

Effective remedies for asylum-seekers at EU external borders

A new pact on migration and asylum

SUMMARY

The European Union's objectives in the field of external border protection are to safeguard freedom of movement within the Schengen area (an area without internal borders) and to ensure efficient monitoring of people who cross the EU's external borders. To strengthen its external borders and prevent irregular migrants from reaching EU territory, the EU has focused on extending its partnerships with third countries as well as on reinforcing and providing its border agencies with stronger means and powers.

Furthermore, a new pact on migration and asylum, presented in 2020 but still the subject of negotiations between the Council of the EU and the European Parliament, introduces a new set of border procedures as a key 'migration management tool' in the event of the arrival of a large number of asylum applicants from third countries.

When conducting border management and immigration control, states' authorities need to respect international legal requirements that protect the human rights of non-nationals who are subjected to border checks, by providing effective remedies for human rights violations at borders, such as a possibility to lodge an appeal against a decision before a competent, independent and impartial national authority.

At the European and EU level, a range of human rights standards have been developed that regulate the powers of individual states when allowing or refusing entry to irregular immigrants and asylum-seekers and when implementing their expulsion to countries from which they have come or transited on their way.



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Introduction

Effective management of EU external borders is key to improving the security of those living or travelling within the Schengen area. The aim is to facilitate legitimate border crossings; manage migration effectively; improve internal security in the EU and safeguard the principle of free movement of persons. At the same time, border surveillance and border management operations carried out at the EU's external borders must respect international and European human rights and humanitarian law.

The unprecedented [migration flows](#) of 2015 put management of the EU's external borders to the test, with uncontrolled arrivals of migrants and asylum-seekers in the EU eventually leading to the [temporary reintroduction of internal borders](#) between several Member States. To strengthen the external borders and prevent irregular migrants from reaching EU territory, the EU has focused on extending its partnerships with third countries, notably [Turkey](#) and [Libya](#), as well as on reinforcing and providing stronger means and powers for the [European Border and Coast Guard Agency](#) (Frontex), among others.

Some of these EU policies seem to have had an impact on the number of [detected illegal border crossings](#) along the EU's external borders, with a significant fall in numbers in 2017-2020. However, a renewed surge in migrant arrivals is being seen in 2021, especially on the central and western Mediterranean routes, as well as the opening of new routes at the [EU's eastern border](#).

The EU has been much [criticised](#) for prioritising border controls over migrants' human rights and for externalising border controls in cooperation with third countries, leading to grave human rights violations at the borders, including ['pushbacks'](#) and [lack of access to effective remedies](#). Furthermore, a [new pact on migration and asylum](#), presented in 2020, introduces a new set of border procedures and significant changes as regards the **right to an effective remedy** to violations of human rights. It remains to be seen whether inter-institutional negotiations on the pact's proposals will increase the protection of migrants by strengthening Member States' obligations to provide an effective remedy while conducting border proceedings.

Right to an effective remedy in European and EU law

At the European and EU level, a range of human rights standards have been developed regulating the powers of individual states when allowing or refusing irregular immigrants and asylum-seekers' entry into their territory and when implementing their expulsion to countries they have come from or have transited on their way.

European Convention on Human Rights

Article 13 of the [European Convention on Human Rights](#) (ECHR)

'Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

Council of Europe (CoE) [member states](#), including all EU Member States, have an obligation to guarantee everyone within their jurisdiction, within or outside national territory, the rights and freedoms protected by the ECHR. Those rights include the right to life (Article 2), the right not to be subjected to torture or to inhuman or degrading treatment or punishment (Article 3), the protection from slavery and forced labour, including human trafficking (Article 4), the right not to be unlawfully or arbitrarily detained (Article 5), and the right to respect for private and family life (Article 8). Furthermore, [Protocol No 4](#) to the ECHR prohibits the collective expulsion of aliens (Article 4).

Individuals must be able to **obtain a relief at national level for violations of their Convention rights** through mechanisms for lodging administrative and judicial complaints (right to an effective

remedy), while member states need to conduct an effective investigation into allegations submitted. According to the [Guide on Article 13 of ECHR](#), prepared by the European Court of Human Rights (ECtHR), Article 13 requires a domestic remedy before a **competent national authority**, either judicial or non-judicial, which must be **independent** and afford **procedural safeguards** to applicants and be able to deliver a **legally binding, enforceable decision**. The applicants must submit an **'arguable'** claim of violation of a Convention right, meaning that Article 13 has no independent existence, but instead complements other substantive clauses of the ECHR and its protocols. Furthermore, the remedy must be effective, in that it is **sufficient, accessible** and **prompt**.

In its judgment in [M.K. and Others v Poland](#), which concerned applications submitted by Russian nationals, who attempted to cross the border between Poland and Belarus, the ECtHR held that there had been a violation of Article 13 ECHR in conjunction with Article 3 and Article 4 of Protocol No 4. The Court stated that an appeal against a refusal of entry and a further appeal to the administrative courts were not effective remedies within the meaning of the Convention because they did not have an automatic suspensive effect. Furthermore, the Polish government did not indicate any other remedies that might satisfy the criteria under Article 13 of the Convention.

As explained in a [note](#) by the European Union Agency for Fundamental Rights (FRA) and the CoE, an effective remedy based on Article 13 deals with the **substance** of a complaint under ECHR. The effectiveness of a remedy should include the following criteria:

- The remedy must be **effective in practice as well as in law**, meaning it should be accessible and capable of preventing or stopping the alleged violation or providing suitable redress.
- A single remedy or a **combination of remedies** provided under domestic law can satisfy the Article 13 requirement.
- The remedy must include **independent and rigorous scrutiny** by a competent national authority of the complaints made and an **automatic suspensive effect**.¹

As regards [ECtHR case law](#) concerning applications in the area of asylum and migration, ECtHR examines whether effective guarantees exist which would protect applicants against arbitrary, direct or indirect, *refoulement*² to the country from which they have fled. National authorities must examine the substance of any complaint by an individual claiming that his or her removal to another State would expose him or her to a risk of treatment that is contrary to ECHR Articles 2 and 3, and also afford proper reparation. Furthermore, an effective remedy must provide for an automatic suspensive effect in expulsion cases, as confirmed by ECtHR in [Hirsi Jamaa and Others v Italy](#). Individuals must also receive sufficient information concerning their situation to be able to make use of appropriate remedies, to substantiate their complaints. To do this, they generally need to have access to interpreters and legal assistance.

EU law

EU primary law

As set out in a [paper](#) by the European University Institute and the Centre for Judicial Cooperation, the right to an effective remedy has been characterised as a general principle of EU law. It is binding on the EU and on the Member States when they implement Treaty obligations and when they are otherwise acting in an area falling within the scope of EU law. According to Article 19 of the [Treaty on the European Union](#), 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

The EU law standards are enshrined in particular in Article 47 (right to an effective remedy and to a fair trial) and Article 41 (right to good administration) of the [Charter of Fundamental Rights of the European Union](#) (the Charter).

The first subparagraph of Article 47 is based on Article 13 of the ECHR, which ensures the right to an 'effective remedy before a national authority'. The Charter, however, requires that a tribunal carry out the review, whereas Article 13 of the ECHR only requires a review before a national authority.

Article 47 of the [Charter of Fundamental Rights of the European Union](#)

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The second paragraph of Article 47 of the Charter is based on ECHR Article 6, which guarantees the right to a fair trial but only applies to civil and criminal enforcement. Article 6 of the ECHR therefore does not apply to immigration and asylum cases, since they do not involve the determination of a civil right or obligation. Article 47 of the Charter, to the contrary, is applicable both in those cases and in purely administrative law proceedings.

Furthermore, parties may rely on Article 47 of the Charter in case of a violation of any right conferred on them by EU law, and not only in respect of the rights guaranteed by the Charter, whereas Article 13 ECHR is limited to the right guaranteed by the Convention itself.

As further explained by the above-mentioned paper, Article 52 of the Charter also provides that the Charter needs to be interpreted to at least the same level of protection as the relevant right in the ECHR. [Explanatory notes on the Charter](#) confirm this, stressing that **the meaning and scope of the Charter shall be determined not only by reference to the text of the ECHR but also by reference to the case law of the ECtHR.**

On administrative enforcement, Article 41 of the Charter provides for the right to good administration.

Article 41 of the [Charter of Fundamental Rights of the European Union](#)

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 41 binds EU institutions, bodies, offices and agencies, and EU Member States, as a general principle of EU law, when they act within the scope of EU law. This article sometimes overlaps with Article 47, especially in the area of migration and asylum proceedings, as the boundaries between the [administrative and judicial phase](#) in national enforcement systems are not always clear.

EU secondary law

EU secondary legislation specifies the characteristics of the authorities responsible for reviewing complaints and the types of remedies they are permitted to grant against decisions made in the framework of border management and expulsions.

Under Article 14(2) of the [Schengen Borders Code](#) (SBC), entry may only be refused by a substantiated decision stating the precise reasons for the refusal. According to Article 14(3) of the

SBC, Member States must grant third-country nationals the possibility to appeal against a border guard's decision to deny entry. It does specify, however, that complaints against such decisions shall not have a suspensive effect. Third-country nationals shall also be provided with contact points able to provide information regarding representatives competent to act on their behalf. According to recital 36 and Articles 3 and 4, SBC should be applied in accordance with the Member States' obligations as regards relevant Union law, the Charter, international law, access to international protection and *non-refoulement*. Furthermore, according to Recital 7 and Article 7(1), border guards performing their duties must fully respect human dignity.

In accordance with Article 46 of the [Asylum Procedures Directive](#), applicants, including those in a border procedure, must be provided with an effective remedy before a court or tribunal against a decision taken on their application for international protection. The competent court or tribunal examining the request for appeal must do so 'in terms of fact and law'. Member States have to provide a reasonable time limit for the applicant to exercise her/his right to an effective remedy. Applicants shall be allowed, in principle, to remain in the territory of the Member State until the time limit within which they may exercise their right to an effective remedy has expired, and when such a right has been exercised within the time limit, pending the outcome of the remedy.

Member States may provide that the appeal against a decision taken in a border procedure does not suspend the applicant's expulsion. However, this is only allowed if the asylum applicant has the necessary linguistic and legal assistance and at least one week to prepare the request to remain on the territory during the appeal and the grounds of appeal. Moreover, the court or tribunal should examine the negative asylum decision in terms of fact and law in the context of the assessment of this request for suspensive effect.

Third-country nationals who are denied entry and thus face a return decision or an entry ban under Article 13 of the [Return Directive](#) are entitled to an 'effective remedy to appeal against or seek review of decisions related to return' before a 'competent judicial or administrative body composed of members who are impartial and who enjoy safeguards of independence'. Judicial review and automatic suspension of the enforcement of the return decision is not explicitly required under the current directive. However, the European Court of Justice clarified in [Abdida](#), [Gnandi](#), [LM, B](#), and [FMS](#) that a remedy before a judicial authority or an independent authority that can be regarded as a court must be granted and that such a remedy cannot be considered effective if it has no automatic suspensive effects when there are substantial grounds to believe that the person would be subject to the death penalty, torture or inhuman or degrading treatments if removed.

When a third-country national is detained for the purpose of repatriation after having been refused admission at the EU border or being denied permission to stay within the territory of a Member State, additional guarantees apply. In these circumstances, third-country nationals have the right to be notified right away about the potential of pursuing legal action to challenge the detention's legality (Article 15(2) of the Return Directive).

In the context of border management operations carried out by Frontex, its founding regulation sets out a complaints mechanism (Article 111 of the [European Border and Coast Guard Regulation](#)). This procedure allows anyone who has been directly affected by the acts of staff involved in a joint operation (Article 111(2)) to file a complaint if they believe their fundamental rights have been violated. In the case of a registered complaint concerning a team member from a host Member State or from another participating Member State, the home Member State shall ensure appropriate follow-up, including disciplinary measures, referral for the initiation of civil or criminal justice proceedings as necessary, and other measures in accordance with national law (Article 111(7)).

Border procedures in the new pact on migration and asylum

According to the [new pact on migration and asylum](#) proposed by the European Commission in September 2020, border procedures are a key 'migration management tool' in the event of arrival of a large share of asylum applicants from third countries with a [low EU recognition rate](#).

Based on the new [proposal](#) for a screening regulation and the [amended proposal](#) for an asylum procedures regulation, submitted as part of the pact, a new [pre-entry phase](#) would be created, consisting of a screening, starting with preliminary health and vulnerability checks and finishing with the transmission of information to the appropriate authorities. Applicants subject to screening would then be directed to the asylum and return border procedure. People in a pre-entry phase or border procedure would be considered as not having, for legal purposes, entered the Member State territory.

Screening procedure at the EU external border

The Commission asserts that as the **screening procedure** is essentially aimed at information-gathering and 'does not entail any decision affecting the rights of the person concerned, no judicial review is foreseen regarding the outcome of the screening'. As such, it is not covered by the right to an effective remedy under Article 47 of the Charter.

Article 8 of the **proposal for a screening regulation** establishes that the authorities responsible for screening shall provide third-country nationals with information regarding in particular: the scope of the screening and their rights and obligations and all other information relating to the conditions of entry and stay in the EU; the possibility to apply for asylum or for relocation to another EU Member State and access to the personal data collected and processed during the procedure.

In particular, Article 7 of the proposal establishes an obligation for each Member State to set up an 'independent' monitoring mechanism for ensuring respect of fundamental rights during screening, with particular regard to the prevention of arbitrary detention, the need to ensure access to asylum, and due respect for the *non-refoulement* principle.

As presented in a [study](#) commissioned by the European Parliament's Civil Liberties, Justice & Home Affairs Committee (LIBE), the pre-entry screening would serve as a tool for directing newly arrived third-country nationals not fulfilling the entry conditions into one of the following three channels:

- refusal of entry (on the basis of Article 14 SBC);
- return procedure;
- **asylum border procedure**: determining either the inadmissibility of the application or providing for an accelerated examination of its merits, followed by:
 - **return border procedure**, if an application in the context of the asylum border procedure is rejected as inadmissible, unfounded, or manifestly unfounded, or
 - ordinary asylum procedure for examining applications for international protection.

Asylum and return border procedure

To address the limited results of EU efforts in the field of return to date, the European Commission proposes, in the **amended proposal for an asylum procedures regulation**, to merge the asylum and return border procedure into a single process. The aim is to quickly assess asylum requests at the external border that are considered 'abusive' or inadmissible, or that have been lodged by applicants from countries with a low recognition rate, in order to swiftly return those without a right to stay in the EU. During this process, applicants will typically be subjected to significant restrictions of movement (detention) for the duration of the border procedure.

According to the LIBE study, provisions in the amended proposal relevant to access to effective remedy at the external border are:

Combined remedy for asylum and return decisions

The regulation would establish a combined remedy for both asylum and return decisions, and an appeal procedure for both asylum and return decisions would be introduced before the same court or tribunal within the same judicial proceedings and time limits. At the same time, all the legal effects of a return decision would be automatically suspended for as long as the applicant has a right to remain or is allowed to remain in the territory.

Limitation of appeal in certain cases

According to the proposal, Member States should have the option to consider an appeal against a decision that declared an application for refugee status to be inadmissible, when the appellant has been granted subsidiary protection status offering the same rights and benefits as refugee status under EU and national law.

In addition, to improve the effectiveness of procedures at the external border and to ensure effective returns, the proposal could allow for only one level of appeal in relation to decisions taken in the context of the border procedure. Thus, Member States would not be able to offer applicants for protection the possibility to lodge a further appeal against a first appeal decision concerning a rejection decision taken in the asylum border procedure.

Limitations of suspensive effect

According to the proposal, applicants would retain the right to remain on the territory pending the outcome of an appeal. However, it is proposed to extend the exceptions from this rule as compared to the current [Asylum Procedures Directive](#) (Directive 2013/32/EU). There would be no automatic suspensive effect of appeal against decisions rejecting an application as unfounded or manifestly unfounded, if it falls within the accelerated examination procedure or the asylum border procedure, as well as decisions rejecting a subsequent application as unfounded or manifestly unfounded.

European Parliament position

The Parliament has not yet adopted its position on the proposals from the new pact on migration and asylum. However, in its [resolution](#) of 10 February 2021, on the implementation of Article 43 (border procedures) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection, it stressed that automatic refusal of entry, *refoulement* and collective expulsions are prohibited under EU and international law. Parliament furthermore highlighted that Member States have a duty to inform persons of the possibility to apply for asylum if there are indications of protection needs, and that persons subject to a refusal of entry must be given access to an effective remedy, in accordance with EU law and the ECHR. Parliament also called on the European Commission to ensure Member States' compliance with these obligations, including by suspending EU payments in cases of serious deficiencies. The Parliament also noted that, in a border procedure, an appeal against a return decision the enforcement of which may expose the third-country national concerned to a serious risk of *refoulement*, must have a suspensive effect.

Academic and stakeholder views

Several academics and stakeholders have expressed dissatisfaction as regards access to effective remedies available to asylum-seekers during border procedures.

The authors of the LIBE committee study provide a critical assessment of the pact proposals, including on the screening regulation and the asylum procedures regulation. They suggest that clear, independent monitoring methods and follow-up procedures are established in cases of non-compliance with fundamental rights during the screening procedure. This should ensure that an effective remedy for victims of fundamental rights violations is guaranteed in line with Article 13 ECHR and Article 47 of the Charter. They furthermore note that the amended proposal on the asylum procedures regulation does not adequately address practical obstacles that may hinder applicants' access to legal assistance in the specific context of border procedures, as widespread use of detention and strict time limits may render the right to an effective remedy ineffective and prevent access to justice.

In its paper, the [Meijers Committee](#) expresses a number of concerns and recommendations as regards the right to an effective remedy in the amended proposal for an asylum procedures regulation. For example, the Meijers Committee considers that all appeals against first decisions on applications for international protection should have automatic suspensive effect. It also suggests

the proposal should clearly state that an effective remedy in all cases requires the possibility for a court to, at least, order an [injunction](#) with the effect of suspending return.

The European Council on Refugees and Exiles (ECRE) has published an [assessment](#) of the pact proposals for increased or mandatory use of border procedures, in which it criticises significant expansion of the temporal scope of border procedures and subsequent systematic detention of asylum-seekers at the border. According to ECRE, the right to an effective remedy is best served by granting asylum-seekers access to a fair and efficient procedure on the territory, not by prolonging their suffering in conditions that may amount to inhuman and degrading treatment. The ECRE also published [comments](#) on the Commission proposal for a screening regulation and [comments](#) on the amended proposal for an asylum procedures regulation. It claims that there should be an appeal procedure, open to people who are subject to the screening process, who wish to contest the decision on referral. It also addresses specific time limits under which appeals may be lodged, which must meet the standards of reasonableness, and recommends a deletion of a provision that envisages one level of appeal against a decision taken in the context of the border procedure. The paper also addresses the lack of specific provisions on access to free legal assistance in the border procedure, as well as limitations to the suspensive effect of appeal.

MAIN REFERENCES

Diaz Crego M., [Recasting the Return Directive](#), EPRS, European Parliament, March 2021.

Dumbrava C., [Screening of third-country nationals at the EU's external borders](#), EPRS, European Parliament, November 2020.

Orav A., [Common procedure for asylum](#), EPRS, European Parliament, March 2021.

[The European Commission's legislative proposals in the New Pact on Migration and Asylum](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, July 2021.

ENDNOTES

¹ Suspensive effect allows applicants to remain in the territory of a state until the time limit to lodge an appeal has expired, as well as pending the outcome of an appeal.

² Article 33(1) of the [1951 Refugee Convention](#) includes the principle of *non-refoulement*, according to which states are prohibited from 'expel[ling] or return[ing] a refugee in any manner whatsoever to the frontiers of territories, where his[her] life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion'.

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