the right to an effective remedy under the EU Charter, we present the following additional conclusions.

The combination of pre-entry screening and mandatory border procedures creates a **cumulative risk of refoulement**. This risk is exacerbated by several factors:

- Insufficient screening time: the maximum seven-day window for screening is often too short to identify complex protection needs or hidden vulnerabilities, such as human trafficking.
- Lack of automatic suspensive effect: In many cases, appeals do not automatically halt a deportation. This means an individual could be removed from the country before a court has even ruled on their appeal

Access to an effective remedy is hampered by the new regulations in several ways:

- Compressed timelines: in accelerated procedures, asylum seekers may have only five to ten days to lodge an appeal, which is often insufficient to find legal counsel and gather evidence.
- Limited access to support: there is reduced access to legal assistance and NGOs during border procedures, placing applicants at a serious procedural disadvantage.
- No review of screening: the initial screening outcome is recorded in a form that cannot be directly challenged in court, even though it determines which subsequent procedure the applicant will face.

The introduction of the "20% recognition rate rule", whereby nationality determines whether an applicant is placed in a mandatory border procedure, is highly problematic. This rule shifts the focus from an individual’s specific protection needs to their nationality, risking discriminatory practices and contradicting the principle that every asylum claim should be assessed on its own merits.

The Pact fails to fully uphold the best interests of the child. Even unaccompanied minors can be subjected to accelerated border procedures if they are deemed a threat to national security or public order, potentially conflicting with international conventions on children's rights (CRC).

4. Improvements/ Recommendations

To address the structural shortcomings identified within the screening and border procedures under the Pact, and to ensure effective compliance with EU primary law, the 1951 Refugee Convention and international human rights obligations, the following recommendations are put forward. These recommendations are meant for a broad audience, including academics, civil society, and EU-institutions to critically assess the Pact and where necessary make amendments. Taken together, these recommendations aim to improve the pre-entry phase towards an approach that prioritises individual protection needs over migration control objectives.

I. Abolition/Reform of the Legal Fiction of Non-Entry

The legal fiction of non-entry should be removed from the screening and border procedures. Treating individuals as legally absent despite their physical presence on the territory creates a stratified asylum system and results in unequal access to rights and safeguards. This fiction facilitates accelerated processing, limits judicial oversight and increases the risk of refoulement by weakening procedural guarantees at a critical stage. Yet, the fact that individuals subject to border and screening processes are present on the territory and under the jurisdiction of Member States must be emphasised. Notably, Member States cannot disregard their rights and the procedural safeguards in place by asserting a non-entry fiction.⁶⁸ As we have demonstrated in this comment, the CJEU and ECtHR have repeatedly emphasised that States also have a certain obligation to protect human rights even beyond their own physical territory. As soon as a Member State exercises jurisdiction, asylum seekers must be recognised as rights-bearing individuals entitled to the full protection of EU and international law.

II. Ensuring Quality and Fairness over Procedural Speed

While procedural efficiency is a legitimate objective, speed must not take precedence over the quality, fairness and thoroughness of asylum decision-making. Rigid and compressed time limits risk undermining applicants' ability to articulate their claims, obtain legal assistance and present relevant evidence, particularly in complex or trauma-related cases. The legal framework should allow for the extension of timeframes where necessary to ensure an individualised and well-founded assessment of

⁶⁸ European Council on Refugees and Exiles (ECRE), *Comments on the Regulation of the European Parliament and of the Council Introducing the Screening of Third-Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817* (ECRE, February 2025)

protection needs, in line with the requirements of the right to asylum and the principle of non-refoulement.

III. Limiting the Use of Alternative or Remote Processing Locations

Asylum applications should not be processed in alternative or remote locations that restrict access to legal assistance, oversight mechanisms or judicial remedies. Conducting procedures in isolated or securitised settings risks rendering procedural guarantees ineffective in practice and contributes to *de facto* detention. Border procedures must be carried out in locations that ensure meaningful access for lawyers, NGOs, courts and monitoring bodies, and that allow applicants to effectively exercise their rights.

IV. Guaranteed and Continuous Access to Legal Assistance and NGOs

Asylum seekers must have continuous, effective and confidential access to legal assistance and independent organisations throughout the screening and border procedures. Legal advice at an early stage is essential for understanding procedural rights, identifying vulnerabilities and preventing wrongful removal. Any restrictions on access to legal representatives or NGOs should be exceptional, strictly necessary and proportionate, and must never undermine the practical effectiveness of the right to an effective remedy.

V. Exclusion of Vulnerable Groups from Border and Accelerated Procedures

Unaccompanied minors, families with children and other vulnerable persons should be exempt from border and accelerated procedures. Subjecting these groups to fast-track processes with reduced safeguards fails to take account of their heightened protection needs and is incompatible with the best interests of the child and the principle of human dignity. Vulnerable applicants should instead be channeled into regular procedures that provide enhanced procedural and reception safeguards.

To add, the best interests of the child must be treated as a primary consideration throughout the entire pre-entry phase, in accordance with Article 3 of the Convention on the Rights of the Child (“CRC”) and Article 24 of the EU Charter. This requires more than a formal reference to children’s rights. Authorities must carry out a substantive, individualised assessment of each child’s situation prior to any procedural referral, taking into account their age, maturity, safety, psychological well-being and family links. Procedural design and implementation should actively prevent situations in which children are exposed to accelerated processing or containment measures that may compromise their development or protection.

VI. Strengthening Safeguards in Vulnerability Screening

Vulnerability screening must be reinforced through clearer standards, specialised training and the involvement of qualified professionals. Identification mechanisms should be capable of detecting both visible and less apparent vulnerabilities, including trauma, torture, trafficking, sexual or gender-based violence and mental health conditions. Where vulnerabilities are identified, this should trigger immediate procedural adaptations and access to appropriate support services, rather than mere notation in the file.

VII. Ensuring Individual Assessment of Asylum Claims

Asylum claims must be examined on an individual basis and on their own merits, without reliance on generalised indicators such as recognition rates linked to nationality. Recognition rates vary between Member States and cannot substitute for an individual assessment of protection needs. The use of such indicators risks discriminatory treatment and undermines the core principles of the Common European Asylum System and the 1951 Refugee Convention.

VIII. Restoring Suspensive Effect of Appeals

Appeals against negative decisions in border and accelerated procedures must have automatic suspensive effect. Without such effect, applicants face a real risk of removal before a court has examined the legality and substance of the decision, which may lead to irreversible harm. Automatic suspensive effect is a necessary safeguard to ensure compliance with the principle of non-refoulement and the right to an effective remedy under Articles 18, 19 and 47 of the EU Charter.

IX. Enabling Judicial Review of Screening Outcomes

Effective judicial review of the screening outcome must be made available. Although formally characterised as an information gathering stage, the screening procedure has decisive consequences for the legal position of the individual, including referral to accelerated or border procedures. Given its impact on access to rights and safeguards, the absence of judicial oversight risks rendering the right to an effective remedy illusory. Judicial review of the screening form and referral decision is therefore necessary to uphold the rule of law and fundamental rights.

X. Establishment of an Independent Monitoring Mechanism

An independent monitoring mechanism should be fully operational throughout the pre-entry phase, as envisaged in the Screening Regulation and the Asylum Procedures Regulation.⁶⁹ Monitoring bodies must be institutionally independent, adequately resourced and empowered to carry out regular and

⁶⁹ Article 10 SR and Article 43(4) APR

unannounced visits, receive complaints and issue binding or follow-up recommendations. Effective monitoring is essential to identify systemic deficiencies, prevent rights violations, and ensure accountability at the external borders.