

A possible agreement on the reform of CEAS at the Council in June

What is at stake?

After more than 7 years of tense and divisive negotiations of a reform of the Common European Asylum System (CEAS) in the Council, EU Member States (EUMS) may be edging closer to an agreement on two key legislative proposals at the June JHA Council or a later date in June.

Those proposals are:

→ Asylum Procedures Regulation (APR) which sets out the requirements for asylum processes in Europe.

→ Asylum and Migration Management Regulation (RAMM) which is supposed to replace the Dublin III Regulation. It sets out the rules determining which EUMS is responsible for an asylum application and solidarity mechanisms.

An agreement on a Council position on these two proposals would be significant because it would unlock the long stalemate on the rules on responsibility and solidarity among Member States for people seeking asylum and the processes that people arriving in the EU should go through, particularly at the external border.

The next pages set out the potential agreements that are on the table in the Council and assesses them from a rights perspective.

1 Mandatory asylum and return procedures at the border

If the proposal for the APR currently under discussion is agreed in the Council, certain groups of people will have their asylum application assessed in a border procedure and, if they receive a rejection, the return procedure will also be a border procedure. The category affected would be people from countries where the EU-wide protection recognition rate is 20% or lower. The use of the border procedures will be mandatory for the Member States.

Border procedures are expedited procedures, with reduced safeguards. They are currently optional under EU law, and little used. Where they are used, they almost always take place in (de-facto) detention. Under the proposals, the asylum and border procedures would last up to 12 weeks per procedure, meaning a potential six months in total. They would likely take place in detention or at least conditions akin to detention, not least because the Council and Parliament have agreed to a reform of the Reception Conditions Directive which makes applying the border procedure a ground for the use of detention.

The proposal met with objections from the countries at the external border because it would increase their responsibilities as they would have to set up centres in border areas (controversial for local populations) and manage the border procedure, in addition to the regular procedure on territory.

Member States are debating exemptions from the border procedure, potentially removing the limited exemptions proposed by the European Commission. Member States may agree that nobody, not even families with children, unaccompanied children or other vulnerable people, would be excluded from the procedure. Another issue under discussion is whether the border procedure has to take place at the border; some Member States want it also to be possible at other locations, while maintaining the fiction that the person is not on the state's territory.

In practice, it would mean:

- ➔ Large-scale detention in centres at the EU's borders, including of children and other vulnerable applicants, such as survivors of torture.
- ➔ Substandard asylum processes – border procedures tend to operate with reduced procedural guarantees, such as very limited access to legal aid.
- ➔ Increased risk of refoulement and other violations – reduced safeguards include a removal of the suspensive effect of appealing a return decision, meaning the person would need to leave the EU territory before the outcome of the appeal is known.

2 A target number of people who would need to be subject to the border procedure in exchange for derogations

During the negotiations, the rules on procedures started off highly complex and became even more so. Although in the form of a Regulation, therefore binding and directly applicable in the EUMS, there was a considerable amount of discretion available to EUMS, as well as certain exemptions and a lack of clarity.

The Member States supporting the expanded and mandatory use of the border procedure (those not at the external border) became concerned that there were too many ways to evade the use of the border procedure. Thus, negotiations moved to consider numerical targets. In addition, Member States are focusing on an agreement on the use of the border procedure in exchange for derogations rather than solidarity (see below).

For these reasons, the concept of “adequate capacity” has been introduced. The adequate capacity is the required number of people who have to be processed in the border procedure – a target or a minimum number. There will be an overall EU adequate capacity (overall number of people to be processed in the border procedures for a given year) and an adequate capacity per EUMS (the number of applications they must process in the border procedure during the year). The individual Member State’s adequate capacity is calculated by taking the overall EU number multiplied by the number of “irregular” entries for the country in question, divided by the overall number of irregular entries.

The Member States which do not support mandatory border procedures (those at the external borders who would have additional responsibilities, see above) have countered by arguing for a cap – a maximum number of applications to be processed in border procedures rather than a minimum.

Be it a maximum or a minimum, when the target is reached by an EUMS, they no longer have to apply the border procedure (applicants can be processed in the regular procedure). A new discussion has started on whether the adequate capacity should be a number that has to apply “at any given time” rather than an annual target.

In an effort to reach an agreement on responsibility and solidarity, the Swedish Presidency was asked to present numbers so that EUMS can assess whether there is balance. The first proposal was 30,000 people to be processed in a border procedure and 30,000 relocations or equivalent solidarity contributions. It also includes the figure of EUR 22,000 as the financial contribution that would be equivalent to one relocation for those preferring that option.

The solidarity contributions are split across all 27 Member States but when a country is under pressure, its contributions are reduced in the form of “offsets”. Certain Member States, argue that offsets – the reductions in contributions – should not be applied when a country is not cooperating on take-back transfers.

In practice, it would mean:

- ➔ Further arbitrariness in who is subject to border procedure: while previously the suggestion was that it would only apply to specific profiles of people, it now is dependent on whether Member States hit certain numerical targets.
- ➔ Expanded use of border procedures in exchange for the right of Member States to apply derogations.
- ➔ Further incentives for Member States at the external border to deny access to their territory to reduce the number of people that they need to process in the border procedure.

3 A reform of solidarity that does not reform solidarity rules

The European Commission's proposal for a reform of the Dublin system outlined in the RAMM did not foresee a substantive reform of the rules, including the first country of entry principle. In addition, it introduced a longer period of responsibility of the first country of entry for the applicant, which remains contentious in the Council, with some Member States arguing for cessation of responsibility after 1 year and others for 3 years. The few proposals to make the system more balanced by introducing more criteria for allocating responsibility to another EUMS (e.g. allowing for a unification with wider group of family members (including siblings)) are rejected by most Member States.

A dedicated mechanism for solidarity following Search and Rescue (SAR) has also been deleted. The proposals for a solidarity mechanism for situations of migratory pressure remains central to the negotiations. EUMS have agreed that solidarity will be "mandatory but flexible" meaning that the contributing EUMS can choose between relocation, capacity building and a financial contribution.

In practice, it would mean:

- ➔ Little will change in relation to the distribution of responsibility for people seeking asylum in Europe, with disproportionate responsibility lying with the countries at the external border.
- ➔ This may mean that Member States at the external border will continue to have an incentive to deny access to their territory, to keep reception and integration measures limited, and to let people travel onwards to other Member States.
- ➔ Relocation will remain an option for those Member States who are willing, based on a target set by the European Commission.
- ➔ Member States who do not wish to relocate people can provide financial support, potentially also by financing projects and activities that take place outside the EU and which seek to prevent people from arriving in Europe.

While not for discussion and adoption at the June JHA Council, plans are in the works to merge the two legislative proposals that deal with mechanisms for derogations from EU asylum law, specifically the Instrumentalisation Regulation and the Crisis Regulation.

The concept of “instrumentalisation” of migration would be revived and codified in EU law and a menu of derogations would be available to EUMS. Derogations allow Member States to not abide by certain legal obligations. Under discussion are derogations from rules on deadlines for registration, for the duration of the border procedure, on points of entry, on material reception conditions, on procedural guarantees and on the use of the border procedure. Three derogatory regimes are considered – for situations of crisis, force majeure and “instrumentalisation”.

Whereas previously Member States were attempting to reach an agreement on responsibility in exchange for solidarity – specifically, increased use of the border procedure in exchange for solidarity mechanisms – the focus on solidarity has been deprioritised. The solidarity mechanism does not prioritise relocation. One of the deals under discussion is centred on responsibility – border procedure – in exchange for derogations, rather than solidarity.

In practice, it would mean:



One legislative proposal that would include three different scenarios for Member States to claim that they should be able to derogations, in the case of force majeure, crisis and instrumentalisation.



Derogations would include the opportunity for Member States to extend registration periods for asylum expand, subject the vast majority and in some cases all people arriving to the border procedure, curtail the right to an effective remedy and limit material reception conditions thereby reducing access to asylum in the EU.



At any point in time several different systems of derogations would apply across the EU, which would represent the end of a **COMMON European Asylum System**

Conclusions

What's next?



It remains unclear whether an agreement in Council can be found as positions continue to differ greatly among Member States including on numbers for and exemptions to the border procedure, on rules on duration and cessation of responsibility, and on the use and definition of safe third country concepts.



The deal on the table seems to be particularly unattractive for countries at the EU external border. They would essentially sign up to something that leaves them with additional responsibilities without receiving substantive commitments related to solidarity in return, and without a change in the basic rules on responsibility sharing.



Whether the offer of derogations – the possibility for them to not apply asylum standards in some circumstances – is enough to sway them is not clear. There may also be other measures not related to asylum that are offered to countries such as Italy to win their support for the deal.



Of course, an agreement in Council on these two pieces does not mean an overall agreement on the new rules. The European Parliament has a crucial role to play in negotiating the final rules. However, as ECRE's analysis highlights, the EP's position on both RAMM and APR do not fully address the major short-comings of the European Commission's proposals and it may be that the EP is likely to concede to the Council where the two disagree.