



ELDH European Association of Lawyers for Democracy & World Human Rights

EJDM Europäische Vereinigung von Juristinnen & Juristen für Demokratie und Menschenrechte in der Welt
EJDH Asociación Europea de los Juristas por la Democracia y los Derechos Humanos en el Mundo
EJDH Association Européenne des Juristes pour la Démocratie & les Droits de l'Homme
EGDU Associazione Europea delle Giuriste e dei Giuristi per la Democrazia e i diritti dell'Uomo nel Mondo

WITH LAWYERS
IN 21 COUNTRIES

Equality Privacy Social Rights
No Racism Peace No Torture No War
Self-Determination of Peoples Civil Rights Democracy
Human Rights Rights of Migrants

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ELDH statement on the new EU 'Pact on Migration and Asylum'

The Pact on Migration and Asylum published on 23 September 2020, provides a framework to facilitate and justify the obstruction of access to asylum procedures, unlawful returns and refoulement. Although labelled a 'fresh start',¹ it retains many highly contentious aspects of the old border policy including a discriminatory fast track border procedure, military and technological border fortification, and an emphasis on containment, detention, deportations and border externalisation. The following specific elements give particular cause for concern:

1. Pre-entry screening;
2. Obligatory 'border procedure';
3. Deportation 'sponsorship' as a form of 'solidarity' between member state;
4. Expansion of the Eurodac database;
5. Monitoring Mechanisms; and
6. The guidance on "definition and prevention of the facilitation of unauthorised entry, transit and residence.

1. Pre-entry screening

A new mandatory pre-entry screening expanding the previous Schengen Borders Code applies to all third country nationals disembarking from a Save and Rescue (SAR) operation,² to be carried out within 5 days.³ It consists of identification, health and security checks, preliminary vulnerability checks, fingerprinting and the registration of biometric data in the Eurodac database. During this process people are deemed not to be "legally present" in EU territory.⁴ This raises concerns about:

- Reception conditions and whether people will effectively be detained for the duration of the 'pre-entry' screening;

¹ EU Commission Press Release, 'A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity', Brussels, 23 September 2020

² Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a 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 COM/2020/612 final, *Reasons for and objectives of the Proposal*.

³ Ibid, Article 6.3

⁴ Ibid, Article 4; Article 40 of the 'Amended proposal revising the Asylum Procedures Regulation', Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2020/611 final.

ELDH European Association of Lawyers for Democracy & World Human Rights

President: Professor Bill Bowring, London | E-Mail: bill.bowring@eldh.eu | Phone +44 (0)781 048 34 39

Présidente d'honneur: Professeure Monique Chemillier-Gendreau, Paris

Secretary General: Thomas Schmidt (lawyer), Düsseldorf | E-Mail: thomas.schmidt@eldh.eu |

Phone +49 (0)172 68 10 888

Postal address: ELDH | Thomas Schmidt | Platanenstrasse 13 | D – 40233 Düsseldorf (Germany)

Website: www.eldh.eu

- Due process guarantees such as: access to legal advice, the grounds decisions about access to the territory will be made on, and how decisions can be appealed;
- The use and retention of biometric information;
- How ‘vulnerable’ individuals will be identified (especially given systematic failures to identify ‘vulnerable’ individuals – particularly survivors of torture, trafficking and gender-based violence – in the comparable truncated screening process in Lesvos and other hot spots).

2. *Obligatory ‘border procedure’*

This procedure applies to asylum seekers who are identified through the pre-entry screening as being from a country of origin with an EU-wide average asylum recognition rate of less than 20% (unless they are identified as vulnerable).⁵ These people will receive decisions on admissibility and the merits of their application for international protection in an accelerated 12-week examination procedure.⁶ A similar ‘border procedure’ that was already optional under Article 43 of the EU Procedures Directive and has been in place in Lesvos and other Aegean islands, has been repeatedly denounced⁷ because:

- It violates the individualised nature of the right to international protection;
- It discriminates on the basis of nationality;
- It obstructs access to the asylum procedure;
- It prevents asylum seekers obtaining effective remedy against unlawful decisions;
- Individuals are unlawfully automatically detained and deprived of their liberty during the accelerated procedure; and
- All of the above leads to unlawful returns and refoulement in breach of EU and international law.

3. *Deportation ‘sponsorship’ as a form of ‘solidarity’ between member states*

The legislative proposals in the new Pact contain an Orwellian distortion of ‘solidarity’ in the concept of ‘return sponsorship’. The idea is that member states can choose how they ‘share responsibility’ for asylum seekers: mainly by either accepting relocations or through the new option of ‘sponsoring’ – carrying out – deportations on behalf of another member state:

*“under this **new form of solidarity measure**, Member States would commit to **return irregular migrants on behalf of another Member State**, carrying out all the activities necessary for this purpose directly from the territory of the benefitting Member State (e.g. return counselling, leading policy dialogue with third countries, providing support for assisted voluntary return and reintegration)”* (emphasis added).⁸

This is disturbing on many levels. The notion of ‘return sponsorship’ also raises practical concerns, such as:

- The likelihood of a replication of ‘hotspot’, Moria-style ‘containment’ or closed facilities in the (presumably likely) event that states choose to sponsor deportation rather than to accept relocation;
- How accountability for unlawful deportations and refoulement will work: i.e whether the state rejecting a claim for international protection or the state carrying out the deportation on behalf of another will bear legal responsibility.

⁵ Articles 40 and 41, ‘Amended proposal revising the Asylum Procedures Regulation’, Ibid

⁶ Article 41 (2), Ibid

⁷ <<https://www.ecre.org/greece-nationality-based-detention-in-the-moria-refugee-camp/>>;

<<http://legalcentrelesvos.org/2017/09/30/september-report-on-rights-violations-and-resistance-in-lesvos>>

⁸ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM/2020/610 final

4. Expansion of Eurodac database

The proposals to extend surveillance and monitoring will increase data control over migrants, a group already highly categorised, analysed and datafied. This raises issues such as:

- Consent (will migrants be forced to give up their personal data?);
- Age of consent (EURODAC now retains data for children as young as 6);
- Data retention (data is stored for five years);
- Increased surveillance and monitoring creates further possibilities of criminalisation and exploitation, since the internalised border it creates makes it even harder for migrants to move safely.

5. Monitoring mechanisms

The pre-entry screening provides for several levels of monitoring, the first being an “independent monitoring mechanism” which Member States will be required to set up themselves, and to which European bodies including Frontex vulnerability assessments will contribute. IADL is concerned that, given that Member States and Frontex are operating pushbacks, such a monitoring mechanism set up by Member States and involving Frontex cannot be independent.

Further monitoring will be carried out by the new European Union Agency for Asylum and the European Commission, which will have the power to launch infringement procedures where necessary, which is to be welcomed. However, **for monitoring to be truly independent it must come from non-State actors**, for example through existing non-governmental and civil society organisations.

6. The guidance on “definition and prevention of the facilitation of unauthorised entry, transit and residence

The guidance, which invites Member States, in their application of the Facilitation Directive, to distinguish between activities carried out for the purpose of humanitarian assistance and those carried out to facilitate irregular entry or transit, is to be welcomed as an attempt to prevent criminalisation of acts of solidarity and humanitarian assistance.

However, the guidance is not legally binding and “does not prejudge the competence of the Court of Justice of the European Union, which is responsible for the final interpretation of EU law,” merely providing “greater clarity on its [the Directive’s] scope of application”.⁹ More robust enactment is needed, for example, revising the directive itself to include a clear definition of migrant smuggling to require unjust enrichment, and making the humanitarian exemption clause mandatory for all Member States.¹⁰

Moreover, the continued criminalisation of assistance in irregular entry and transit without further provision of safe and legal routes for migration to the EU will continue to push migrants into exploitation and situations of vulnerability and harm.

The ELDH demands a different approach: a decisive departure from the EU’s violent and failed policies entrenched in this supposedly ‘new’ Pact; and a move towards genuinely transformative policies which recognise migration both as something people have always done, and as a consequence of Europe’s historic and ongoing imperialist ventures.

⁹ Page 2 of the guidance, <https://ec.europa.eu/info/sites/info/files/commission-guidance-implementation-facilitation-unauthorised-entry_en.pdf>

¹⁰ <<https://www.migpolgroup.com/wp-content/uploads/2020/03/ReSoma-criminalisation-.pdf> p3
<<https://www.fidh.org/en/issues/human-rights-defenders/joint-statement-the-eu-must-stop-the-criminalisation-of-solidarity>>

The ELDH demands:

1. Universal freedom of movement - defund and demilitarise border agencies, facilitate safe passage to and through Europe and the right to remain for all migrants.
2. Evacuate all camps on the Aegean islands, end all policies that lead to the 'containment' of people at Europe's external borders and beyond through deals with third countries; provide safe and dignified accommodation for all.
3. End illegal pushbacks at the EU's external borders - provide safe passage and legal routes for people to access the territory and a proper European search and rescue operation.
4. End the criminalisation of solidarity, including maritime search and rescue and collective resistance to inhumane policies.
5. Full access to accommodation for applicants which meets the standards of the EU Accommodation Directive 2013 for international protection as well as screening and assessment services. All accommodation should maintain Covid-19 Protection Measures.
6. Independent monitoring mechanisms of state actions and policies to come from non-state actors.