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Implications of the proposed solidarity mechanism on the EU returns system

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If implemented with independent monitoring and adjusted as secondary solidarity support, the relocation of returnees can be a viable solidarity tool for effective and safe return of migrants in irregular situations across the EU.

The Council's approach on solidarity mechanism offers a simplified version of the Commission's technical concept of return sponsorships.

Mutual recognition of return decisions by Member States should include effective Frontex and independent monitoring to ensure fundamental rights compliance.

The proposed solidarity mechanism should keep the mandatory relocation of asylum seekers as the primary and preferred option.

Since the peak of migration flows to the European Union (EU) in 2015, its priorities in migration management have shifted, culminating in the legislative proposals featured in the New Pact of Migration and Asylum (Pact), proposed by the European Commission in September 2020.

Regarding EU return policy, the Pact aimed to make returns ‘more effective’. It proposed closer links between asylum and return processes through a new return border procedure, and introduced ‘return sponsorships’ as a form of solidarity among EU Member States.¹ In June 2023, the Council agreed to its negotiating position on some of these legislative proposals as co-legislator.² This policy brief aims to inform the Council’s negotiating position by examining the potential implications of the proposed solidarity mechanisms on the EU return system.³

This brief is based on a MIGNEX Background Paper: An examination of the legislative framework in the EU migration and asylum law.⁴

Making returns ‘more effective’ is one of the prioritised policies in the Pact.

The low return rates of migrants in irregular situations, compared to the return decisions adopted by Member States, was the basis on which the Pact argued for ineffectiveness in existing return policy (see Figure 1).

To this end, the Commission’s approach aims to minimise the procedural aspects of returns; maximising administrative and operational cooperation among the Member States and the EU authorities.

This strategy involves quick assessment of asylum applications, swift returns at borders and the relocation of returnees as part of the solidarity mechanism to support Member States facing migratory pressure.

In addition, the Commission’s strategy for successful returns includes enhancing cooperation with third countries on readmissions and upholding the fundamental rights of returnees, especially the non-refoulement principle.⁵

The Council’s simplification of “return sponsorships” aims to find middle ground with conflicting Member State views.

The concept of mandatory yet flexible solidarity mechanisms to support Member States facing migratory pressures is amongst the most novel reforms of the Pact. Member States can contribute to a solidarity pool designated each year with different inputs that are of equal value, unlike the mandatory relocation of asylum-seekers during the 2015 migration (policy) crisis which some Member States had refused to comply with.

According to the Council’s negotiating position, inputs to the solidarity pool include: the relocation of asylum seekers, refugees or irregular third-country nationals who are to be returned; direct financial contributions; and alternative solidarity measures for capacity building. Moreover, with the so-called ‘Dublin offsets’, if the relocation target of the Commission’s annual Migration Management Report is not met, Member States can cancel their transfers to a Member State under migratory pressure to top-up their unfulfilled pledges.⁶ Therefore, this option is regarded as secondary-level solidarity support.

In addition to relocations, the Commission’s proposal also contained return sponsorships. This would enable Member States to support a pressured Member State in the return of irregular migrants, with supporting states taking responsibility if return is not carried out within a set period. However, the Council’s position removes the notion of return sponsorship and embeds the return of third-country nationals in irregular situations as a solidarity pledge in the form of relocations.

The return of migrants in irregular situations as a form of solidarity by Member States signifies a revival of mutual recognition in return decisions.

Directive 2001/40/EC fosters inter-state cooperation (with the recognition of return decisions issued by one Member State within the territory of another). However, mutual recognition in return has not been widely used

due to its contested usefulness. The proposed solidarity mechanism necessarily requires mutual recognition of return decisions for the supporting Member States to remove third-country nationals upon transferring them to its territory.

The Commission's recent recommendation on mutual recognition of return decisions urges Member States to examine the case of each third-country national so as to comply with the principle of non-refoulement, best interests of the child, family life and health, both before recognizing a return decision and before removal.⁷

Thus, the supporting Member States should ensure that the return decision is in line with these principles. This is critical for the functioning of solidarity through returns in line with fundamental rights. Additionally, considering its increasing mandate in returns⁸, Frontex monitoring powers - as well as independent monitoring - should play a crucial role in state examination of whether a removal is in compliance with the principle of non-refoulement.

Shifting responsibility for removals risks increased reliance on Member States against the mandatory relocation of asylum seekers.

Assessing compliance with fundamental rights prior to removal could provide an additional layer of protection for returnees from the risk of refoulement. However, Member States opting for returns as their solidarity pledges are also likely to be the ones that have been persistently against the relocation of asylum seekers as a solidarity tool, such as the Visegrád group.

Therefore, the new system risks increased reliance upon fewer Member States, whose return rates are generally higher yet whose compliance with fundamental rights in return is contested.⁹ This is not only at odds with the Pact's comprehensive approach aiming to address the current system's imbalance - with few Member States handling the majority of asylum applications - but also a system that is based on fundamental rights compliance.

Relocation of returnees could be an effective 'secondary-level' solidarity tool if accompanied with effective monitoring.

Some policy implications concerning the impact of the proposed solidarity mechanism in returns have emerged from this brief:

- A watered-down approach to mandatory solidarity - focusing on relocation of returnees, financial contributions, and capacity building - will be preferred by

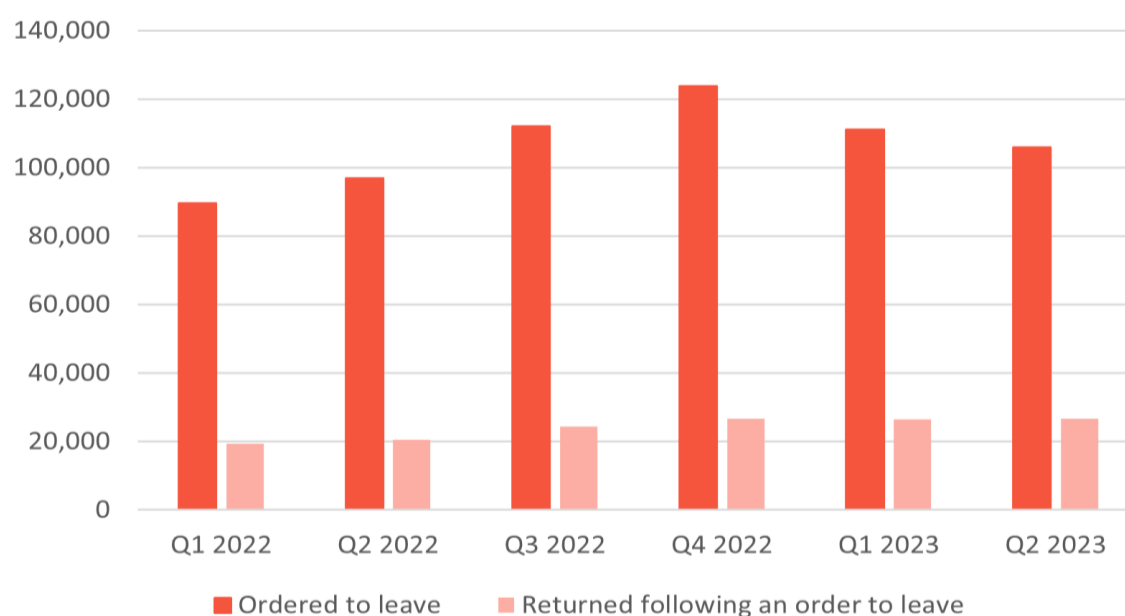


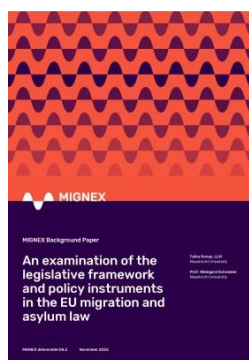
Figure 1. Non-EU citizens ordered to leave and returned following an order to leave, Q1 2022 – Q2 2023 (absolute numbers)

Source: Eurostat

specific Member States that oppose mandatory relocations. This is not in line with upholding fundamental rights during returns and fair sharing of responsibility as enshrined in the Treaty.¹⁰

- Frontex’s forced-return monitoring and a dedicated independent monitoring should be an indispensable part of the mutual recognition of return decisions by Member States for the solidarity pledges in returns, in order to be compliant with fundamental rights.
- Prioritisation of the physical transfer of returnees to the supporting Member States - over cancelling Dublin transfers - casts doubts on the practicality of the mechanism. Some Member States under pressure could benefit more from a reduction of the Dublin cases for which they would normally be responsible.
- Instead of Dublin offsets, EU policymakers should consider situating relocation of

Further reading



Günay, T. and Schneider, H. (2022). An examination of the legislative framework and policy instruments in the EU migration and asylum law. MIGNEX Background Paper. Oslo: Peace Research Institute Oslo. Available at www.mignex.org/d082.

returnees as a secondary-level solidarity support that is only possible if mandatory relocation of asylum seekers is not met by Member States at a sufficient level. Mandatory relocation should be the primary and preferred option.

Notes

1. See: European Commission, What is the New Pact on Migration and Asylum of the EU? https://home-affairs.ec.europa.eu/policies/migration-and-asylum/new-pact-migration-and-asylum_en, (accessed 28 October 2023).
2. Council of the EU, The ordinary legislative procedure [website], <https://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/>, (accessed 29 October 2023).
3. The AMMR proposes a new solidarity mechanism to balance the responsibility for the number of asylum applications across the EU and replaces the current Dublin regulation setting out rules determining which member state is responsible for the examination of an asylum application. See: Council of the European Union, (EC) 2003/109 and the proposed Regulation (EU) Asylum and Migration Fund – General Approach, 1443/23, Article 1
4. This policy brief is based on research documented in MIGNEX Background Paper: An examination of the legislative framework and policy instruments in the EU migration and asylum law. Günay T. and Schneider H. (2022)
5. The principle of non-refoulement is a fundamental principle of international refugee and human rights law that bars States from removing individuals from their jurisdiction when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations. See: Article 33 of the 1951 Refugee Convention.
6. The proposed solidarity mechanism is based on the Annual Migration Management Report in which the Commission indicates minimum thresholds for relocation and financial contributions to be collected in an Annual Solidarity Pool.
7. Commission Recommendation of 16.3.2023 on mutual recognition of return decisions and expediting returns when implementing Directive 2008/115/EC of the European Parliament and of the Council, C(2023) 1763, p. 5.
8. The Pact reiterates Frontex’s leading role in return operations and regards monitoring and operational support provided by Frontex as key for mutual trust in the EU.
9. See for example: UNHCR, Press release, Hungary’s coerced removal of Afghan families deeply shocking, 8 May 2019, <https://www.unhcr.org/news/news-releases/hungarys-coerced-removal-afghan-families-deeply-shocking>, (accessed 21 October 2023).
10. Treaty on the Functioning of the European Union, Article 80.

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MIGNEX – Aligning Migration Management and the Migration-Development Nexus – is a five-year research project (2018–2023) with the core ambition of creating new knowledge on migration, development and policy. It is carried out by a consortium of nine partners: The Peace Research Institute Oslo (coordinator), Danube University Krems, the University of Ghana, Koç University, Lahore University of Management Sciences, Maastricht University, ODI, the University of Oxford and Samuel Hall.

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