

# EU return sponsorships: High stakes, low gains?

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# Executive summary

The concept of 'EU return sponsorships' is one of the New Pact on Migration and Asylum's central and most novel proposals. It may also prove to be the most controversial.

At its core, this proposal put forward by the European Commission introduces **return sponsorship as an expression of responsibility-sharing between member states**. Member states would be required to support other EU countries facing migratory pressure. If they oppose the option of relocating asylum seekers, they can facilitate the returns of migrants who lack permission to remain in Europe instead.

The Commission's objective was to bridge the political divisions between member states while simultaneously achieving policy objectives of internal solidarity and returns. However, making this work in practice is not without challenges. This Discussion Paper unpacks the return sponsorship mechanism and discusses its likely implications, coming to the following five conclusions:

## CONCLUSION 1

The concept of **return sponsorship is unlikely to succeed in resolving political divisions over responsibility-sharing** in Europe. Rather, pre-existing conflicts are being transposed onto the precise requirements of return sponsorship, such as the transfer of migrants within Europe if returns are unsuccessful.

## CONCLUSION 2

The flexibility embedded in the solidarity mechanism comes **at the expense of predictable and tangible support** for EU states facing migratory pressure. The proposal may only provide a limited correction of the disproportionate responsibility borne by EU border states.

## CONCLUSION 3

The Commission proposes various mechanisms to match the preferred contributions of a sponsor with a border state's urgent needs. This will be an **administratively heavy matching exercise which lacks effective enforcement tools**. Repeated delays and the politicisation of solidarity processes are likely.

## CONCLUSION 4

**Return sponsorships are ill-suited to the high stakes of return procedures** in terms of human rights. They may even create new vulnerabilities for migrants issued return orders. The involvement of multiple states in return procedures is not accompanied by appropriate harmonisation on return standards or clear accountability in case of a human rights violation. The proposed transfers to sponsoring states are also rights-sensitive: few guarantees regarding the legal status and protection of those migrants with weak return prospects are provided.

## CONCLUSION 5

**As it stands, return sponsorship will only be successful if returns can be done faster and in far greater numbers**. This will be difficult given the established reluctance of many third countries to readmit their own (and other) nationals. If this is not feasible, intra-EU transfers of migrants whose returns are pending will gain importance – with a high probability of continued conflicts among member states.

Overall, the Commission is taking a considerable risk with its return sponsorship concept. It may prolong the polarised discussions among member states on the fair distribution of migrants within Europe. It may provide only modest support to countries at the EU's external border. The concept provides cooperation-reluctant member states with discretion and possibilities to shift and shirk responsibilities. It is difficult to see how the proposal's high stakes will translate into high gains in terms of outcomes.

If the proposal is to move forward, negotiators should prioritise strengthening the **predictability and tangibility** of support provided by the solidarity mechanism to the EU's border states, ensure that return sponsorships do not create **new human rights risks** for migrants issued return orders, and **avoid inflated expectations** regarding the impact of a growing use of conditionality on returns.

# Introduction

On 23 September 2020, the European Commission unveiled its long-awaited New Pact on Migration and Asylum.<sup>1</sup> Aiming to mark a “fresh start on migration”, the Commission put forward a complex package of five new legislative proposals, three recommendations and one guidance, with further legislative initiatives to follow in the coming year.<sup>2</sup>

Many ideas in the proposals are not new, prompting many commentators to brand the Pact as old wine in new bottles. This is not true for all the proposals, however. The most novel among them is part of the proposed solidarity mechanism at the heart of the Pact. According to this proposal, member states will be required to support other states that face migratory pressure. If they oppose the option of relocating asylum seekers, they can support the return of migrants who lack permission to stay in Europe through ‘return sponsorships’. Various forms of flexible mandatory solidarity have been discussed in recent years. However, return sponsorship as an expression of responsibility-sharing between member states has hardly featured in any of them and is new in EU law.

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## Return sponsorship as an expression of responsibility-sharing between member states is new in EU law.

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The concept of return sponsorship may also prove to be the most controversial element of the New Pact in inter- as well as intra-institutional negotiations. Different political actors have already started to firmly defend or, instead, oppose different aspects of the concept. Return sponsorships are also central to the Commission’s understanding of how all the different elements of the Pact come together.<sup>3</sup> Whether this proposal stands or flounders will determine the acceptance and prospects of the New Pact as a whole.

# 1. The concept of return sponsorship

## 1.1. RETURN SPONSORSHIPS UNDER THE NEW PACT

The return sponsorship mechanism appears in the Commission’s proposal for a new Asylum and Migration Management Regulation (AMR).<sup>5</sup> At its core, this proposal establishes a form of mandatory yet flexible solidarity among member states. The core elements

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## Whether the return sponsorship proposal stands or flounders will determine the acceptance and prospects of the New Pact as a whole.

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This Discussion Paper unpacks the return sponsorship proposal and discusses its likely implications. The first section explains its key features and the role the Commission attributes to it. Above all, the proposal constitutes a clear attempt to bridge the considerable divisions between member states by advancing on solidarity and return policy objectives simultaneously. The second section studies the effectiveness and possible outcomes of return sponsorships once used in practice. Three crucial questions are explored:

1. Will the proposal be able to provide **tangible support to member states at the EU’s external border**?
2. Is the instrument a suitable addition to EU return policy, capable of navigating the **complexity and human rights sensitivity of returns**?
3. Are the proposed measures likely to secure the New Pact’s wider **objective of increasing returns**, and what fate awaits the Pact **if this expectation cannot be met**?

The concept of return sponsorship is likely to be modified over the coming months. Important practical and operational details were purposely omitted from the Commission’s proposal, to allow for room for manoeuvre in the upcoming negotiations. As Home Affairs Commissioner Ylva Johansson has noted, whereas “the devil is in the details”, the same is true for the opportunities within the proposals.<sup>4</sup> Although much remains uncertain, this Discussion Paper outlines several practical challenges that must be resolved if the mechanism’s functioning is to be secured.

of the Dublin III Regulation (604/2013), determining which state takes responsibility for asylum applications, remain in place. However, if the Commission deems that a state is faced with migratory pressure (including a risk thereof), other member states will have to step in, depending on their GDP and population size.<sup>6</sup> **States may choose to contribute** via the mechanism **by relocating a number of asylum applicants,**

**‘sponsoring’ the return of an equal number of migrants** without the permission to remain in the EU, **through operational support** (with some caveats), **or a combination of these**.<sup>7</sup> A similar mechanism will apply in cases of disembarkation following search and rescue operations. A corrective mechanism is envisioned if contributions fall short overall, including a Solidarity Forum where member states would be invited to adjust their contributions.<sup>8</sup>

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## The New Pact set out a form of mandatory yet flexible solidarity among member states.

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**The AMR is purposely open and flexible about the forms of support that states acting as ‘return sponsors’ may offer.** They may counsel on returns, provide financial or logistical support towards voluntary return and reintegration, lead or support readmission negotiations with third countries, or organise return flights.<sup>9</sup> Sponsoring states may send officials to the state from which returns are conducted, or support could be provided entirely remotely. They may indicate which nationalities they wish to sponsor (but not relocate).<sup>10</sup> Importantly, these contributions must be established “in close coordination with the benefitting Member State”.<sup>11</sup> An EU Return Coordinator within the Commission – yet to be appointed – will coordinate this dialogue and ensure that the sponsoring state’s support will address the benefitting states’ expressed needs. The position has been proposed precisely for this purpose.<sup>12</sup>

Sponsored returns are to be conducted from the benefitting state, which remains in charge of issuing return decisions and responsible for the return procedure (including deciding whether to grant a period of voluntary departure, order detention). If returns fail to be carried out within 8 months (or 4 months in cases of “crisis”), the returnee will be transferred to the sponsoring state. This does not imply the end of a return procedure, but a shift of responsibility for conducting it.<sup>13</sup>

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## The New Pact builds on existing leverage and conditionality mechanisms to increase the cooperation of third countries on readmission.

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To support the functioning of return sponsorships, the **New Pact introduces other measures to facilitate**

**quick returns.** The Commission seeks to streamline national return procedures by asking states to issue (negative) asylum and return decisions jointly, establishing a new High-Level Network for Return, and setting out a Strategy on Voluntary Returns and Reintegration in spring 2021. Most significantly, the New Pact also builds on existing leverage and conditionality mechanisms to increase the cooperation of third countries on readmission. This will become a firmer priority in the EU’s external partnerships.<sup>14</sup>

The EU has already strengthened its conditionalities over the past years. It has increasingly suggested withdrawing benefits (i.e. negative conditionalities) if its offers (positive conditionalities) do not bear results. Among others, the 2019 revision of the Visa Code (810/2009) introduced a mechanism for the Commission to assess the level of a third country’s cooperation annually. Based on these assessments, the Commission may propose visa restriction or facilitation measures to the Council, to incentivise readmission cooperation.<sup>15</sup>

Article 7 of the newly proposed AMR extends this mechanism to other policy areas. It suggests that “any measures [...] could be taken to improve the cooperation of [a] third country as regards readmission”.<sup>16</sup> If accepted, this clause will **allow the EU to use development aid, trade, legal pathways and financial support more proactively**, as the proverbial ‘stick’ for increasing cooperation on readmission.<sup>17</sup> **The Commission also seeks to enhance the attractiveness of its incentives.** These may include funding under the Neighbourhood, Development and International Cooperation Instrument, of which 10% is to be allocated to migration-related issues under the proposed EU budget for 2021-27.<sup>18</sup> Legal migration pathways also feature in the New Pact. Although the full extent of these proposals is yet to be developed, EU Talent Partnerships, for example, may also be proposed as an incentive.<sup>19</sup>

## 1.2. THE RATIONALE OF THE PROPOSAL

The return sponsorship proposal is dominated by the larger, realpolitik vision that underpins the New Pact.<sup>20</sup> **The objective of return sponsorships is two-fold.** On the one hand, it aims to provide a solution to the complex question of responsibility-sharing within Europe. Those member states that oppose the mandatory relocation of asylum seekers may be more willing to engage in returns, thereby alleviating pressure from countries at the EU’s external border. On the other, the proposal is part of a broader political objective by the Commission and member states to increase returns from Europe.

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### 1.2.1. Solidarity: Searching for a new compromise

The new solidarity mechanism aims to resolve **the deadlock over responsibility-sharing** that has blocked progress in the Council on the reform of the Common European Asylum System since 2016. Most member states agree that the existing Dublin III Regulation creates imbalances and must be revised to include greater responsibility-sharing for asylum seekers arriving in the Union. However, there is no agreement over what should replace it.

Southern European states have long led calls for an EU-wide mandatory relocation system for asylum seekers. However, such proposals have faced public and fierce opposition from the Visegrád states (i.e. Hungary, the Czech Republic, Poland, Slovakia), Austria and Denmark, among others, who rejected obligations to contribute. The positions of Northern and Western European states have varied over time and by country. Some, such as Germany, have repeatedly advocated for mandatory relocations, whereas France has been open to more flexibility in the forms of contributions.<sup>21</sup>

Against this background, to meet both sets of political demands, it was already clear by early 2020 that the Commission would propose a mandatory flexible solidarity system. States would be required to support those facing migratory pressure, but with the freedom to choose their contribution method, in line with their domestic priorities.<sup>22</sup>

### 1.2.2. Returns: Aiming for higher numbers

The return sponsorship mechanism also seeks to advance the New Pact's broader efforts to **increase the number of effective returns**. Even before the Pact was unveiled, it was clear that returns would play a prominent role in the proposals.<sup>23</sup> Indeed, at the launch, Commissioners Margaritis Schinas and Ylva Johansson announced "a new European ecosystem geared towards effective returns" that would send "an important message" to people intending to come to Europe without a valid claim to international protection.<sup>24</sup>

The aim of increasing returns is not new, but it has climbed as a political priority in recent years. The percentage of return decisions that are effectively carried out (i.e. the return rate) has been consistently low in recent years, between 35% and 40%.<sup>25</sup> In 2019, it fell further to 29%.

The Commission has also pointed to the decreased rate of positive recognition of asylum applications in Europe, compared to 2015-16 levels (30% of first-instance decisions in 2019).<sup>26</sup> More asylum seekers are coming from countries with low recognition rates. This shift in the profile of asylum applicants, it argues, places high burdens on member states' asylum and return systems and justifies new measures to accelerate and streamline return procedures.<sup>27</sup> However, the figures cited by the Commission are disputed, as they exclude people granted authorisation to stay on humanitarian grounds, as well as the substantial (and growing) number of people granted positive decisions on appeal.<sup>28</sup>

In turn, member states have long called at the "highest political level" for the use of all available tools to secure the cooperation of non-EU countries on readmission.<sup>29</sup> Agreement between member states tends to be more easily forged on issues relating to the external dimension, particularly the focus on return and readmission. Against this background and given the difficulty in securing progress in other areas, **returns have increasingly taken centre stage as a policy priority**. The return sponsorship concept is part of this effort.

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**Greater cooperation between member states on returns achieves two goals at once. It contributes to a wider policy objective of increasing returns while further incentivising member states to participate in an EU solidarity mechanism.**

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Greater cooperation between member states on returns, therefore, achieves two goals at once. It contributes to a wider policy objective of increasing returns while further incentivising member states to participate in an EU solidarity mechanism.<sup>30</sup> In this way, the new return sponsorship mechanism is positioned as the 'missing piece' of a functioning EU asylum and migration policy.

### 1.3. POLITICAL FAULT-LINES: TOO MUCH, OR NOT ENOUGH

Even before the presentation of the New Pact, the Commission predicted that the proposals would please no-one. It hoped that this would demonstrate its willingness to incorporate and balance the different positions of member states.<sup>31</sup> However, bridging these political divisions is no easy task.

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**The key cleavages between member states are now beginning to surface, indicating that the negotiations will be long, tense and difficult.**

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Most member states refrained from publicly reacting to the New Pact's contents in the weeks following its publication, partly due to the many open questions about the proposals. At the Strategic Committee on Immigration, Frontiers and Asylum meeting on 13 October 2020, member states reportedly issued a total of 74 pages with demands for clarification.<sup>32</sup> The key cleavages are now

beginning to surface, indicating that the negotiations will be long, tense and difficult.<sup>33</sup> Return sponsorship seems to be a particularly controversial element.

Whereas the German Presidency of the Council of the EU aimed to achieve a political agreement on some of the Pact's more general principles by the end of 2020, persistent divisions between member states along earlier fault-lines made even a broad consensus impossible.<sup>34</sup> A progress report issued by the German Presidency in December 2020 highlighted a range of pending questions, including the possible forms of solidarity measures. Further issues identified include whether relocation or return sponsorship should be mandatory in specific situations, under what conditions the solidarity mechanism should apply, and the rules defining member states' specific solidarity commitments.<sup>35</sup>

### 1.3.1. Is the concept of return sponsorship too far-reaching...

When the New Pact was released, many commentators argued that the return sponsorship mechanism is a concession to the Visegrád Four and likeminded states, such as Austria, Denmark, Slovenia and Estonia.<sup>36</sup> As highlighted above, they have long opposed mandatory relocations of asylum seekers while calling for a greater emphasis on returns and border controls. The proposal does indeed cater to their demands for flexibility in the form of solidarity and their calls for more returns. That said, **certain obligations embedded in the concept have already started to raise their objections.**

On 24 September 2020 – one day after the publication of the New Pact – officials from the Visegrád states travelled to Brussels and publicly rejected the proposals as insufficiently restrictive.<sup>37</sup> Some representatives from Central and Eastern Europe issued more positive remarks. Austrian officials, for example, noted that the Pact “has already moved a lot in [their] direction”.<sup>38</sup>

However, the requirement to transfer returnees to the sponsors' territory after 8 months is already proving to be a challenging element in Council negotiations. Austrian and Hungarian officials have branded this idea as relocation “through the back door” or under a “different name”.<sup>39</sup> A softening of this transfer requirement is a priority in the Council negotiations for several Central and Eastern European countries. In a non-paper of December 2020, they argued that greater flexibility is needed and stressed that any relocations or admissions must remain voluntary. They also called for a wide catalogue of possible solidarity contributions that “tak[es] into account their capacities, possibilities and preferences”.<sup>40</sup>

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**It is no surprise that this transfer obligation is controversial.** Should returns fail to be conducted within the prescribed period, Visegrád states would be mandated to transfer third-country nationals. They would, in addition, be persons whose asylum applications have already been rejected, and whose returns have also proved most challenging. The return sponsorship concept, therefore, compels such states to confront the complexity and costs of policies that they have long advocated for (e.g. large-scale return operations away from Europe). Still, it seems unlikely that they will agree to ‘pay’ this price, nor take responsibility for those migrants whose returns are more complicated.

### 1.3.2. ...or not far-reaching enough?

Conversely, Southern European states will need to be convinced that the new mechanism will provide tangible solidarity and alleviate the pressure and responsibilities that the EU's migration management system attributes to them.

This is also challenging. While they have emphasised their constructive approach to the negotiations, **their reservations about the Pact have been equally voiced.**<sup>41</sup> In the weeks following the Pact's publication, Malta's Home Affairs Minister warned that it “does not go far enough on solidarity”, as relocations would remain “entirely voluntary”.<sup>42</sup> Various Greek ministers demanded that the Pact's solidarity provisions be strengthened, stating that there is “no other option” than a “fair redistribution of [the] burden”.<sup>43</sup>

As the negotiations begin in earnest, these positions are becoming more entrenched. In late November 2020, the leaders of Spain, Italy, Greece and Malta issued a joint letter rejecting the “imbalances” between responsibility and solidarity in the proposals.<sup>44</sup> In their view, the solidarity proposal is “complex and vague”, and “mandatory relocation should remain [...] the main solidarity tool” within Europe. They also ask for further safeguards in the implementation of return sponsorships in practice.<sup>45</sup> In addition, several Southern European states are reportedly asking to shorten the 8-month deadline for the transfer of responsibilities.

Certainly, these positions are volatile and only indicate the direction of the negotiations to come. Nevertheless, it is fair to assume that Southern European states' support will depend on the form and extent of the Pact's solidarity requirements. Among others, they can be expected to seek to improve the predictability of responsibility-sharing systems, including retaining or even reinforcing the requirement to transfer migrants who cannot be returned.

## 2. The key challenges of return sponsorships

The proposal will, naturally, change substantially over the course of negotiations. However, several practical obstacles that will need to be resolved to secure its functioning can already be identified.

This section analyses **three questions that will be central to interinstitutional negotiations and the proposal's future success**. First, can return sponsorships provide tangible and predictable solidarity, given the flexibility embedded in the concept? Second, is the return sponsorship mechanism well-suited to respond to the complexities and risks inherent in return procedures, notably regarding the safeguarding of migrants' rights? Third, is its core objective of conducting swift returns achievable? Cross-cutting all these questions is the overarching issue: Can and will this concept work?

### 2.1. CAN RETURN SPONSORSHIPS PROVIDE TANGIBLE SOLIDARITY TO EU BORDER STATES?

A critical question for the concept of return sponsorship is whether it can sufficiently support member states on the EU's border, which face greater migratory pressure. This section examines the trade-offs between flexibility and predictability in the Commission's proposal, and the likely effectiveness of the Commission's effort to match the 'supply and demand' of solidarity contributions to ensure tangible support.

#### 2.1.1. Leaning towards flexibility

The Commission's proposed model for responsibility-sharing introduces various forms of flexibility in how contributors can express solidarity. This flexibility may come at the expense of predictable and tangible outcomes for states facing migratory pressure. Both responsible Commissioners have emphasised that there would not be mandatory relocation quotas for asylum seekers at any point: return sponsorship would always remain an option, and states may choose which nationalities they want to 'sponsor' within this concept.<sup>46</sup>

This raises the question of whether such a degree of flexibility can be provided without undermining the overall system's balanced and fair functioning. It is still unclear how each member state will choose to contribute, or what the exact needs will be in practice. However, experience suggests a limited political will to contribute to relocations at the scale of actual needs. Two voluntary, ad hoc relocation mechanisms have been established in recent years: the Malta Declaration of September 2019, aimed at asylum seekers rescued at sea and disembarking in Malta or Italy;<sup>47</sup> and the Commission's scheme to voluntarily distribute unaccompanied children from overcrowded camps in the Greek islands from March 2020 onwards.<sup>48</sup> While they have provided valuable support to many asylum seekers in need and states under pressure, both of these schemes

have failed to secure the support of more than a handful of member states, and this after considerable pressure and delays.<sup>49</sup>

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Compared with relocations, return sponsorships may be more attractive to member states as they will only lead to a delayed or no transfer of migrants to their territories. There is a risk, therefore, that member states will disproportionately favour contributing through returns, even if it is not the most needed or appropriate method of alleviating pressure in a certain case. This may lead to certain policy areas being under- or overfunded across the board.<sup>50</sup> Moreover, the introduction of returns as an option for solidarity risks shifting the priorities of member states that participate in existing ad hoc relocation schemes. It may weaken the (modest) momentum that has been achieved for intra-EU relocations.

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**There is a risk that member states will disproportionately favour contributing through returns.**

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The flexibility afforded to states to choose the nationalities whose returns they wish to sponsor is also sensitive. Certain states in the EU's eastern and south-eastern neighbourhood are known to willingly facilitate the readmission of their nationals from Europe (e.g. Albania, Serbia, Ukraine, Russia, Georgia). Other countries of origin have low rates of effective returns (e.g. Mali, Guinea, Syria, Afghanistan, Bangladesh, Algeria).<sup>51</sup> EU member states may consider it rational to opt for nationalities that are known to be returned more straightforwardly. Questions as to **how this 'competition' for sponsoring certain nationalities will be determined**, and who will remain responsible for those *not* chosen, are left open.

#### 2.1.2. Sponsors' diverging capacities to contribute

When preparing the New Pact, the Commission drafted a matrix to see which member states could sponsor which nationalities.<sup>52</sup> It found that **almost all member**

states could contribute to the returns of some key nationalities, based on returns they had already successfully conducted in the past. On this basis, Commission officials argue that the proposal could circumvent the concerns raised above.

However, this argument is optimistic. Firstly, even if almost all states do have some diplomatic links to countries of migrants' origin, **some have far stronger bilateral relations than others**. Over 70% of total bilateral readmission agreements concluded between EU and African countries are covered by France, Italy and Spain.<sup>53</sup> This raises questions over whether the EU states most likely to engage in return sponsorships can achieve sufficient returns. Hungary or the Czech Republic, for example, have rates of effective returns that are well below the European average.<sup>54</sup> They do not have particular diplomatic clout nor (historically) close relations with key countries of origin. There are few obvious reasons to assume that they can incentivise third countries to cooperate more on readmission.

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### Can the EU states most likely to engage in return sponsorships achieve sufficient returns?

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Such EU countries with weak diplomatic leverage may seek to contribute through other means (e.g. financial or operational support). Nevertheless, they are poorly placed to address bilateral readmission negotiations or the implementation of EU readmission agreements, which are a key bottleneck to successful returns. The proposal is still open on whether various member states could 'share' an individual's return sponsorship according to their strengths. For example, one state may fund flights or voluntary return and reintegration programmes. Another may lead readmission negotiations. This could provide an answer to certain member states' challenging lack of capacity. However, it would entail a greater need for coordination and may raise additional discussions over which state has the primary responsibility.

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### Member states must put their privileged bilateral relationships under pressure, to return migrants from other EU states.

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Secondly, **whether the EU countries with stronger diplomatic links** with key countries of origin **will be willing to leverage them for a common European**

**objective is still an open question**. Readmission issues tend to affect bilateral relations negatively.<sup>55</sup> Nevertheless, this is a key demand of the return sponsorship concept: member states must put their privileged bilateral relationships under pressure, to return migrants from other EU states. The authors' interviews with EU officials signal the latter's awareness that this issue is sensitive and that the return sponsorship mechanism ought not to lead a member state to compromise its bilateral relations.<sup>56</sup> Lastly, it remains to be seen whether third countries will be receptive to a member state that is their historical partner negotiating on behalf of another state or group of states.

#### 2.1.3. The challenge of mutual trust

In order to function effectively, return sponsorships would rely on and build upon mutual trust between member states. EU border states that would benefit from return sponsorships **may not always prioritise facilitating a 'sponsored' return**. They are aware that they will cease to be responsible for these people after a certain period and may, for example, choose to prioritise returns that are non-sponsored and for which they have permanent responsibility. This may be likely if solidarity contributions fail to ease the pressure on their systems sufficiently.

The opposite is also possible. Even if a benefiting state takes efforts to effectuate a return procedure seriously, sponsoring states may contest this. As the EU border state would still be responsible for the first 8 months, their choices (whether to e.g. offer voluntary return, apply detention) are likely to impact the effectiveness of a return procedure. Sponsoring states **may, therefore, argue that a benefiting state has not exhausted all options or is to blame for the failure to return**, and object to a transfer of responsibilities on this basis.

Lastly, the procedure relies on member states **trusting the merits and safeguards of each other's return decisions and procedures**. As explored in section 2.2.1., this cannot always be expected. EU states still have widely divergent asylum recognition rates and do not share an understanding of what countries are safe for return. Aside from fundamental rights concerns, the return sponsorship mechanism is bound to lead to controversies over states' policies and the blame for bottlenecks.

#### 2.1.4. Matching needs with contributions

Commission officials have stressed that contributions proposed by member states under the solidarity mechanism must be based on the actual needs of states at the EU external border.<sup>57</sup> A state cannot propose a contribution that is not needed.

The proposal also includes **corrective mechanisms**, should the proposed commitments fall short. This involves a Solidarity Forum in which states will be invited to increase or adapt their commitments – although it remains unclear what this will entail precisely and what incentives may be used to enhance states' contributions. A further correction may follow if states

have disproportionately opted for material or operational contributions: the Commission can require them to relocate or return 50% of the share of persons they were allocated.<sup>58</sup> Whereas this corrects (albeit in a limited way) the potential imbalance between operational support and relocations/returns, this does not answer questions over the balance between relocations and returns, nor the precise forms of contributions within return sponsorship.

Making this work in practice is not straightforward. The solidarity mechanism will entail a complicated matching exercise between what benefiting states need and what sponsoring states are willing and able to offer. In the case of return sponsorships, member state authorities will need to liaise closely with each other, on a case-by-case basis, to determine what forms of support towards return would add value and be most appropriate. Both parties could sign, for example, a memorandum of understanding on the relevant forms of support and terms thereof. The EU Return Coordinator would be involved in and help to coordinate this dialogue.

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**The solidarity mechanism will entail a complicated matching exercise between what benefiting states need and what sponsoring states are willing and able to offer. Cooperation-reluctant member states may find many opportunities to undermine the solidarity mechanism.**

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This setup risks descending into **time-consuming, politically sensitive and ad hoc negotiations**, which may fail to provide prompt support for EU border states. Bringing together different interests and resolving conflicts are no small tasks for the Return Coordinator. They are substantial expectations for a position that is yet to be created, and whose level of seniority within the Commission is yet to be determined.<sup>59</sup> This process could imply manifold and prolonged negotiations on (i) the exact support to be offered; and (ii) the implementation of this support. In this context, cooperation-reluctant member states may find many opportunities to undermine the solidarity mechanism and lower their contributions in practice.

### 2.1.5. Solidarity in practice

Two factors further confound **the operationality of return sponsorship**. As it stands, the proposal envisions a strong role for the European Commission in determining when and how the solidarity mechanism would come into play. The Commission grants itself the role of establishing when a member state is confronted with recurring arrivals, migratory pressure, the risk thereof, or crises. Its decisions will be based on a “holistic qualitative assessment” which considers a

broad range of factors, including structural forecasts of anticipated migration flows, which are purposely left vague to retain its flexibility.<sup>60</sup> This discretion also applies when determining how various contributions relate to each other. For example, how many returns equal the financing of a new detention centre?

The degree of flexibility and discretion granted to the Commission complicates predicting how the mechanism will work in practice. The Commission will have to be seen as an honest, trusted and impartial broker among member states.<sup>61</sup> Conversely, if this role is not preserved – if the Commission’s discretionary and coordinating powers do not survive the Council negotiations; a likely outcome, according to some –, the AMR’s solidarity mechanism may come to resemble **the ad hoc bargaining** that has characterised relocation efforts over the past years.<sup>62</sup> Some countries, notably the Visegrád states, have already called for greater involvement of the Council and member states in triggering and implementing the solidarity mechanism.<sup>65</sup>

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**The degree of flexibility and discretion granted to the European Commission complicates predicting how the solidarity mechanism will work in practice.**

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The enforcement of the new solidarity mechanism poses similar questions. **No targeted incentives, sanctions or enforcement tools appear to be envisioned** in case a member state fails to comply with the solidarity mechanism, in its entirety or in part. Instead, the Commission appears to rely on infringement procedures. These tend to be lengthy and may not be enough to secure a state’s compliance. For example, on 2 April 2020, the Court of Justice of the EU ruled against Poland, Hungary and the Czech Republic for failing to take part in the 2015 emergency relocation mechanism. The ruling came almost five years after the original decision and long after the end of the relocation scheme.<sup>64</sup> Its practical effects were limited: the ruling did not change the position of these three states, which have not implemented a single relocation since.

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**The European Commission tends to be hesitant to trigger infringement procedures in politically sensitive areas.**

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Furthermore, the Commission tends to be hesitant to trigger infringement procedures in politically sensitive areas. The solidarity mechanism may create conflicts

of interest that further complicate their use. Given the Commission's reliance on states' willingness to contribute to solidarity efforts voluntarily, such as through the Solidarity Forum, it will likely be hesitant to sour relations by launching infringement procedures over other aspects of the solidarity mechanism. Considering **the significant gaps in the implementation of existing asylum legislation**, there is every risk that the Pact's more politically sensitive proposals may become a dead letter.<sup>65</sup>

#### 2.1.6. A weak insurance scheme for member states at the EU border

The solidarity contributions under the New Pact's proposal, therefore, are expected to be flexible and potentially limited. They may do little to alleviate pressure from states at the EU's border.

All the while, the costs and obligations for countries of first arrival remain substantial, as the key tenets of the Dublin Regulation would remain in place. The responsibility for newly arriving asylum seekers is first and foremost allocated to the first country of entry. Even before a relocation or a return sponsorship process kicks in, host countries are responsible for migrants' pre-entry screening, conducting a preliminary assessment of responsibility, and assessing all asylum applications channelled into the border procedure. They also host and are responsible for conducting sponsored returns during the first 8 months. In addition, border countries bear the entire costs should the system function poorly and bottlenecks build up. Therefore, the proposed solidarity instrument constitutes a poor insurance scheme for countries facing high migratory pressure.<sup>66</sup>

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**The costs and obligations for countries of first arrival remain substantial, as the key tenets of the Dublin Regulation would remain in place.**

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## 2.2. WILL RETURN SPONSORSHIPS INCREASE MIGRANTS' VULNERABILITIES?

The suitability of the Commission's return sponsorship proposal for the complexity and sensitivity of return policy, and its implications for migrants subject to return decisions, merit attention. It asks states to conduct negotiations with third countries on behalf of each other, recognise each other's return decisions, and facilitate return procedures. These objectives raise the question of how migrants will be treated, given the range of actors involved in the procedure. Which state actor should be held accountable when fundamental rights breaches are alleged, and multiple states and/or EU agencies are involved? How should differences in protection standards and processes between member states be dealt with?

### 2.2.1. The division of responsibilities

The return sponsorship concept entails a complex division of responsibilities between benefiting and sponsoring states. Sponsors' level and forms of involvement will vary case by case. Their possible impact on benefiting states' policies and practices is difficult to anticipate. However, two concerns can already be mentioned. They relate to the creation of incentives to shirk responsibilities and of accountability gaps in light of states' divergent practices and protections.

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**The return sponsorship concept entails a complex division of responsibilities between benefiting and sponsoring states. How will migrants be treated, who should be held accountable, and how should differences in protection standards be dealt with?**

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First, this division of responsibilities may **disincentivise host states from resolving a person's legal status** where returns are difficult or unsustainable. Factors such as the best interest of the child, possible family ties, the length of time spent in the country<sup>67</sup> or medical grounds have often led member states to provide migrants with humanitarian leave to remain or other forms of regularised status.<sup>68</sup> Return sponsorships discourage these humane and pragmatic measures. States may simply 'wait out the clock' for migrants to be transferred elsewhere, where they may then remain in an irregular situation.<sup>69</sup>

Second, the blurring of responsibilities can **weaken safeguards and accountability mechanisms for the outcomes of return**. The risks associated with conducting return procedures (particularly when done quickly and in greater numbers) include violations of the principle of non-refoulement. It is critical that responsibility for various aspects of a return procedure can be clearly and distinctly attributed to certain authorities, both legally and politically. Earlier research has highlighted that the outcome of EU return policies is already sometimes difficult to attribute, such as in the context of informal readmission agreements or Frontex involvement in returns.<sup>70</sup> The return sponsorship mechanism may accelerate this trend further.

The question of clear responsibilities concerns most aspects of a return procedure. These include ensuring that there is no risk of abuse or chain (i.e. indirect) refoulement, seeking guarantees of protection from countries of return, establishing effective monitoring or reintegration programmes post-return, or addressing cases where a country of return disputes a migrant's nationality.

It also concerns provisions ensuring that return procedures fully comply with fundamental rights, such as in the context of a disproportionate use of detention, in relation to the protection of sensitive personal data, or the right to an effective judicial remedy. Some countries have a dismal record of (not) protecting migrants' rights; Hungary stands out as an extreme case, but the country is not unique.<sup>71</sup> In October 2020, the European Court of Human Rights condemned Belgium for returning Sudanese nationals in cooperation with Sudanese officials.<sup>72</sup> Belgium faced significant criticism for allowing Sudanese authorities to interview migrants on Belgian soil without interpreters being present. Several of the migrants reportedly suffered abuses from Sudanese authorities upon return. Such incidents are unfortunately not rare; state efforts to accelerate returns carry the risk that they will become more prevalent in the future.

**The involvement of multiple actors in return procedures**, with formal or informal influence at various stages, complicates the definition of clear lines of accountability. It **risks leading to watered-down responsibility, blame-shifting and accountability gaps** over possible human rights violations. As seen in the recent investigations into Frontex's alleged involvement in pushbacks, the shared responsibility between agencies and national authorities over return and border management operations has already complicated efforts to challenge the actors' actions and prevent future malpractice.<sup>73</sup>

These challenges are exacerbated further by the divergent asylum recognition rates and a lack of harmonisation on safe countries for return or on conditions for receiving a regular status. Some divergences have even led several EU states' courts to block Dublin transfers of certain groups of asylum seekers to member states that, in their view, posed a risk of indirect refoulement to unsafe third countries.<sup>74</sup> France, for example, halted transfers of Afghan asylum seekers to states that conduct large numbers of returns to Afghanistan. National courts have also recently blocked transfers on indirect refoulement grounds: from Germany to Greece and Sweden, Belgium to Bulgaria, or most of the EU to Hungary.<sup>75</sup>

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## **EU member states are still far from having mutual trust and practising the mutual recognition of return decisions.**

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In short, EU member states are still far from having mutual trust and practising the mutual recognition of return decisions. Return sponsorships risk making sponsoring states complicit in returns that they would not have carried out themselves and/or to countries they do not consider safe. Safeguards to ensure compliance with non-refoulement obligations will need to be strengthened to limit this risk.

### **2.2.2. Post-transfer protection**

Under return sponsorships, a person issued a return order would typically be transferred to another member state after 8 months if returning to their country of origin or transit is not possible. This raises the question of **how to guarantee their protection and access to rights after a transfer**. Most of them may be unlikely to leave or be returned if returns were impossible in the first 8 months. The likelihood of conducting an effective return diminishes over time: data from several EU member states suggests that if third-country nationals are not returned in the first few weeks, return procedures are unlikely to be successful.<sup>76</sup> Migrants may therefore face a prolonged stay in the state they have been transferred to. This would create a challenging context. Those states with political climates most hostile to migration, and who have opposed EU relocation schemes most vehemently, may be tasked with accepting migrants who are declared to be in a state of irregularity. It also bears noting that vulnerable applicants, including children, are not explicitly exempted from return sponsorships.

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## **Vulnerable applicants, including children, are not explicitly exempted from return sponsorships.**

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More specifically, one challenge relates to **third-country nationals' legal status post-transfer**. After a transfer, sponsoring states could either recognise the first member state's return decision, issue their own, or opt for a different legal status for the transferred person.<sup>77</sup> As noted in the AMR, the articles of the Return Directive (2008/115/EC) will apply in such a case.<sup>78</sup> The return sponsorship proposal does not outline in detail whether it is permitted, for example, to **detain a person a second time following a transfer**. If the time they may have already spent detained in another member state is not explicitly accounted for, the overall period in detention could exceed the limits established in the Return Directive. As the Directive permits detention insofar as there is a "reasonable prospect of removal" and procedures are conducted with due diligence, it is unlikely to be legally justified and proportionate post-transfer in most cases.<sup>79</sup>

If a return procedure from the sponsoring state is also not feasible, national laws will apply. This could lead to the suspension of a return decision, a toleration regime, or pathways to regularisation.<sup>80</sup> There is **very little EU harmonisation of the safeguarding of minimum standards for people who cannot be returned**.<sup>81</sup> The post-transfer situation hence merits close attention. Certain sponsoring states with less developed national systems could pose a risk of inadequate living conditions and situations of protracted irregularity. No EU

initiatives to tackle this legislative gap are currently planned, neither in the New Pact nor the recast of the Return Directive.

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**The post-transfer situation merits close attention, as the likelihood of conducting an effective return diminishes over time. Certain sponsoring states could pose a risk of inadequate living conditions and situations of protracted irregularity.**

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Regardless of the safeguards in place, the practice of transferring returnees from one state to another so they can each try to deport them is questionable. As noted by legal scholar Francesco Maiani, this is far removed from the “human and humane approach” that Commission President Ursula von der Leyen had touted before the New Pact’s launch.<sup>82</sup>

This will raise particular challenges for people who **have not newly arrived but have been in a country irregularly for some years** before being issued a return decision. People intercepted within EU territory and subsequently issued a return order (who e.g. abscond during or after asylum procedures, eluded border controls upon entry, overstay a tourist or resident visa, or otherwise lose their legal status) could also be subjected to return sponsorship.<sup>83</sup> The proposal is not limited to spontaneous arrivals but rather to any “individually identified illegally staying third-country nationals” within the territory of a member state.<sup>84</sup> In these cases, people may have already **developed familial and other close ties, found a residence, learnt the language and/or secured informal employment**. Transferring them to another state where they may face similar situations of protracted irregularity, yet without these support networks, is neither compassionate nor likely to foster positive integration outcomes.

These concerns render the return sponsorship mechanism in the New Pact too blunt a tool to address the complex circumstances of a significant portion of people who are issued return decisions but have weak prospects for return.<sup>85</sup>

### **2.3. WILL THIRD COUNTRIES COOPERATE MORE ON RETURN AND READMISSION?**

Closer cooperation with third countries is at the centre of the Commission’s proposals. In order to function coherently and fulfil its political rationale, the return sponsorship concept relies on returns being conducted in far larger numbers and much more quickly. If this is

not achieved, the issue of migrants’ transfer to other EU member states will become central to the proposal’s functioning in practice. In several interviews with the authors, EU officials stated that **these transfers should remain the exception**.<sup>86</sup> Low returns would also heighten the pressure on countries of first arrival, reignite sensitive discussions on responsibility-sharing in Europe and blame for bottlenecks in EU return systems, and exacerbate questions over the protection and inclusion of migrants with low return prospects.

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**In order to function coherently and fulfil its political rationale, the return sponsorship concept relies on returns being conducted in far larger numbers and much more quickly.**

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Alternatively (or simultaneously), the EU may seek to significantly reduce the number of people arriving in Europe and in need of being returned. The EU has increasingly cooperated with key neighbouring states, such as Libya, to reduce the number of spontaneous arrivals through the Mediterranean Sea. These activities often no longer build upon direct EU presence or extraterritorial EU border operations, working instead through ‘indirect orchestration’ via third-country authorities, thereby “posing new challenges for human rights protection.”<sup>87</sup>

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**It will not be easy for the EU to increase the number of effectuated returns significantly.**

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In any event, it will not be easy for the EU to increase the number of effectuated returns significantly. As highlighted above, in 2019, the number of returns carried out was less than a third of the total issued return orders. This figure has consistently ranged between 30% to 40% in recent years.<sup>88</sup> Increasing returns beyond current levels is far from simple. For instance, the return of many migrants with an order to leave risks compromising **the principle of non-refoulement**. EU member states have issued many return decisions for nationals of countries that struggle with insecurity and conflict, including Afghanistan, Mali and Iraq. EU member states often cite the existence of safe areas within these countries as an argument as to why returns are possible. However, this argument has been contested.<sup>89</sup> Returns to these states, or states like Turkey that pose a risk of indirect (or secondary) refoulement, have faced several legal challenges across the EU.<sup>90</sup>

A further challenge to the Commission's objective is **securing closer readmission cooperation from non-EU countries**. Countries of origin tend to benefit from the remittances sent by citizens who managed to migrate to Europe or elsewhere, even when they reside in irregular situations and/or work in the informal economy. Close cooperation with the EU on return issues is therefore often perceived by countries of origin to contradict – even betray – their populations' interest and can carry high political costs.<sup>91</sup> For example, public backlash pushed Mali to withdraw from an agreement with the EU in 2016. More generally, it often leads third states to refuse to sign formal readmission agreements with the Union.<sup>92</sup> Readmission can also be costly due to the structural and institutional reforms needed to implement formalised agreements or (re)integrate returnees.

In the New Pact, the Commission proposes strengthening third countries' cooperation by having **stronger incentives and more negative conditionality**. Member states are likely to follow the Commission's proposal to expand the EU's toolbox. They may agree to introduce a special clause on the possibility of sanctioning non-cooperative behaviour, as proposed in the AMR proposal, and may endorse the calls for comprehensive partnerships with third countries.<sup>93</sup> However, some hesitance in operationalising such tools is to be expected. This section discusses whether (i) such an approach can deliver the Commission's heightened expectations; and (ii) member states will be willing to implement it in practice.

### 2.3.1. The effectiveness of conditionalities

First, the effectiveness of using conditionality to increase readmission cooperation cannot be taken for granted. On the one hand, regarding negative conditionality, the Commission conducted an impact assessment in 2018 alongside the revised Visa Code, which further legalised the conditionality link between readmission cooperation and visa benefits. The Commission concluded that "there is **no hard evidence** on how visa leverage can translate into better cooperation of third countries on readmission", besides limited "anecdotal experience".<sup>94</sup>

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**The effectiveness of using conditionality to increase readmission cooperation cannot be taken for granted.**

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Bangladesh and Côte d'Ivoire are two countries often referred to by proponents of a punchier EU approach. The threat of visa restrictions seemingly led to their acceptance of readmission arrangements in September 2017 and July 2018, respectively.<sup>95</sup> However, in the Bangladeshi case, the return rate has only fallen further since, whereas it has barely increased for Côte d'Ivoire.<sup>96</sup> While readmission cooperation is influenced

by a complex range of factors, ranging from the state of overall bilateral relations to shifts in competing domestic priorities, the cases highlight the need to examine carefully whether negative conditionalities are indeed effective.

Conversely, regarding positive conditionality, a successful example is **the Western Balkans**. All countries from this region (barring Kosovo) were offered visa-free travel to Europe in exchange for close cooperation on readmission and other areas. This was a yearlong process, involving an ever-increasing list of EU conditions and close monitoring on the EU's side. Since 2011, the EU has also created a visa suspension mechanism, threatening the reintroduction of visa requirements in case of a lack of cooperation. It was first tailor-made to the Western Balkans but was reformed in 2016 to be applied more widely.<sup>97</sup> The Western Balkans have had very high return rates from the EU, even reaching over 100% in some years (due to backlogs).

However, the Western Balkans constitute a **relatively unique setting**: it is geographically close to the EU and keen to have close political relations (reflected by the EU accession process). Importantly, the EU has also been ready to provide them with strong incentives; not only visa facilitation but full visa-free travel. Geographical proximity, strong incentives and close political relations are factors that will most likely to lead to cooperation on readmission.<sup>98</sup> Transposing this success elsewhere is not straightforward.

### 2.3.2. Having conditionality tools – and using them

Therefore, if conditionality is to overcome third countries' objections to readmission effectively, the EU's offers may need to be substantial. However, it is not certain that member states will be ready to **commit to a strong conditionality** or prioritise readmission cooperation over other relevant policy areas. The political will of member states will largely determine the extent to which conditionality is effectively employed. This willingness has been lacking in the past. Different trade-offs will need to be weighed regarding the use of positive and negative incentives.

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**The political will of member states will largely determine the extent to which conditionality is effectively employed. This willingness has been lacking in the past.**

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Firstly, particularly for positive conditionality, **member states may be unwilling to facilitate visa travel or open up access to their labour market to sufficient degrees**. On the one hand, visa policies are sensitive for member states; they are perceived as a useful tool to prioritise migration from one region over another.

Moreover, several governments face pressures from populist parties and want to avoid being portrayed as lenient on migration issues by opening visa channels to countries associated with irregular migration.<sup>99</sup> The EU has thus far refrained from offering similarly strong incentives to non-European countries as it did to the Western Balkans. In negotiations with Morocco and Tunisia, this led discussions to stall,<sup>100</sup> with readmission and visa facilitation negotiations with Morocco hitting further obstacles in late 2020.<sup>101</sup>

A further substantial incentive concerns labour pathways. The Commission already pushed for creating legal migration quotas in the form of EU Mobility Partnerships in the late 2000s. However, **member states retained the competence over defining national entry quotas and have not yet shown much political will to use these as an incentive.**<sup>102</sup> A case in point is the EU's Mobility Partnership with Morocco, which was signed in 2013.<sup>103</sup> In 2010, 10,416 Moroccan seasonal workers were allowed to enter the EU. By 2016, the number fell to 3,781, despite the Mobility Partnership in place. Member states were unwilling to offer more places.<sup>104</sup> In the coming years, member states will face a difficult economic context and higher unemployment rates due to the COVID-19 pandemic. They may not be willing to increase third-country nationals' access to their labour markets.

Secondly, for negative conditionality, **member states would need to act in unison and prioritise migration-related issues in Europe's foreign policymaking.** EU governments may be reluctant to accept the impositions of visa or economic sanctions against a valued partner only due to missing cooperation on return.

Some EU member states have close socioeconomic and political ties with countries of migrants' origin and transit (often post-colonial). They cooperate closely on a whole range of economic, foreign and security issues (e.g. Spain–Morocco; Italy–Tunisia; France–Mali). For instance, France is leading a wider European effort to fight Islamic terrorism in Sahel states – efforts considered vital to the security of both African and European states. States may be unwilling to jeopardise these broader interests for readmission.<sup>105</sup> At times, EU member states have also gone for bilateral readmission agreements instead of supporting the negotiations of EU readmission ones.<sup>106</sup> This suggests that the appetite for prioritising an EU-wide return ecosystem over individual partnerships may be small.

Representatives of several non-EU countries have already clearly stated their opposition to such an approach.<sup>107</sup> The International Organization for Migration echoes these concerns, urging Europe to “strive for balance between EU priorities such as returns and readmission, and issues that go to the heart of other states' perspectives such as enhanced mobility and legal migration channels.”<sup>108</sup> The Commission's Communication accompanying the New Pact's proposals also acknowledges that readmission cooperation can be “politically sensitive for partners”.<sup>109</sup> This indicates that

the costs of a conditionality approach to a long-term partnership based on mutual trust and shared interests may be considerable.

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### **The costs of a conditionality approach to a long-term partnership based on mutual trust and shared interests may be considerable.**

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More generally, the EU must now also deal with a quickly shifting international landscape. Its policy offers – and demands – are in increasing competition with other global players, notably in the African continent, where Chinese, Russian, American and Middle Eastern actors are investing in and competing for influence. The altering international context may make it more complicated for the EU to engage with negative conditionalities in the return domain and produce further hesitation for member states.<sup>110</sup>

The willingness of certain member states to use – and risk – their close bilateral ties with third countries will be a determining factor of whether the EU (as a whole) manages to realise a more conditionality-driven EU approach on return. Indeed, the Commission acknowledges that the imposition of sanctions must be based on an assessment of the overall interest of the EU, and not just specific to the migration field.<sup>111</sup>

In order to successfully overcome third countries' reluctance to cooperate on readmission, experience suggests that any incentive may have to be substantial, whether positive or negative, given the importance of migration for key countries of origin's political economies. Nevertheless, in Europe, there is a limited political will to offer substantial incentives at such scale. Past experience, including Mobility Partnerships, demonstrates that it is easier to politically create than practically apply conditionalities, as their use comes with considerable trade-offs. Whether the Commission's proposals can fulfil the heightened expectations on the significantly increased scale of returns, therefore, is uncertain.

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### **Past experience demonstrates that it is easier to politically create than practically apply conditionalities, as their use comes with considerable trade-offs.**

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# Conclusions: Towards a more balanced approach?

Negotiations on the New Pact's proposals, including the notion of return sponsorship, are already proving to be **tense and complicated**. The German Council Presidency hoped for an initial broad consensus by the end of 2020, but EU member states have needed more time to decide the key principles which would guide the future reform.

This Discussion Paper draws **five conclusions** from an analysis of the New Pact's return sponsorship concept, to inform future negotiations and analysis on this proposal:

## CONCLUSION 1

The concept of return sponsorship is an instrument deriving from realpolitik thinking, aimed at bridging divides over responsibility-sharing and the EU-wide distribution of migrants. However, **it risks only shifting, rather than ending, these conflicts**. Questions over the precise modes of mandatory solidarity contributions, particularly the requirement to transfer migrants in irregular situations after 8 months, are already proving controversial. The instrument is too far-reaching for some, and too slow and insufficiently committing for others. EU negotiations are likely to remain politicised, even if the focus has changed.

## CONCLUSION 2

The Commission's proposed solidarity mechanism is defined by the flexibility it grants member states to contribute to the overall functioning of a pan-European migration system in tailor-made ways, in line with their preferences. **This flexibility comes at the expense of predictability for EU border states facing migratory pressure**. If accepted, the proposal could provide greater European responsibility-sharing than ensured in the status quo. However, overall, it constitutes a limited corrective mechanism with few enforcement tools. It may thus do little to alleviate the pressure on EU border states.

## CONCLUSION 3

The Commission is looking to ensure that solidarity contributions match states' needs. However, this system is highly administratively complex. It entails, for example, a network of bilateral coordination facilitated by an EU Return Coordinator who will have to smooth tensions and avoid the politicisation of the concept of return sponsorship. This position is yet to be created. **Making this proposal work in practice is no easy task**. Moreover, the systematic process of bilateral coordination and negotiations will provide cooperation-reluctant member states with opportunities to shirk and shift responsibilities.

The solidarity mechanism, notably the return sponsorship concept, may struggle to deliver tangible and predictable results.

## CONCLUSION 4

The return sponsorship mechanism is ill-suited to respond to the human rights risks involved in return procedures. Rather, **it may create new vulnerabilities for migrants ordered to leave**. The concept builds (implicitly) on the assumption that EU member states have common standards regarding the recognition of safe countries of origin, the issuance of return decisions, or the grounds for receiving a regular status. This is not the case. The proposed transfer to a sponsoring state after 8 months requires additional safeguards and particular attention to the situation of migrants unlikely to leave or to be returned. The proposal is silent on their post-transfer protection or prospects, assuming primarily that returns will eventually succeed in all but exceptional cases.

## CONCLUSION 5

**Return sponsorships rely on returns to non-EU countries increasing in an unprecedented manner**. For the last two decades, many third countries have been highly reluctant to readmit their nationals, given the role of migration in their political economies. They may not adapt their behaviour quickly, even if the EU changes its approach. The strategy proposed by the New Pact is to increase the use of conditionality. However, the EU's conditionality approach tends to be successful only in very particular circumstances (notably if a third country is keen to get closer political relations and the EU has strong, positive incentives to offer). These preconditions will be difficult to replicate in many regions. At the same time, it remains to be seen if EU member states will have the political will to employ sanctioning and negative conditionalities. There are tight political and economic trade-offs that member states will need to keep in mind, and that may constrain Europe's options.

If the approach to the external dimension does not change and returns are not stepped up in an unprecedented manner, the internal transfers of returnees within Europe will come to the forefront, gaining more relevance than the Commission currently hopes for. This will also heighten politically sensitive discussions around the internal dimension of the return sponsorship mechanisms and, with them, on responsibility-sharing in Europe more generally – the very challenge the Pact sought to address.

The European Commission is taking a considerable political risk with the proposed solidarity mechanism, and particularly the return sponsorship concept. It is an instrument of high stakes, and potentially only low gains. The stakes are high for EU border countries, whose asylum systems may continue to endure stress; for the discussion on the EU's problem-solving capacity and European solidarity, which may remain politicised; for migrants subject to return decisions, whose protection may prove uncertain; and for countries of migrants' origin, which may see migration become an increasingly determining element of their relations with the Union. Meanwhile, the potential gains are modest. Return sponsorships may not be a game-changer with regard to correcting the disproportionate pressure on countries at the EU's border or enhancing returns to third countries.

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A fair responsibility-sharing mechanism within Europe will need tools other than return sponsorships. This said, the deep divides between member states over the EU-wide distribution of migrants have limited the Commission's room for manoeuvre. If the return sponsorship concept moves forward, negotiators should ensure that the proposal is implementable and effective in practice.

Negotiators should, first, focus on **strengthening the predictability and tangibility of support provided by the solidarity mechanism for the EU's border states**. The return sponsorship concept must be prepared for states' likely low political will to contribute to solidarity efforts. Strengthening the available tools and incentives to enforce solidarity contributions (including within the Solidarity Forum and correction mechanism); further defining the types of contributions that can be considered acceptable; and strengthening the predictability of the mechanism's triggering and implementation would all be conducive to this end.

Second, the proposal should **avoid creating new vulnerabilities for migrants issued return orders**. Certain safeguards will need to be built in to ensure return sponsorships' compatibility with human rights protection. As above, the proposal must also be prepared for the number of returns remaining low, and address migrants' prolonged vulnerabilities following a transfer to a sponsor state. Excluding vulnerable groups from the proposal explicitly, as well as people with established links in the host country (and for whom transfers may not be logical)

would be a step forward. Minimum safeguards following a transfer, coupled with effective monitoring, will also be needed. These include during the return process (e.g. to limit the use of detention, ensure consistent access to services), as well as greater EU harmonisation should return be significantly hampered (such as on prospects for tolerated status or regularisation).

Third, in the meantime, EU institutions and member states should be wary of inflated expectations regarding the likely impact of conditionality on returns. They should **acknowledge the possible costs of conditionality** and, in particular, avoid an over-reliance on negative conditionality. At the same time, transparency about the incentives employed and their concrete impact on return and readmission rates will be paramount so that the public can adequately evaluate its effectiveness.

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**EU institutions and member states should be wary of inflated expectations regarding the likely impact of conditionality on returns.**

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Many details of the return sponsorship concept remain unclear or are to be defined in the inter- and intra-institutional negotiations. Resolving the challenges outlined in this Discussion Paper will be critical to progress in the negotiations, let alone for the success of the New Pact as a coherent and balanced package of proposals.

- <sup>1</sup> European Commission, [A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity](#), 23 September 2020a, Brussels.
- <sup>2</sup> These include a proposal for an Asylum and Migration Management Regulation (AMR); a proposal for a Screening Regulation; an amended proposal for an Asylum Procedures Regulation; an amended proposal for a Eurodac Regulation; a proposal for a Regulation establishing a crisis instrument; a recommendation on an EU mechanism for preparedness and management of crises related to migration; a recommendation on legal pathways to protection in the EU; a recommendation on cooperation among member states concerning private search and rescue operations; and guidance on the implementation of EU rules on the facilitation of unauthorised entry, transit and residence. Initiatives to be presented in the following months include an Action Plan on Integration and Inclusion, a Strategy on the future of Schengen, a Strategy on voluntary returns and reintegration, an operational strategy on returns, an Action Plan against migrant smuggling, as well as a Skills and Talent Package. Earlier proposals carried over from recent years include those for a Qualification Regulation, a recast Reception Conditions Directive, the regulation establishing a European Union Agency for Asylum, a Union Resettlement and Humanitarian Admission Framework Regulation, and the recast Return Directive. The previous proposal for a Dublin IV Regulation was notably withdrawn and replaced with the new AMR.
- <sup>3</sup> E.g. the European Commission's Staff Working Document issued alongside the New Pact describes return sponsorships as the means to "tackle the challenges of migration in a holistic manner", to increase the "willingness to engage in solidarity" and to "improv[e] return efforts" in Europe. European Commission (2020b), [Commission Staff Working Document Accompanying the document 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 \[Asylum and Migration Fund\]](#), SWD(2020) 207 final, Brussels, pp.52, 76. Also, interview with European Commission official, October 2020.
- <sup>4</sup> Comment by Ylva Johansson, European Commissioner for Home Affairs, during "[The New Pact on Migration and Asylum: A fresh start?](#)" online event as part of the Mercator Dialogue on Asylum and Migration project on 13 November 2020, European Policy Centre, Brussels.
- <sup>5</sup> European Commission (2020c), [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, Brussels.
- <sup>6</sup> *Ibid.*, Art.54.
- <sup>7</sup> *Ibid.*, Art.45.
- <sup>8</sup> Concretely, states will first issue solidarity response plans stating how they plan to contribute. If these contributions fall short overall, the European Commission may convene a Solidarity Forum to invite member states to adjust their type of contributions. If, following this, there is a shortfall of over 30% of relocations or return sponsorships required, states that chose to contribute through other measures (e.g. operational support) will have to take responsibility for 50% of their share of either relocations or return sponsorships. *Ibid.*, Arts.52(4), 53(2).
- <sup>9</sup> *Ibid.*, Art.55(4).
- <sup>10</sup> *Ibid.*, Art.52(3).
- <sup>11</sup> *Ibid.*, Art.55(1).
- <sup>12</sup> Interview with European Commission official, October 2020.
- <sup>13</sup> European Commission (2020c), *op.cit.*, Art.55(2).
- <sup>14</sup> *Tagesschau*, "[Wie soll #Europa mit Geflüchteten an seinen Grenzen umgehen?](#)", *Twitter*, 26 October 2020.
- <sup>15</sup> For a discussion on these past policy developments, see Mercator Dialogue on Asylum and Migration (2020), "[2020 MEDAM Assessment Report on Asylum and Migration Policies in Europe](#)", Kiel: Kiel Institute for the World Economy, pp.26-32.
- <sup>16</sup> European Commission (2020c), *op.cit.*, Art.7(1).
- <sup>17</sup> *Tagesschau* (2020), *op.cit.*
- <sup>18</sup> European Commission (2020d), [EU Budget for the Future: The Neighbourhood, Development and International Cooperation Instrument](#), Brussels.
- <sup>19</sup> Aside from tackling skills and labour gaps in the EU, Talent Partnerships are specifically envisioned as "part of the EU's toolbox for engaging partner countries strategically on migration." European Commission (2020e), [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum](#), COM(2020) 609 final, Brussels, p.23.
- <sup>20</sup> See Thym, Daniel, "[European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum](#)", *Immigration and Asylum Law and Policy Blog*, 28 September 2020.
- <sup>21</sup> For an overview of these divisions and their policy implications, see Mercator Dialogue on Asylum and Migration (2020), *op.cit.*, pp.17, 19-21.
- <sup>22</sup> These include the Joint Declaration of Intent (Malta Declaration) of September 2019, by which several member states committed to relocating a share of migrants disembarked in Malta or Italy following search and rescue, or the Commission's scheme to facilitate voluntary relocations of unaccompanied minors from the Greek islands in March 2020. See Carrera, Sergio and Roberto Cortinovis (2019), "[The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism?](#)", Brussels: Centre for European Policy Studies; European Commission, [Migration: Commission takes action to find solutions for unaccompanied migrant children on Greek islands](#), 06 March 2020f, Brussels.
- <sup>23</sup> Neidhardt, Alberto-Horst and Olivia Sundberg Diez (2020), "[The upcoming New Pact on Migration and Asylum: Will it be up to the challenge?](#)", Brussels: European Policy Centre.
- <sup>24</sup> Schinas, Margaritis, [Speech by Vice-President Schinas on the New Pact on Migration and Asylum](#), European Commission, 23 September 2020; Johansson, Ylva, [New Pact on Migration and Asylum](#), European Commission, 23 September 2020.
- <sup>25</sup> See Eurostat, "[Third country nationals returned following an order to leave - annual data \(rounded\)\[migr\\_eirtn\]](#)" (accessed 16 December 2020); Eurostat, "[Third country nationals ordered to leave - annual data \(rounded\)\[migr\\_eiord\]](#)" (accessed 16 December 2020).
- <sup>26</sup> Eurostat, "[First instance decisions on applications by citizenship, age and sex - annual aggregated data \(rounded\)\[migr\\_asydcfstaj\]](#)" (accessed 16 December 2020).
- <sup>27</sup> European Commission (2020b), *op.cit.*, p.29.
- <sup>28</sup> The first-instance recognition rate in 2019 is 38.1% once people benefiting from permission to remain on humanitarian grounds are included (e.g. most Venezuelan applicants in Spain). Moreover, in 2019, 91,030 positive final decisions were issued in the EU following an appeal. The proportion of appeals that end in positive decisions has increased considerably, from consistently under 20% between 2012 and 2016, to consistently over 30% between 2017 and 2019. Overall, the number and percentage of asylum decisions issued in Europe that end in a positive outcome (nearly 300,000 in 2019) is substantially higher than indicated by the Commission's figures.
- <sup>29</sup> Interview with European Commission official, October 2020. See e.g. Council of the European Union (2019), [Policies and Tools to Enhance Readmission Cooperation – Presidency Discussion Paper](#), 13190/19, Brussels.
- <sup>30</sup> European Commission (2020b), *op.cit.*, p.52.
- <sup>31</sup> Zalan, Eszter, "[Commissioner: No one will like new EU migration pact](#)", *EUobserver*, 18 September 2020.
- <sup>32</sup> Comment by Stephan Mayer, Parliamentary State Secretary to the Federal Minister of the Interior, Building and Community of Germany, during "[Online public discussion: Assessing the New Pact on Migration and Asylum](#)" online event on 18 October 2020, Hellenic Foundation for European and Foreign Policy.
- <sup>33</sup> Herszenhorn, David M. and Jacopo Barigazzi, "[EU ministers vow to step up terror fight, but migration deal slips away](#)", *Politico*, 13 November 2020; Eder, Florian, "[POLITICO Brussels Playbook: Disinformation vs. science – Square 1 on migration – Conte hits the slopes](#)", *Politico*, 26 November 2020.
- <sup>34</sup> Nielsen, Nikolaj, "[Solidarity on migration eludes German EU presidency](#)", *EUobserver*, 15 December 2020.
- <sup>35</sup> German Presidency of the Council of the European Union (2020), [Presidency progress report on key elements of a European Migration and Asylum policy and the way forward](#).

- <sup>36</sup> See e.g. Peel, Michael and Sam Fleming, "[Brussels unveils plan to overhaul EU migration policy](#)", *Financial Times*, 23 September 2020; Martín, María, "[El pacto migratorio europeo ignora las pretensiones de España](#)", *El País*, 23 September 2020a; Bandhari, Romit, "[New EU migration pact driven by political compromise, not humanitarianism](#)", *The Conversation*, 25 September 2020.
- <sup>37</sup> Brzozowski, Alexandra, "[In Brussels, Visegrad countries reject the EU's migration plan](#)", *EURACTIV*, 24 September 2020.
- <sup>38</sup> *Euronews*, "[Hungary, Poland and Czech Republic 'oppose EU's new migration pact'](#)", 24 September 2020.
- <sup>39</sup> *Ibid.*; Barigazzi, Jacopo, "[Germany's Horst Seehofer: Yes, we can get a political deal on migration](#)", *Politico*, 08 October 2020; *Daily News Hungary*, "[Orbán: New EU migration pact could force Hungary to welcome migrants](#)", 26 September 2020.
- <sup>40</sup> Polish Presidency of the Visegrád Group (2020), "[New Pact on Migration and Asylum: Joint Position of Poland, Hungary, Slovakia, Czech Republic, Estonia, and Slovenia](#)".
- <sup>41</sup> Martín, María, "[Sánchez asume el control del pacto migratorio para ganar fuerza en Bruselas](#)", *El País*, 28 September 2020b; Masdeu, Jaume, "[España critica el pacto de migración, pero lo acepta como base negociadora](#)", *La Vanguardia*, 25 September 2020.
- <sup>42</sup> Barigazzi (2020), *op.cit.*
- <sup>43</sup> Comment by George Koumoutsakos, Alternate Minister for Migration and Asylum Policy of Greece, during "[Online public discussion: Assessing the New Pact on Migration and Asylum](#)" online event on 18 October 2020, Hellenic Foundation for European and Foreign Policy, *op.cit.*
- <sup>44</sup> Government of Spain (2020), "[New Pact on Migration and Asylum: comments by Greece, Italy, Malta and Spain](#)", Madrid.
- <sup>45</sup> *Ibid.*; Cué, Carlos E. and Bernardo de Miguel, "[España, Italia, Grecia y Malta se unen para rechazar el pacto migratorio de la UE](#)", *El País*, 25 November 2020. Further concerns raised by Southern European member states, including those contained in the joint letter, include the mandatory nature of border procedures, which they argue will create permanent and disproportionate pressure on their asylum systems, are "unrealistic and will not work." Furthermore, they call for "trust-based, equal partnerships" with third countries that include a greater focus on legal channels and a greater focus on positive incentives and commitments to secure cooperation.
- <sup>46</sup> European Commission, "[Vice-President Schinas and Commissioner Johansson on the new pact for Migration and Asylum](#)", *YouTube*, 23 September 2020g; Schinas (2020), *op.cit.*
- <sup>47</sup> See Germany, France, Italy and Malta (2019), "[Joint Declaration of Intent on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism](#)", Valletta.
- <sup>48</sup> European Commission (2020f), *op.cit.*
- <sup>49</sup> Of the over 2,000 relocations which have been conducted from Italy and Malta since January 2019, most appear to have been to France and Germany. Similarly, over half of the 2,000 vulnerable asylum seekers and refugees relocated from Greece in 2020 were transferred to Germany. Whereas 16 member states have so far pledged relocations under this scheme, these came only after substantial delays and often with extremely limited commitments (e.g. Lithuania relocating only 1 unaccompanied minor). See Mercator Dialogue on Asylum and Migration (2020), *op.cit.*, p.19; International Organisation for Migration, "[Voluntary Scheme for the Relocation from Greece to other European Countries](#)", 17 December 2020; European Commission, "[Relocation of unaccompanied children from Greece to Portugal and to Finland – Questions and answers](#)", Brussels, 07 July 2020h; European Commission (2020b), *op.cit.*, p.52.
- <sup>50</sup> See also Neidhardt and Sundberg Diez (2020), *op.cit.*, p.8.
- <sup>51</sup> Mercator Dialogue on Asylum and Migration (2020), *op.cit.*, p.23.
- <sup>52</sup> Interview with European Commission official, October 2020. This matrix is not publicly available.
- <sup>53</sup> Cassarino, Jean-Pierre (2020), "[Readmission, Visa Policy and the 'Return Sponsorship' Puzzle in the New Pact on Migration and Asylum](#)", ADiM Blog, pp.5-6.
- <sup>54</sup> E.g. between 2017 and 2019, the Czech Republic had an effective return rate of 13%. Hungary had a rate of 27%, while also conducting small absolute numbers of returns. See *Eurostat*, "[Third country nationals returned following an order to leave - annual data \(rounded\)\[migr\\_eirtn\]](#)" (accessed 16 December 2020); *Eurostat*, "[Third country nationals ordered to leave - annual data \(rounded\)\[migr\\_eiord\]](#)" (accessed 16 December 2020).
- <sup>55</sup> See e.g. Cassarino, Jean-Pierre (2010a), "[Dealing with unbalanced reciprocities: Cooperation on Readmission and Implications](#)" in Jean-Pierre Cassarino (ed.), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*, Washington DC: Middle East Institute, Ch.1.
- <sup>56</sup> Interviews with European Commission officials, October and November 2020.
- <sup>57</sup> *Ibid.*
- <sup>58</sup> European Commission (2020c), *op.cit.*, Art.53(2). For a detailed discussion on the solidarity mechanism, including its corrected elements, see Maiani, Francesco, "[A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact](#)", *Immigration and Asylum Law and Policy Blog*, 20 October 2020.
- <sup>59</sup> Interview with European Commission official, October 2020.
- <sup>60</sup> European Commission (2020c), *op.cit.*, p.12. See also *ibid.*, p.20 and Art.53(3)-(4).
- <sup>61</sup> Woollard, Catherine, "[The Pact on Migration and Asylum: it's never enough, never, never](#)", *ECRE Weekly Bulletin*, 25 September 2020; Maiani (2020), *op.cit.*
- <sup>62</sup> Vignon, Jérôme and Jean-Louis De Brouwer, "[New Pact on Migration: A balanced proposal to be further enhanced](#)", Jacques Delors Institute, 02 September 2020.
- <sup>63</sup> Polish Presidency of the Visegrád Group (2020), *op.cit.* See also German Presidency of the Council of the European Union (2020), *op.cit.*, p.8.
- <sup>64</sup> Judgment of 2 April 2020, *Commission v Poland, Hungary and the Czech Republic*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257.
- <sup>65</sup> E.g. the prevalence of recent pushback allegations, widely divergent asylum recognition rates across Europe, and sub-standard reception conditions Southern and Eastern Europe.
- <sup>66</sup> Maiani (2020), *op.cit.*
- <sup>67</sup> As explored in section 2.2.2., the return sponsorship mechanism may also apply to migrants who are not newly arrived in Europe and could therefore already have relevant links with the host country.
- <sup>68</sup> Regularisation programmes have been a regular feature of several EU member states over the past decades, including recent schemes in the context of the COVID-19 pandemic (notably in Italy). Individual pathways to regularisation are provided in law in several member states. See European Migration Network (2016), *EMN Synthesis Report for the EMN Focussed Study 2016. The Return of Rejected Asylum Seekers: Challenges and Good Practices*, Brussels, p.33; Brick, Kate (2011), "[Regularizations in the European Union: The Contentious Policy Tool](#)", Washington DC: Migration Policy Institute.
- <sup>69</sup> States' grounds for granting regular status vary. As such, individuals that would receive regular status in one EU member state may remain indefinitely irregular in another.
- <sup>70</sup> Sundberg Diez, Olivia (2019), "[Diminishing safeguards, increasing returns: Non-refoulement gaps in the EU return and readmission system](#)", Brussels: European Policy Centre.
- <sup>71</sup> Gil-Bazo, María-Teresa (2017), "[The End of the Right to Asylum in Hungary?](#)", *EDAL Journal*.
- <sup>72</sup> European Court of Human Rights, *MA v Belgium*, Appl. No. 19656/18, ECLI:CE:ECHR:2020:1027JUD001965618, 27 October 2020; Debeuf, Koert, "[Belgium's collaboration with Sudan's secret service: my story](#)", *EUobserver*, 29 October 2020.
- <sup>73</sup> See European Parliament, [MEPs to grill Frontex director on agency's role in pushbacks of asylum-seekers](#), 30 November 2020; Fink, Melanie, "[Why it is so Hard to Hold Frontex Accountable: On Blame-Shifting and an Outdated Remedies System](#)", *EJIL: Talk*, 26 November 2020; Carrera, Sergio and Marco Stefan (2018), "[Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?](#)", Brussels: Centre for European Policy Studies.
- <sup>74</sup> Sundberg Diez (2019), *op.cit.*, p.13.
- <sup>75</sup> European Council on Refugees and Exiles (2019), "[No reason for returns to Afghanistan](#)", Brussels, p.3; Hungarian Helsinki Committee (2018), "[Summary of bans on/stopping of Dublin returns to Hungary – as of 16 May 2018](#)", Budapest; Administrative Court of Munich, Judgment of 17 July 2019, *M 11 S 19.50722 and M 11 S 19.50759*; Administrative Court of Saarland, Judgment of 27 February 2018, *5 L 140/18*; Belgian Council on Alien Law Litigation, Judgment of 11 April 2017, *185279/2017*.

- <sup>76</sup> See e.g. European Parliamentary Research Service (2019), [The proposed Return Directive \(recast\): Substitute Impact Assessment](#), PE 631.727, Brussels, p.115; Commissione Straordinaria per la Tutela e la Promozione dei Diritti Umani (2014), [Rapporto Sui Centri di Identificazione ed Espulsione in Italia \(luglio 2014\)](#); Garante nazionale dei diritti delle persone detenute o private della libertà personale (2019), [Resoconto stenografico Seduta n. 4 di Giovedì 27 giugno 2019: Indagine Conoscitiva In Materia Di Politiche Dell'immigrazione, Diritto D'asilo E Gestione Dei Flussi Migratori](#), Camera dei Deputati.
- <sup>77</sup> Interview with European Commission official, October 2020.
- <sup>78</sup> European Commission (2020c), *op.cit.*, Art.58(5).
- <sup>79</sup> European Parliament and Council of the European Union (2008), [Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals](#), Brussels, Art.15(4).
- <sup>80</sup> Interview with European Commission official, October 2020.
- <sup>81</sup> For an overview of states' practices and EU legislation in this area, see European Migration Network (2016), *op.cit.*, pp.31-34.
- <sup>82</sup> Maiani (2020), *op.cit.*; von der Leyen, Ursula, [State of the Union Address by President von der Leyen at the European Parliament Plenary](#), European Commission, 16 September 2020.
- <sup>83</sup> There are no official figures on the profiles of people issued return orders, or the length of their prior stay in the country. Visa overstayers, for example, are estimated to constitute a significant proportion of the people irregularly in Europe. See Morehouse, Christal and Michael Blomfield (2011), [Irregular Migration in Europe](#), Washington, D.C: Migration Policy Institute.
- <sup>84</sup> European Commission (2020c), *op.cit.* Also interview with European Commission official, December 2020. In addition, the Commission's proposal for a Screening Regulation explicitly highlights its applicability to migrants without authorisation and who are apprehended within the country's territory (except for visa overstayers, who have already been screened). See European Commission (2020i), [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, Brussels, Art.5.
- <sup>85</sup> It is estimated that there are at least 300,000 "non-removable returnees" in Europe per year. See European Commission (2019), [Commission Staff Working Document: Fitness Check on EU Legislation on legal migration {SWD\(2019\) 1056 final}](#), SWD(2019) 1055 final, Brussels, p.85.
- <sup>86</sup> Interviews with European Commission officials, October and November 2020.
- <sup>87</sup> See e.g. Müller, Patrick and Peter Slominski, [Breaking the legal link but not the law? The externalization of EU migration control through orchestration in the Central Mediterranean](#), *Journal of European Public Policy*, 24 April 2020.
- <sup>88</sup> See Eurostat, [Third country nationals returned following an order to leave - annual data \(rounded\)\[migr\\_eirtn\]](#) (accessed 16 December 2020); Eurostat, [Third country nationals ordered to leave - annual data \(rounded\)\[migr\\_eiord\]](#) (accessed 16 December 2020).
- <sup>89</sup> For instance, see the UN Refugee Agency's assessment of the availability of 'Internal Protection Alternatives' in Kabul, UN High Commissioner for Refugees, [Afghanistan: Compilation of Country of Origin Information \(COI\) Relevant for Assessing the Availability of an Internal Flight, Relocation or Protection Alternative \(IFA/IRA/IPA\) to Kabul](#), December 2019.
- <sup>90</sup> This can occur, for example, because EU asylum procedures under the Qualification Directive (2011/95/EU) do not consider all grounds that could amount to refoulement, and because individuals who would face persecution if returned may be refused international protection on procedural or technical grounds. This is the case for a non-trivial proportion of rejected applications. For further detail, see Sundberg Diez (2019), *op.cit.*
- <sup>91</sup> Zanker, Francisca and Judith Altrogge, [Why return from Europe is causing problems for The Gambia](#), *The Conversation*, 18 November 2019.
- <sup>92</sup> For a more detailed overview of these challenges, see Mercator Dialogue on Asylum and Migration (2020), *op.cit.*, Ch.3-4.
- <sup>93</sup> European Commission (2020c), *op.cit.* Art.7.
- <sup>94</sup> European Commission (2018), [Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation \(EC\) No 810/2009 establishing a Community Code on Visas \(Visa Code\)](#), SWD(2018) 77 final, Brussels, p.31.
- <sup>95</sup> Council of the European Union (2019), *op.cit.*, p.6; Peel, Michael, [EU threatens visa curbs over illegal migrant returns](#), *Financial Times*, 14 March 2018.
- <sup>96</sup> In 2017, 11.1% of all nationals from Bangladesh and 2.7% from Côte d'Ivoire who were ordered to leave their host country were returned from the EU27. In 2019, these figures were 8.6% for Bangladesh and 3.4% for Côte d'Ivoire. See Eurostat, [Third country nationals returned following an order to leave - annual data \(rounded\)\[migr\\_eirtn\]](#) (accessed 16 December 2020); Eurostat, [Third country nationals ordered to leave - annual data \(rounded\)\[migr\\_eiord\]](#) (accessed 16 December 2020).
- <sup>97</sup> Another example is Turkey, which agreed to the EU-Turkey Statement in 2016. Moving towards visa-free travel was defined as an incentive for Turkey to accept the return of migrants from Greece. See Trauner, Florian (2017), [The EU Visa Suspension Mechanism](#), Paris: European Union Institute for Security Studies.
- <sup>98</sup> Cassarino, Jean-Pierre (2010b), [Readmission Policy in the European Union](#), PE 425.632, Brussels: European Parliament.
- <sup>99</sup> See Trauner, Florian and Emmanuele Manigrassi (2014), [When Visa-free Travel Becomes Difficult to Achieve and Easy to Lose: The EU Visa Free Dialogues after the EU's Experience with the Western Balkans](#), *European Journal of Migration and Law*, Volume 16, Issue 1, pp.125-145.
- <sup>100</sup> Abderrahim, Tasnim (2019), [A Tale of Two Agreements: EU Migration Cooperation with Morocco and Tunisia](#), Barcelona: European Institute of the Mediterranean.
- <sup>101</sup> See Reuters, [Morocco rebuffs EU request to re-admit third-country migrants](#), 15 December 2020; EURACTIV with AFP, [EU wants to improve migration cooperation with Morocco](#), 2 December 2020.
- <sup>102</sup> Reslow, Natasja (2018), [Making and Implementing Multi-Actor EU External Migration Policy: the Mobility Partnerships](#) in Sergio Carrera, Leonhard Den Hertog, Marion Pamozzon and Droa Kostakopoulou (eds.), *EU External Migration Policies in an era of global mobilities: intersecting policy universes*, Leiden: Brill | Nijhoff.
- <sup>103</sup> Council of the European Union (2013), [Joint declaration establishing a Mobility Partnership between Morocco and the European Union and its Member States](#), 6139/13, Brussels.
- <sup>104</sup> Guild, Elspeth, [Negotiating with Third Countries under the New Pact: Carrots and Sticks?](#), *Immigration and Asylum Law and Policy Blog*, 27 November 2020.
- <sup>105</sup> Cassarino (2020), *op.cit.*, p.4.
- <sup>106</sup> Panizzon, Marion (2012), [Readmission agreements of EU member states: a case for EU subsidiarity or dualism?](#), *Refugee Survey Quarterly*, Volume 31, Issue 4, pp.101-133.
- <sup>107</sup> See e.g. Tadesse Abebe, Tsion and Aimée-Noël Mbiyozo, [Focus on migrant returns threatens AU-EU negotiations](#), Institute for Security Studies Africa, 22 October 2020; Comment by Ambassador Teneng Mba Jaiteh, Head of Mission of The Gambia to the EU, during [Return and readmission after the New Pact](#) online event as part of the Mercator Dialogue on Asylum and Migration project on 21 October 2020, European Policy Centre, Brussels.
- <sup>108</sup> International Organization for Migration, [IOM Welcomes Proposals for a New EU Pact on Migration and Asylum](#), 25 September 2020.
- <sup>109</sup> European Commission (2020e), *op.cit.*, p.17.
- <sup>110</sup> See Mercator Dialogue on Asylum and Migration (2020), *op.cit.*, p.29. di Carlo, Ivano; Elem Eyryce Tepeciklioğlu; Amanda Paul and Yu-Shan Wu (2020), [Eurasia goes to Africa](#), Brussels: European Policy Centre.
- <sup>111</sup> Interview with European Commission official, October 2020.







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