

Policy Brief

Asylum Reform: What to expect from Germany's EU Council presidency

Lucas Rasche, Policy Fellow

19 May 2020

Although the Covid-19 outbreak has reshuffled Germany's agenda for the upcoming EU Council presidency, a three-point plan by the German government provided new impetus to the discussion about reforming the Common European Asylum System (CEAS). This Policy Brief analyses how Germany's three-point plan, centred on the idea of a border procedure, compares to previous reform proposals and which elements of the plan can move the reform process forward. It concludes by identifying three areas in which the upcoming German Council presidency can adopt a pragmatic approach to forge a compromise in the Council.

#Asylum
#EUPresidency
#FreshStart

Amid efforts to contain the Covid-19 outbreak and its economic fallout, the EU and its member states are still trying to cope with the repercussions of Europe's previous crisis. Ever since the arrival of more than one million asylum seekers in 2015 led the Common European Asylum System (CEAS) to collapse, EU leaders are struggling to establish a fair system of responsibility sharing. In the absence of revised asylum rules, the EU has reverted to a policy predominantly driven by the objective of limiting new arrivals. However successful this approach might have been in terms of helping reduce arrival numbers, it has obvious pitfalls. The disproportionate use of violence against asylum seekers at the border between Greece and Turkey in early March this year and the temporary suspension of Greek asylum rules recently exemplified the limitations of the EU's post-2015 migration toolbox.

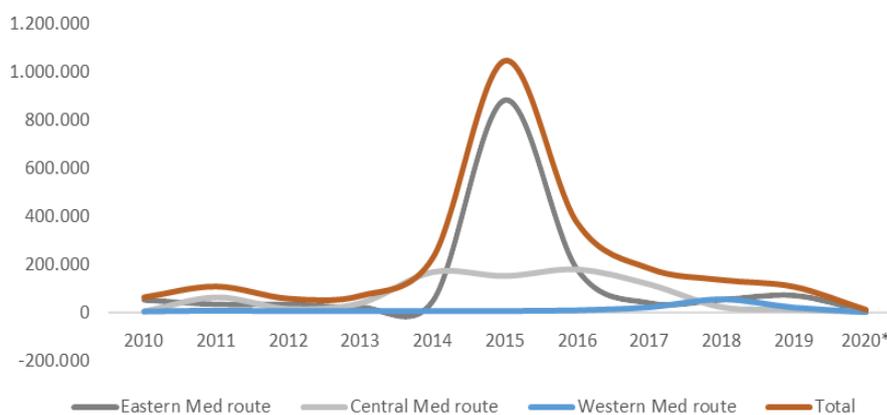
Considering the disproportionate pressure placed on countries of first arrival and major destination countries within the EU, the upcoming German EU Council presidency had initially made reforming the CEAS one of its main priorities. Given that the Covid-19 outbreak has reshuffled the European agenda, there is uncertainty about the role that asylum reform will play under the German EU Council presidency. Even so, a position paper circulated in November last year already started a process of informal negotiations about the idea of establishing a pre-screening of asylum claims at the EU's external borders.

This policy brief first illustrates why reforming the EU’s asylum rules remains necessary five years after the so-called “migration crisis”. It then goes on to analyse how Germany’s three-point plan, centred on the idea of a border procedure, compares to previous reform proposals and which elements of the plan can move the reform process forward. The policy brief concludes by identifying three areas in which the upcoming German Council presidency can adopt a pragmatic approach to forge a compromise in the Council.

1. Why reforming the EU’s asylum rules is urgently needed

Compared to 2015, the number of irregular arrivals has fallen significantly. At the height of the “migration crisis”, more than one million people crossed irregularly into the EU. In 2019, this number had fallen to around 100.000. In fact, the number of irregular border crossings per year has stabilised well under 250.000 already since 2017 (see: chart 1).

Chart 1: Number of irregular border crossings by year & route



Source: European Commission; *data for 2020 until April.

However, an exclusive focus on arrival numbers misses the bigger picture. The EU-Turkey deal – one of the central elements of the EU’s crisis response – is vulnerable to abuse, as the arrival of roughly 15.000 asylum seekers at the border with Greece in early March illustrated. The cooperation with the Libyan Coast Guard has shrunk the humanitarian space in the Mediterranean and has been criticized by human rights groups and politicians alike. Meanwhile, expanding the European Border and Coast Guard’s competences and mandate is met with resistance by some “frontline” member states.

While certain elements of the EU-Turkey deal (e.g. continuous financial support) and a coordinated effort to manage external borders remain valid components of the EU’s migration policy, they do not address the malfunctions at the heart of the CEAS. Two sets of numbers help illustrate why reforming the EU’s asylum rules is as pressing now as it was in 2015.

- i. First, the CEAS still suffers from an imbalanced allocation of asylum applications. The vast divergence between member states is exemplified by the Commission’s hypothetical “fair share” model – which allocates a number of asylum applications to each member state in line with its GDP (50%) and population size (50%). Whereas states like Germany, Greece, Malta, Cyprus, Belgium, Sweden or Austria have (more than) fulfilled their “fair share” in almost every year since 2015, others such as Poland, the Czech Republic, Romania or the Baltic countries are far from meeting their quotas (see: table 1).

- ii. Second, reception facilities on the Greek islands do not provide adequate living conditions nor access to swift asylum procedures. Despite efforts by the Greek government to speed up asylum procedures on the Aegean islands, there was a [backlog](#) of 87.000 first instance decisions and 38.000 appeals at the start of 2020. Roughly 38.000 people are currently living on the Greek islands in camps designed to host no more than 6.000 asylum applicants. Despite the effort by ten EU member states to evacuate some 1,600 unaccompanied minors, these camps remain fundamentally inapt to cope with a possible Covid-19 outbreak.¹

Table 1: Member states' fulfilment of the "fair share" in percentage

EU member states	Fair Share fulfilled by...				
	2015	2016	2017	2018	2019
Austria	333%	164%	171%	102%	84%
Belgium	135%	57%	103%	136%	149%
Bulgaria	179%	179%	60%	45%	34%
Croatia	3%	31%	24%	22%	35%
Cyprus	120%	163%	443%	796%	1245%
Czech Republic	7%	7%	12%	15%	16%
Denmark	106%	33%	31%	37%	25%
Estonia	9%	7%	13%	7%	7%
Finland	188%	35%	56%	55%	49%
France	41%	47%	101%	134%	129%
Germany	197%	318%	169%	153%	124%
Greece	60%	246%	509%	635%	664%
Hungary	996%	174%	35%	8%	5%
Ireland	19%	13%	29%	38%	43%
Italy	55%	84%	322%	81%	54%
Latvia	9%	10%	18%	10%	10%
Lithuania	8%	8%	19%	15%	21%
Luxembourg	81%	72%	147%	146%	124%
Malta	189%	202%	322%	386%	642%
Netherlands	86%	41%	64%	90%	84%
Poland	8%	19%	14%	12%	11%
Portugal	4%	7%	15%	12%	15%
Romania	4%	6%	27%	13%	14%
Slovakia	3%	1%	3%	3%	4%
Slovenia	6%	31%	61%	129%	152%
Spain	14%	15%	62%	100%	195%
Sweden	496%	91%	149%	135%	149%
United Kingdom	20%	21%	35%	43%	44%

Source: Eurostat; author's calculations.

¹ Thus far, Belgium, Bulgaria, France, Croatia, Finland, Germany, Ireland, Portugal, Luxembourg and Lithuania, as well as Switzerland, have pledged to relocate 1,600 unaccompanied minors from the Greek islands.

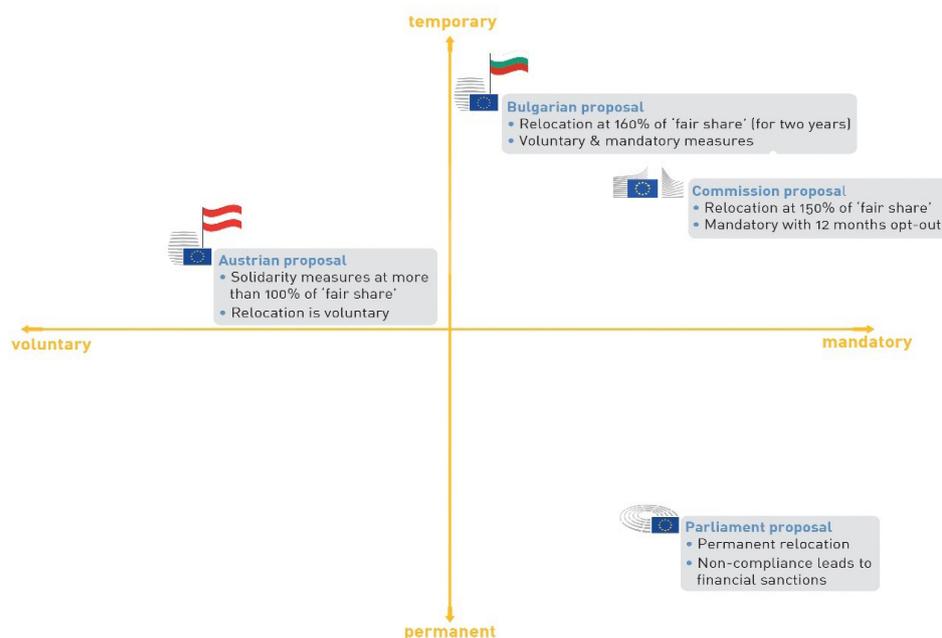
The persistence of this situation has humanitarian and political costs. The lack of a clear operating procedure has hampered member states' efforts to evacuate minors from the Greek islands and will continue to do so in future emergencies. And as long as countries such as Cyprus (1245%), Greece (664%) or Malta (642%) continue to receive substantially more asylum applications than they should do in a "fair" system, any new increase in arrivals – regardless of its magnitude – could end up in another political crisis.

1.2. Revisiting the deadlock

Proposals to revise the Dublin regulation, which allocates the responsibility for asylum processing, have been made by the Commission, the European Parliament, as well as by the Bulgarian and the Austrian EU Council presidencies. To address the member states' uneven responsibilities for providing reception capacities and processing asylum claims, all four proposals have suggested introducing a relocation mechanism for asylum seekers. Yet, the inability of member states to agree on a common position on any of the proposed schemes has paralysed the entire CEAS reform package.² Two points of contention stand out in the negotiations. First, there is disagreement on whether the proposed relocation mechanism should apply permanently, or only at times of large migratory inflows. Second, preferences differ as to whether participation in the relocation of asylum seekers should be mandatory or voluntary.

Chart 2 illustrates where the mentioned reform proposals stand regarding these criteria. Whereas the European Parliament suggests a permanent relocation mechanism, the remaining three proposals advocate a relocation scheme, which only applies once a member state exceeds its "fair share" of asylum applications by a certain percentage (see: chart 3). In case a relocation mechanism is triggered, the Austrian Council presidency's proposal is the only one to date, which advocates for a relocation scheme entirely based on voluntary contributions by the member states.

Chart 2: Previous proposals for a revised Dublin regulation



Source: Rasche, L. (2019), *Relocation Puzzle*. Jacques Delors Centre.

² Whereas a political consensus has been reached between the Commission, the European Parliament and the Council on five legislative files, disagreement on the Dublin regulation and the Asylum Procedures directive undermine the "package approach".

2. Germany's three-point plan for asylum reform

In light of the persisting deadlock in the reform process, the German ministry of interior has circulated a position paper in November last year, which lays the groundwork for its upcoming Council presidency. The paper essentially rests on three ideas: a pre-screening of asylum claims at the border (i), followed by a mandatory relocation scheme (ii) and the permanent responsibility for processing asylum claims (iii). Compared to previous proposals, the German plan combines control-orientated measures with flexibility in an attempt to steer a middle course between opposing groups of member states. Germany's three-point plan can be categorised as opting for a permanent relocation mechanism and although the German government initially preferred a mandatory relocation scheme, it has signalled its consent to a more flexible system of responsibility sharing.

2.1. Border procedures

At the heart of Germany's reform proposal is the idea to introduce a mandatory border procedure. The procedure is supposed to apply at both, the EU's external and internal borders, regardless of the migratory pressure experienced in any given member state. In addition to the obligatory registration to EURODAC and a security screening, the border procedure is to include a preliminary examination of a person's asylum claim. The aim is to filter out applicants whose asylum claims are considered "obviously unfounded" and who would then be rejected entry and immediately returned. Possible categories to be examined include whether a person passed through a safe third country, comes from a safe country of origin or represents a potential threat to public security. For the duration of the procedure, applicants are to be kept in closed facilities.

The proposal has thus far received backing from France, Italy and Spain, which expressed general support to the idea of border procedures in a common [letter](#) to Commissioners Margaritis Schinas and Ylva Johansson. However, Italy and Spain have – together with Greece, Cyprus and Malta – voiced their concern regarding the scope of such pre-screenings and the additional strain this might impose on countries of first arrival. In fact, accelerated procedures, such as those proposed to take place at the border, are often appealed against and can thus delay the asylum process. In a non-paper, these countries therefore [stress](#) that "member states of allocation should be responsible for the examination of the application" including for fast-track applications. Pre-screening asylum applications prior to the applicant's entry into EU territory, as envisioned in Germany's proposal, further resembles ideas of external asylum processing, in which the territorial right to asylum is gradually replaced by a selective resettlement process. While such a model would hardly comply with the human rights obligations enshrined in EU law, it comes [closest](#) to what countries like [Austria](#), Denmark or the Visegrad group have in mind as their preferred reform option.

The idea to introduce border procedures has added a new element to the reform discourse. It reflects the emphasis on control and return policies that have formed the basis for cooperation among member states since 2015. In doing so, it has identified one of the few aspects on which all EU countries agree, thus creating a starting point to take negotiations forward. Yet, the proposal itself mirrors previous debates about fast-track asylum processing and might hence bring familiar problems to the table. Two obstacles must be addressed in this regard. First, the debate in 2018 about so-called "transit centres" at the border between Germany and Austria has highlighted the [legal](#) and operational obstacles of border procedures. Second, similar to the "hotspot" approach in Greece and Italy, border procedures would require confining applicants in closed facilities. This raises questions about their access to legal counselling, adequate reception conditions, sufficient hygiene standards and the maximum duration of their detainment. Re-creating similar conditions to those that can currently be witnessed on the Greek islands should therefore under no circumstances underpin the political ambitions for border procedures.

2.2. Relocation

In a second step, the proposal assigns each applicant who passed the pre-examination to a member state in accordance with a “fair share”. Similar to previous proposals, that share is primarily to be based on a country’s GDP and population size. Other aspects, such as existing family ties or return agreements between the member state and the country of origin, can also feature in the allocation process. The proposal also mentions the possibility of taking migrants’ preferences into account as a positive incentive to prevent secondary movement.

Although the proposal initially mentioned a mandatory quota system, the German government has [signalled](#) its willingness to accept “other measures of solidarity than relocation”. In their letter to the Commission, Germany, France, Spain and Italy also qualified the permanent nature of the proposed relocation mechanism by stating that distribution is needed “in particular when a member state is under disproportionate pressure”. While both points are meant to appease critics of an obligatory distribution scheme, southern member states continue to [insist](#) on a “mandatory system providing for a fair and rapid distribution of asylum seekers” to take place “even without an ongoing crisis”.

The issue of relocation thus remains at the core of disparities between the member states. In its proposal and subsequent communication, the German government has tried carving out a middle ground, offering as much flexibility as necessary while maintaining as much of the proposal’s obligatory character as possible. Yet, as chart 2 shows there is limited room for innovative proposals along these lines that have not already been suggested by other actors. Consequently, Germany’s proposal has thus far done little to alter the frictions that prevent a common position on the relocation puzzle in the Council.

2.3. Permanent responsibility

Third, the proposal sets out that once an asylum seeker is relocated to another member state, that member state should have a permanent responsibility for processing the asylum claim. Access to reception services would equally be restricted to the responsible member state and would be determined in accordance with the country’s general living standard. A transfer of responsibility would thus no longer be possible. These so-called “Dublin transfers”, as they are currently foreseen in case an asylum seeker moves from the responsible member state to a different EU country, hardly work in practice. In 2018, Italy [received](#) 41.911 transfer requests by other member states. Yet, merely 6.351 asylum seekers were eventually [returned](#) to Italy. Similarly, Germany received 25.005 transfer requests that year, but took back only 7.580 asylum seekers.

This lack of implementation largely stems from the fact that member states come up with numerous technical obstacles to delay a transfer. After six months, the existing rules foresee that responsibility for processing an asylum claim automatically shifts from the country of first registration to the member state of residence. That way, many EU countries like Germany, France, Sweden, or the Netherlands, in which migrants either have pre-existing ties or expect better living conditions, end up with more asylum claims than they would initially have to process under the Dublin system. While these member states are consequently in favour of a permanent responsibility, countries of first entry like Italy, Spain, Greece or Malta are wearier of the idea, as they fear an additional burden to their asylum systems.

Table 2: Indication of preferences for Germany's three-point plan by key member states

	Yes	No
Border procedures	France, Germany (potentially also Hungary, Poland, the Czech Republic, Slovakia, Austria, Denmark)	Cyprus, Malta, Greece, Spain, Italy (unless asylum procedures take place after relocation)
Mandatory relocation	Belgium, the Netherlands, Luxembourg, Sweden, Cyprus, Greece, Italy, Malta (indicate openness to more flexibility: Germany, France, Spain, Portugal)	Hungary, Poland, the Czech Republic, Slovakia, Austria, Denmark
Permanent responsibility	Germany, France, Sweden, the Netherlands, Belgium	Cyprus, Malta, Greece, Spain, Italy (unless asylum procedures take place after relocation)

Source: Author's own compilation

The control-orientated measures proposed by Germany mostly speak to the interests of main destination countries in western and northern Europe. In particular the idea of pre-screening asylum applications also bears the potential to win over member states advocating for a more restrictive asylum policy, such as the Visegrad countries (see: table 2). Although countries of first arrival remain sceptical of introducing border procedures, they could consent to a pre-screening process if this is complemented with additional operation and financial support, and crucially with a reliable relocation mechanism.

However, the proposal is unlikely to forge a common position among all 27 EU countries on a mandatory relocation mechanism. Instead, recent developments have indicated a tendency to rely on bi- or multilateral cooperation to organise responsibility sharing. Germany's quest to negotiate return agreements with Spain and Austria in 2018, the declaration by France, Germany, Italy and Malta to distribute asylum seekers rescued at sea in late 2019, as well as the ongoing evacuation of unaccompanied minors from Greece to ten EU member states exemplify this trend and might hence chart possible ways forward.

3. Three take-aways for the German EU Council presidency

The need of addressing the economic and public-health related repercussions of the Covid-19 crisis has added further pressure on the upcoming Council presidency, which had already been tasked with negotiating the EU's next Multiannual Financial Framework (MFF) and the future relationship with the United Kingdom. Respectively, the German government has been trying to lower expectations regarding other items on the agenda, such as the European Green Deal or reforming the CEAS. Indeed, it is unrealistic to expect that the CEAS reform can be concluded in the second half of 2020. Given its role as a key actor in this policy field, Germany should nevertheless attempt to save some of the momentum created by its position paper and work towards a common position in the Council. Three lessons from the previous reform process can provide guidance for a pragmatic approach to the presidency's effort of revising the EU's asylum system.

3.1. Border procedures with clear safeguards

As table 2 indicates, the idea for border procedures has the potential to receive support from western and eastern member states, which are otherwise at odds with each other. To secure

the backing from countries of first arrival, a compromise could be struck on the duration of pre-screening procedures. In order to avoid that a backlog of asylum claims adds further strain on national asylum services, applicants should automatically be relocated to another member state if no decision on the validity of their claim is taken within four weeks. In its recent [judgement](#) on the confinement of asylum seekers in a transit zone at the Serbian-Hungarian border, the Court of Justice of the EU indeed confirmed that “detention may not under any circumstances exceed four weeks”. This benchmark should also be obligatory for a potential border procedure hence avoiding that applicants are stuck in limbo while awaiting their asylum (pre-)decision.

For border procedures to add value to the EU’s asylum and migration policy, it is important to include strong fundamental rights safeguards in the proposal. First and foremost, this includes guaranteeing a fair access to the asylum system and to legal counselling, regardless of the applicant’s chances of receiving international protection. Lessons can also be learned from the debate about “transit centres”, which has shown that any kind of fast-track procedure must not circumvent existing Dublin rules, including the principle of non-refoulement. Given that such pre-screenings are to take place in confined centres, it must further be ensured that applicants benefit from adequate accommodation and reception standards. Integrating UNHCR and the EU’s Asylum Support Office (EASO) in the process to support national asylum services, potentially also in preparing asylum decisions, could help to that end.

3.2. A strong framework for multilateral cooperation

The concept of pre-screening asylum applications at the border only works when such procedures are linked to a stable relocation mechanism, including the participation from all member states. However, given that a mandatory relocation mechanism, as initially foreseen in the German proposal, is unlikely to secure the backing of all member states, the German EU Council presidency should aim to harness the potential of multilateral cooperation. To that end, the presidency should sketch out a flexible but solid framework in which member states and local communities willing to relocate asylum seekers can operate. Such a framework should include three aspects.

- I. First, a distribution key (“fair share”) should not only indicate the number of asylum seekers each member state has to relocate, but also devise an equivalent solidarity contribution for member states refusing to host asylum seekers. Currently, the EU’s Asylum, Migration and Integration Fund (AMIF) pays EUR 6,000 to member states for each relocated person. A similar amount could be deducted from EU funding for each applicant that a member state refuses to relocate.
- II. Second, the presidency should balance such sanctions with strong financial incentives for relocation. Given that it takes five years on average for most asylum seekers to integrate into the local labour market, the EUR 6,000 currently dispersed per relocation should be increased and paid out over a longer period of time. If that amount were doubled for example, relocating the 38,000 asylum seekers estimated by UNHCR to reside on the Greek islands would incur costs of around EUR 456,000. That would be a reasonable amount considering the EUR 10.4 billion earmarked for the AMIF’s successor fund in the next MFF. In order to increase relocation capacities, such funding should be made directly available to communities that are willing to host asylum seekers. This would also create an incentive for communities from structurally weaker regions to participate in the relocation of asylum seekers.
- III. Third, the presidency should devise a standard operating procedure for relocations. The lack of diplomatic channels and the myriad of state actors, EU institutions and UN agencies involved in the process have complicated the evacuation of unaccompanied minors from the Greek islands. Similarly, the absence of a clear relocation process has hampered negotiations to disembark and distribute asylum seekers rescued at sea. The guidelines established through

the Malta declaration can serve as a starting point for such an operating procedure. Using the Temporary Protection directive can also help structuring a relocation process outside the Dublin rules.¹

3.3. Cooperate closely with the Commission

Initially scheduled for March this year, the Commission is expected to present its “new pact” for the EU’s asylum and migration policy in the coming weeks. Following their tour to national capitals, Commissioners Schinas and Johansson have [indicated](#) that the two most controversial items of the seven CEAS files – the Dublin regulation and the Asylum Procedures directive – will undergo a redrafting process. A mandatory relocation mechanism is thereby no longer expected to be part of the Commission’s Dublin proposal. In an [interview](#) with *Deutsche Welle*, Commissioner Johansson has instead referred to the idea of mandatory solidarity, based on flexible contributions by the member states.

To avoid further delaying the reform process, the Commission’s “new pact” should ideally refer to elements within the German proposal. While this could well be the case with regard to the idea of border procedures, the issue of relocation demands further coordination. Here, the Commission’s mandate to devise a proposal including all member states should not become a pretext for watering down ambitions for a more effective system of responsibility sharing. Instead, the Commission and the presidency should work towards facilitating the incorporation of local communities into the relocation process by making direct payments available in the next MFF.

4. Conclusion

Moving towards a partial compromise in the Council should remain Germany’s objective for the upcoming Council presidency. With regard to the trajectory of EU asylum policies since 2015, a consensus appears most likely on the control-orientated elements of Germany’s proposal, such as the permanent responsibility for asylum processes and the idea to establish border procedures. Yet, in particular a potential pre-screening of asylum claims must be complemented with strong fundamental rights safeguards. On the contrary, it is unrealistic to expect a consensus on the issue of relocation. Similar to previous reform proposals, Germany’s three-point plan has little to offer for bridging the divides between member states. A pragmatic way forward would therefore be to establish solid financial incentives and a clear operating procedure for a coalition of both, member states and local communities, willing to participate in responsibility sharing exercises.

¹ See: forthcoming publication by Marie Walter-Franke for a detailed analysis of the Temporary Protection Directive.