



Challenges in the Implementation of the New Pact on Migration and Asylum in National Contexts: The Case of Spain

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1 Introduction

The Schengen Area is the largest area of freedom, security, and justice in the world¹. By eradicating internal borders, the EU created a mechanism of open mobility based on cooperation, mutual trust, and shared responsibilities, reinforcing the core values of freedom and integration that founded the Union. However, due to mass arrivals of migrants and lack of proper government response, the system has been deteriorating, leading to its stall in 2015.

With high public and mediatic pressure, the refugee crisis, Brexit, and COVID-19, the European common space became jeopardized, resulting in the collapse of the established migration system. To counter the weaknesses of the Common European Asylum System (CEAS), in 2024, the Commission adopted the New Pact on Migration and Asylum as a way to evenly balance the migratory pressures throughout the members and strengthen border control.

Nonetheless, the promise of the so-called “European Solution”² seems to remain theoretical. The implementation of the reformed instruments has shown that the pact falls short³ in addressing the pre-existent legal and operational challenges and has raised new humanitarian concerns, creating a handicap in an already pressured system. As a migratory hotspot and a pivotal entry area, Spain is on the frontline of the European crisis, presenting us with a key case study for understanding the challenges of implementing the New Pact.

The present report will assess how the implementation of the New Pact on Migration and Asylum, at national level, may diminish the protection of fundamental rights, focusing on the Spanish reality. Furthermore, it will analyze how the Screening Regulation and the Solidarity Mechanism may reinforce existent grievances and create new challenges for migrants and asylum seekers.

¹European Commission, ‘Schengen area’ (*Migration and Home Affairs*) https://home-affairs.ec.europa.eu/policies/schengen/schengen-area_en Accessed 18 April 2025.

²European Commission, “Statement by President von der Leyen at the joint press conference with President Metsola and Belgian Prime Minister De Croo on the adoption of the Pact on Migration and Asylum” (*Press release*, 10 April 2024) https://ec.europa.eu/commission/presscorner/detail/en/statement_24_1953 Accessed 18 April 2025.

³Steve Peers, ‘The new EU asylum laws: taking rights half-seriously’ *Yearbook of European Law*, Volume 43, 2024, 113–183, <https://doi.org/10.1093/yel/yeae003>. Accessed 18 April 2025.

2 The New Pact on Migration and Asylum: Context and the Relevance of the Spanish Case Study

Migration governance has been one of the most persistent and contentious challenges faced by the EU in recent decades.⁴ The migration crises of 2015 and 2021 exposed deep structural flaws in the CEAS, particularly the lack of coordinated procedures, unequal burden-sharing among Member States, and rising political tensions within the bloc.⁵ In response, the European Commission introduced the New Pact on Migration and Asylum in September 2020, aiming to create a more efficient, fair, and integrated approach to asylum and migration management.⁶ Among the key components of this reform are the Screening Regulation⁷ and the Solidarity Mechanism, both designed to address long-standing issues at the EU's external borders and to rebalance the responsibilities of Member States. These instruments reflect an effort to streamline procedures, enhance border control, and ensure fairer distribution of responsibilities across the Union.⁸

This section will first examine the relevance of the Screening Regulation within the broader context of the New Pact on Migration and Asylum, followed by an analysis of the Solidarity Mechanism and its intended role in addressing the uneven distribution of responsibilities among EU Member States. After outlining these two key instruments, the focus will shift to the Spanish case study, highlighting why Spain represents a particularly important case study for assessing the practical challenges of implementing the Pact. The Screening Regulation was introduced to address a critical gap identified during earlier migration waves: the absence of a common and mandatory procedure to handle the initial arrival of migrants at EU external borders.⁹ This process includes identity checks,

⁴Lorenz Tripp, “Towards a new EU migration and asylum policy – where are we now?”, in *Migration policy and the EU*, Journal no. 2/2023, 26, available at https://www.eca.europa.eu/ECAPublications/JOURNAL-2023-02/JOURNAL-2023-02_EN.pdf Accessed 18 April 2025.

⁵Camilla Lombardo, *Harmonization of EU Asylum Policy: the 2015 refugee crisis and the New Pact on Migration and Asylum*, (LUISS 2025) 60, https://tesi.luiss.it/35923/1/645472_LOMBARDO_CAMILLA.pdf Accessed 18 April 2025.

⁶European Commission, ‘A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity’ (23 September 2020) *Press Corner*. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706 Accessed 18 April 2025.

⁷Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the 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.

⁸PICUM, *Analysis of the Screening Regulation*, (PICUM, October 2024), <https://picum.org/wp-content/uploads/2024/11/Analysis-Screening-Regulation.pdf> Accessed 18 April 2025

⁹Sergio Carrera and Andrew Geddes, *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees*, International Experiences on Containment and Mobility and their Impacts on Trust and Rights <https://www.asileproject.eu/wp-content/uploads/2021/03/EU-pact-migration-asylum-global-compact-refugees.pdf> Accessed 18 April 2025.

health and security assessments, fingerprinting, and a decision on the appropriate follow-up procedure (such as asylum or return).¹⁰

While the regulation is framed as a technical and administrative tool, it has raised substantial human rights concerns. One of the main issues lies in the fiction of non-entry: during the screening process, migrants are considered as not having formally entered the EU, even though they are physically present on its territory.¹¹ This legal fiction allows Member States to hold individuals in designated facilities without formally recognizing their presence, effectively enabling *de facto detention* outside the usual legal safeguards associated with deprivation of liberty.¹² Although the screening aims to enhance security and efficiency, its application may exacerbate existing problems related to arbitrary detention and lack of access to legal remedies¹³ – issues that are particularly acute in high-pressure border areas, such as Spain.

The other central pillar of the New Pact is the Solidarity Mechanism, designed to alleviate the disproportionate pressure faced by frontline Member States like Spain, Italy, and Greece.¹⁴ Under this system, Member States are expected to contribute in various ways – through relocation of asylum seekers, financial support, or operational assistance – according to their capacity and preferences. This flexible and voluntary model represents a political compromise after years of failed attempts to impose binding quotas.¹⁵ However, its flexible nature (solidarity mechanisms are mandatory, however, its nature and implementation is variable) has raised doubts about its real impact.¹⁶ In countries

¹⁰ETIAS.COM, EU Parliament Approves Revamped Migration System Ahead of Elections, (*Webpage ETIAS.COM*), <https://etias.com/articles/eu-parliament-migration-asylum-reform> Accessed 18 April 2025.

¹¹European Parliament, *Legal fiction of non-entry in EU asylum policy*, European Parliamentary Research Service, March 2024, available at [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2024\)760347](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)760347) Accessed 18 April 2025.

¹²Ulrike Brandl, ‘Mix and Match. Detention, “De-Facto Detention” or just Restrictions of Freedom of Movement in the New Pact’, (*EU Migration Law Blog*, 14 October 2024) <https://eumigrationlawblog.eu/mix-and-match-detention-de-facto-detention-or-just-restrictions-of-freedom-of-movement-in-the-new-pact/> Accessed 18 April 2025.

¹³Micaela Del Monte and Anita Orav, *Solidarity in EU asylum policy*, (European Parliamentary Research Service, March 2024), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649344/EPRS_BRI\(2020\)649344_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649344/EPRS_BRI(2020)649344_EN.pdf) Accessed 18 April 2025.

¹⁴European Court of Auditors, *Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results*, (Special Report European Court of Auditors, 2019) 5-11. https://www.eca.europa.eu/Lists/ECADocuments/SR19_24/SR_Migration_management_EN.pdf Accessed 18 April 2025.

¹⁵Anja Radjenovic, *Reforming asylum and migration management*, (European Parliamentary Research Service, October 2020) 1-8. https://www.europarl.europa.eu/cmsdata/226384/Briefing_Reforming_asylum_migration_management.pdf Accessed 18 April 2025.

¹⁶Philippe De Bruycker, *The New European Solidarity Mechanism: Towards a Fair Sharing of Responsibility between Member States?* (Policy Study - Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre, September 2024) 5-22. <https://library.fes.de/pdf-files/bueros/bruessel/21419.pdf> Accessed 18 April 2025.

experiencing constant and high migratory pressure, such as Spain, the absence of binding commitments may mean that solidarity remains more of a political aspiration than a practical solution.

Spain offers a particularly important lens through which to examine the implementation challenges of the New Pact. As one of the EU's primary entry points for migrants – especially via the Western Mediterranean and the Canary Islands – Spain has seen a significant rise in arrivals in recent years. In 2023 alone, more than 50,000 migrants arrived in Spanish territory, with substantial increases in the Canary Islands and the autonomous cities of Ceuta and Melilla.¹⁷

Furthermore, the complex nature of Spain's external borders—particularly Ceuta and Melilla, which are the only EU land borders with Africa – adds another layer of difficulty.¹⁸ These regions have witnessed repeated instances of controversial border practices, including pushbacks and summary returns, which have attracted criticism from human rights organizations and the European Court of Human Rights. In this context, the implementation of the Screening Regulation runs the risk of further entrenching problematic practices, such as arbitrary detention and lack of access to asylum procedures.

Spain's case also illustrates how domestic practices, and administrative capacity can shape (and at times undermine) the effectiveness of EU-wide regulations. In theory, the New Pact aims to harmonize migration procedures across Member States; in practice, the diversity of national systems and political contexts leads to significant discrepancies. In Spain, challenges such as limited reception infrastructure, under-resourced border personnel, and political pressure to reduce irregular migration can undermine the consistent application of EU standards.

The Spanish case study highlights the broader risks inherent in the New Pact's approach. While the Pact aspires to improve coordination and solidarity, its implementation is highly dependent on national conditions. The Screening Regulation, while offering a structured entry procedure, introduces legal ambiguities and risks of rights violations if not properly monitored. Similarly, the Solidarity Mechanism may fall short of its goals unless Member States make tangible commitments to redistribute responsibility more fairly. Ultimately, examining the Spanish context sheds light on the gap between EU-level policy design and on-the-ground realities. As long as frontline states continue

¹⁷Thomas Perroteau, 'Migrant Arrivals In Spain Nearly Doubled In 2023', (*Barron's News*, Jan 2024) <https://www.barrons.com/news/migrant-arrivals-in-spain-nearly-doubled-in-2023-ac74196a> Accessed 18 April 2025.

¹⁸Yanuar Rahmadan, 'Regulating European Union's Border in Africa: The Practice of Semi-permeable Border in Ceuta and Melilla', *Nation State Journal of International Studies* 7(1):14-28, June 2024, available at https://www.researchgate.net/publication/381662525_Regulating_European_Union's_Border_in_Africa_The_Practice_of_Semi-permeable_Border_in_Ceuta_and_Melilla Accessed 18 April 2025.

to face disproportionate burdens, and as long as key aspects of the Pact remain non-binding or inadequately resourced, the vision of a fair and unified European asylum system will remain elusive.

2.1 Screening Regulation: *De facto* Detention?

The Screening Regulation has, as previously mentioned, the main purpose of strengthening the controlling mechanisms¹⁹ of every person arriving irregularly at the EU and Schengen area. The process established by this Regulation is not entirely new²⁰, normalizing the hotspot approach and transforming the process of confinement of third country nationals at the border a standard feature²¹

However, this procedure is combined of several steps which entail a strong balance between two (apparently opposing) needs: individual vulnerability assessment and deprivation of liberty and delay on access to rights to those undergoing the screening procedure. According to the Regulation, member states need to ensure that those persons “remain available to the authorities responsible for carrying out the screening [...] for the duration of the screening”²². This provision does not entail detention, which is reinforced by the fact that it does not prescribe automatic detention during these border procedures²³. Moreover, the jurisprudence of Human Rights Committee also points out that unauthorized entry by migrants does not, by itself, justify detention²⁴.

This demand may lead to what several commentators and NGO’s²⁵ have highlighted as *de facto* detention. This means that people are deprived of their liberty without it being formally recognized as such, without being subject to proper due process and carried out in places not formally recognized for

¹⁹European Council on Refugees and Exiles, ‘Screening Out Rights? Delays, Detention, Data Concerns and The Eu’s Proposal for a Pre-Entry Screening Process’ (*Policy Note #30, 2020*). 1.

²⁰Lyra Jakuleviciene, ‘Re-decoration of existing practices? Proposed screening procedures at the EU external borders’ (*EU Migration Law Blog, 2020*) <<https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/>> Accessed 18 April 2025

²¹Marco Gerbaudo, ‘The European Commission’s Instrumentalization Strategy: Normalising Border Procedures and De Facto Detention’ (2022)7. *European Papers*, 615-626. pp. 618-619.

²²Article 6 of European Parliament and Council Regulation (EU) 2024/1356 of 14 May 2024 introducing the 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 [2024] OJ L, 2024/1356.

²³Janna Wessels, ‘Gaps in Human Rights Law? Detention and Area-Based Restrictions in the Proposed Border Procedures in the EU’ (2023) 25. *European Journal of Migration and Law*, 275-300. pp 281.

²⁴*Ibidem* pp.291.

²⁵Brandl, ‘Mix and Match. Detention, “De-Facto Detention” or just Restrictions of Freedom of Movement in the New Pact’.

that purpose²⁶. The increase on the Spanish immigration rates its geographical characteristics and its migration routes underscore this issue even further, pushing Spain to take on “a gatekeeping role within the EU”²⁷.

To cope with these pressures, the Spanish migration system is divided in three different types of centres: CIEs (*Centro de Internamiento de Extranjero*), CETIs (*Centro de Estancia Temporal de Inmigrantes*), and CATEs (*Centro de Atención Temporal de Extranjeros*). For the purposes of this essay, the one’s that will be the target of the analyses are the latter, for their origin and similitudes with the hotspot (and, screening) approach. Between 2017 and 2018, a period of great migratory pressure on the Andalusian coasts, an unbearable situation of bureaucratic motivated the creation of CATE’s and emergency operations with Frontex²⁸.

The main difference between CIE’s and CATE’s, and which brings the latter closer to the system proposed by the Screening Regulation, is the fact that in CIE’s there are several legal requirements required to detain migrants²⁹. On the other hand, CATE’s do not have formal legal regulations being, in practice, “extensions of the National Police stations” and, therefore, regulated by the police station regulations³⁰. Nonetheless, the Spanish experience within this type of facilities demonstrates that these procedures cannot properly meet the demands set forth by the Regulation, creating situations of extreme vulnerability and precarity. The case of the CATE of Arguineguín, in which most people were illegally detained there for several weeks, without any available judicial remedy³¹. The Spanish Ombudsman has even issued recommendations related to “the training of personnel on the treatment of migrants”, the “presence of more female professionals” and the need to

²⁶Izabella Majcher and Marta Gionco, ‘Immigration Detention And De Facto Detention: What Does The Law Say?’ (*Platform For International Cooperation On Undocumented Migrants*, 2022) <<https://picum.org/wp-content/uploads/2022/09/Immigration-detention-and-de-facto-detention.pdf>> Accessed 18 April 2025. pp. 5

²⁷Claudia Finotelli and Irene Ponzo (Editors), *Migration Control Logics and Strategies in Europe: A North-South Comparison* (Springer, 2023). pp. 91.

²⁸Felipe Manchón, ‘The Pact on Migration and Asylum, a new opportunity for Europe?’ (2020). *IEEE*, 1-17. pp.7.

²⁹Iker Barbero, ‘Los Centros De Atención Temporal De Extranjeros Como Nuevo Modelo De Control Migratorio: Situación Actual, (Des)Regulación Jurídica Y Mecanismos De Control De Derechos Y Garantías, Iker Barbero’ (2021) 45. *Derechos Y Libertades*, 267-302. pp. 280.

³⁰People should not be detain for more than 72 hours withotu judicial authorization. Gustavo de la Orden Bosch (2024), pp 16 and 22; *European Council on Refugees and Exiles*, (2021). pp. 42-43.

³¹Iker Barbero (2021), pp. 295.

“provide information in a language migrants understand”³². This situation was similar to the one lived in other CATE’s³³.

Considering this, there are two main issues regarding the implementation of the Screening Regulation in Spain, related to the issue of *de facto detention*. There is a clear challenge on compliance with the timeframe provided for in the Regulation without disregarding the vulnerabilities of those undergoing the screening³⁴. However, the main element of distinction between detention and restriction on freedom of movement is one of “degree or intensity”³⁵. Moreover, according to the opinion issued by the CJEU on the case FMS, “a coercive measure that deprives [an] applicant of his or her freedom of movement by requiring him or her to remain permanently within a restricted and closed perimeter”³⁶ represents a situation of detention.

This leads to the final issue. Considering that the system proposed by this regulation does not greatly distances itself from the traditional hotspot approach, and that previous experiences, not only in Spain but also in Greece and Italy, failed to offer proper conditions and legal guarantees to the persons undergoing the screening procedure, there is no assurance that it will work properly under this new regulation. To partially solve this issue, Spain would have to heavily fund the training of qualified personnel and improvement of spaces dedicated to this procedure.

The removal of the word “detention” from the CATE’s and from the Screening Regulation represents a strategy of camouflage of humanization of the borders³⁷ in a predominately neoliberal

³²European Council on Refugees and Exiles, (2021). pp. 43-45

³³Rebeca Alcántara, ‘El Defensor del Pueblo insiste en que el centro de inmigrantes de Motril tiene que cerrar’ *IDEAL Granada*, 18 December 2018) <<https://www.ideal.es/granada/costa/defensor-pueblo-insiste-20181218113644-nt.html#>> accessed 18 April 2025; Alba Feixas, “El Gobierno asegura que el nuevo CATE de Motril ya está listo para su uso” *Granada Hoy*, 3 March 2025) <https://www.granadahoy.com/costa_tropical/gobierno-asegura-nuevo-cate-motril_0_2003436504.html> Accessed 18 April 2025; European Council on Refugees and Exiles, (2021). pp. 43-45

³⁴Galina Cornelisse, ‘The Pact and Detention: An Empty Promise of ‘certainty, clarity and decent conditions’”(EU Immigration and Asylum Law and Policy, 2021) <<https://eumigrationlawblog.eu/the-pact-and-detention-an-empty-promise-of-certainty-clarity-and-decent-conditions/>> Accessed 18 April 2025. pp 14.

³⁵Ibid.

³⁶Joint Cases C-924/19 and C-925/19, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 14 May 2020, parag. 223.

³⁷Iker Barbero, “Los Centros De Atención Temporal De Extranjeros Como Nuevo Modelo De Control Migratorio: Situación Actual, (Des)Regulación Jurídica Y Mecanismos De Control De Derechos Y Garantías, Iker Barbero” (2021) 45. *Derechos Y Libertades*, 267-302.pp. 300.

system of commodification³⁸ of migrants, seen as commodities. This system further highlighted by the second challenge of implementation opened by the Screening Regulation: the fiction of non-entry³⁹.

2.2 Screening Regulation and the Fiction of Non-Entry

With the enactment of the Screening Regulation, the fiction of non-entry has acquired a renewed relevance in the migratory context. This concept creates a legal loophole in which physical presence in a territory does not equal legal entry into the country. This stems from the idea that official arrival only happens after legal authorization into the borders, not material presence in them. Historically, this notion has been used by Member States in transit zones, like ports and airports, but never before in asylum-seeking contexts. However, with the Screening Regulation⁴⁰, the fiction of non-entry has been amplified and become a formalized core procedure for border management in the EU. This means that the legal status of the migrants is determined by the state, providing a lawful justification to deny rights and weaken the protections of incoming individuals. As a result, the fiction of non-entry allows governments to delay the process and to manage migration through controlling and limiting means, opening the door for state violations of international legal obligations, such as the principle of non-refoulement.

This concept acquires significant relevance in the context of the Spanish Migration System. As we have previously stated, detention is not a novelty in border management in Spain. In critical areas like Melilla and Ceuta, in North Africa, this is an informal procedure used in exceptional cases. However, the formalization of the fiction of non-entry by the EU Pact allows for this problematic procedure to become the general rule, reducing the rights of already vulnerable individuals. The fiction of non-entry gives a legal basis for Spanish border authorities to bypass the system, legitimizing unlawful⁴¹ procedures such as “*devoluciones en caliente*”. This means that migrants in border areas can be pushed back out of Spanish soil without any access to justice or legal assistance, violating the individual’s fundamental rights and allowing receiving nations the possibility to circumvent their

³⁸“These labourers, who must sell themselves piecemeal, are a commodity like every other article of commerce, and are consequently exposed to all the vicissitudes of competition, to all the fluctuations of the market” Karl Marx and Frederik Engels, *Manifesto of the Communist Party* (Penguin Classics, 2002) pp. 227.

³⁹Elina Hammarström, “Immigration Detention of Children in the New EU Pact on Migration and Asylum” (*OpinioJuris*, 6 December 2024) <<http://opiniojuris.org/2024/12/06/immigration-detention-of-children-in-the-new-eu-pact-on-migration-and-asylum/>> Accessed 18 April 2025

⁴⁰Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, art 4(1).

⁴¹By human right’s bodies such as the ECtHR. Seen in *Hirsi Jamaa and Others v Italy* (2012) App no 27765/09 (ECtHR).

obligations under international law. The implementation of Screening Regulation not only amplifies this issue, through the legislative integration of this fiction in the EU framework but also creates further strain on an already overburdened migration system.

Through CATEs, a version of the fictional concept was already applied, but without any clear or official legal groundwork. Migrants arriving in pressured Spanish regions, like the Canary Islands, during critical phases would be treated as if they were outside of the country and detained for identification and referral purposes. Overall, the Pact did not pioneer the concept, it just standardized a problematic procedure throughout the EU.

It's important to note that the implementation of the Screening Regulation affects EU member's migratory systems differently. In Spain, this fabricated legal status is applied differently across the various migratory centers, being undeniably applied in CATEs and used more ambiguously in CETIs. Furthermore, given the Spanish context, the legal uniformization of the fiction of non-entry aggravates already existing controversial problems. First, considering that Spanish law does not explicitly regulate the ambiguous legal status of people in this fictional scenario⁴², there are a lot of legislative uncertainties⁴³ requiring reform. Spain would need to cautiously review its legal framework in order to apply the European fictional outlook on migrants at the borders.

Secondly, the enactment of the Screening Regulation did not change much in practical matters, however, migrants have seen their rights weakened and more susceptible to violations by the state and its authorities. By formalizing the fiction of non-entry, detentions, and pushbacks became easily enabled by the state, jeopardizing basic international obligations such as the principle of non-refoulement. There is however a distinction to be made between irregular migrants and asylum seekers and, consequently, the risks posed to each of them. Even though both can be found in this legal loophole at the borders due to irregular crossing, asylum seekers are entitled to different protections⁴⁴. If the fiction of non-entry is applied without proper assessment, due to the celerity of the process, vulnerable migrants, such as refugees, can see their legal safeguards vanish. The primary humanitarian concern relates to access to legal aid amidst the Screening process, creating further obstacles to migrants in understanding and interpreting national and European law. By allowing accelerated

⁴²See Organic Law 4/2000 of 11 January on the Rights and Liberties of Foreigners in Spain and Their Social Integration (Ley de Extranjería) (BOE No 10, 12 January 2000).

⁴³For example, the detention period allowed under the Screening Regulation is longer than the one permitted under Spanish law currently.

⁴⁴Following Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

procedures and prolonged detention, this legal grey status undermines mandatory safeguards and protections like the right to asylum and the right to appeal as well as the fundamental principle of non-refoulement.

Lastly, contrary to what was planned, the Pact did not attenuate the reception system of hotspot areas. Due to a lack of infrastructure and human resources, the Screening Regulation will have a countereffect, straining an already overflowing system by creating more bureaucracies.

Essentially, in Spain, the fiction of non-entry, rather than a legal tool, can also be a strategy for exclusion, creating a hindering mechanism for already vulnerable individuals. This, combined with the limited resources of the Iberic country, can lead to poor management of accelerated procedures and endangerment of migrant protections.

While the Courts do not consider the fiction of non-entry directly unlawful⁴⁵, the exercise of this fiction has been reviewed by both the ECtHR and the CJEU. While the CJEU has highlighted the importance of preserving the principles of the Charter⁴⁶, the European Court of Human Rights has had a different outlook on this issue. In the first instance of the *ND & NT v. Spain* case, in 2017, the Strasbourg Court declared that Spain violated the Convention⁴⁷ by not allowing legal safeguards and asylum applications to two migrants who crossed the border irregularly to Melilla. The 2017 decision was congruent with earlier injunctions⁴⁸, where pushbacks, regardless of the means of entry, were considered violations of human rights and national obligations of the states. However, this decision was overturned in 2020, setting a new precedent for EU Asylum and Migration Law. The latter ruling introduced a new concept where the responsibility was shifted from the state to the individual, creating legal ambiguity and indirectly normalizing “pushbacks”⁴⁹ at the EU borders. In combination with the Screening Regulation, this decision can further legitimize the fiction of non-entry and justify the restriction of fundamental rights of irregular migrants and asylum seekers.

⁴⁵The courts have scrutinized the use of the fiction of non-entry but it has not been considered illegal *per se*.

⁴⁶For example, *Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság and Others* (Judgment, 14 May 2020) ECLI:EU:C:2020:367.

⁴⁷Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (*ECHR*, 4 November 1950, ETS No 5), art 13; Protocol No 4 to the Convention (16 September 1963, ETS No 46), art 4.

⁴⁸*Hirsi Jamaa and Others v Italy*, App no 27765/09 (ECtHR, 23 February 2012).

⁴⁹Sergio Carrera, ‘The Strasbourg Court Judgement *N.D. and N.T. v Spain*. A Carte Blanche to Push Backs at EU External Borders?’ (2020) RSCAS 2020/21, *Robert Schuman Centre for Advanced Studies Research Paper* <https://ssrn.com/abstract=3634515> or <http://dx.doi.org/10.2139/ssrn.3634515>, accessed 25 May 2025.

All things considered, without alterations to national law, what once was an informal interim, can become a lasting practice in Spain's migratory approach, leading to concerning restrictions to basic human rights and protections of asylum seekers in the EU's southern border. Therefore, prior to screening, Spain must ensure access to legal aid for all individuals going through frontier checks and avoid any unnecessary and extended detentions, guaranteeing that all third-country nationals in Spanish land encounter a fair and safe system.

3 The Solidarity Mechanism: An Undercooked Attempt at Fairness in EU Migration

The Solidarity Mechanism, a central element of the European Commission's New Pact on Migration and Asylum, was introduced to correct one of the most persistent imbalances within the Common European Asylum System (CEAS): the uneven distribution of responsibility for asylum seekers among Member States, which has been described by some scholars as a "solidarity crisis"⁵⁰. To solve this "crisis", under the new Pact, and through the Asylum and Migration Management Regulation (AMMR)⁵¹, solidarity is no longer narrowly and forcefully defined in terms of relocation quotas, but is instead expanded into a flexible contribution model, in which Member States can choose how they wish to show said solidarity between themselves, be it through relocation, financial contributions, operational support, request-deductions or responsibility offsets⁵².

While politically pragmatic, this voluntarist model presents inherent limitations when assessed through the lens of frontline countries, such as Spain, that bear the brunt of migratory inflows. The Spanish case reveals that the "solidarity à la carte" approach is unlikely to result in either effective burden-sharing or meaningful systemic transformation unless more sincere commitments are embedded within the framework⁵³.

⁵⁰Xavier Groussot and Eleni Karageorgiu, 'Solidarity and the Crisis of Values in the European Union Nordic Journal of European Law' in *Nordic Journal Of European Law* N 2, 2023. 32-52.

⁵¹Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024] OJ L PE/21/2024/REV/1.

⁵²European Commission, 'Pact on Migration and Asylum' (*Home Affairs*) https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en Accessed 25 May 2025.

⁵³See, for example, the arguably unsatisfying results in terms of solidarity relocations: European Commission, '4,000 Asylum Seekers Relocated to Other European Countries under Voluntary Solidarity Mechanism' (*Home Affairs*, 6 February 2024) https://home-affairs.ec.europa.eu/news/4000-asylum-seekers-relocated-other-european-countries-under-voluntary-solidarity-mechanism-2024-02-06_en accessed 25 May 2025.

Despite the Solidarity Mechanism offering several forms of support, its voluntary character means that states are under no legal obligation to offer relocation or other meaningful forms of assistance. As a result, frontline states are often left to fend for themselves. Spain's case is no exception, as it, alongside other frontline hotspots, has to give disproportionate attention to the migration crisis when compared to non-frontline states, many of which choose to reject taking on migrants whenever possible⁵⁴.

The diverse solidarity options introduced with the new Pact are intended to provide Member States with flexibility while ensuring that the aggregate result leads to a tangible impact on countries experiencing overwhelming migratory pressure. However, Member States can opt out of relocations, which have until now been a critical component for alleviating pressure in countries like Spain, without facing legal consequences. Moreover, financial contributions to frontline states, although helpful, do not address the immediate logistical burden of receiving, sheltering, processing and, most importantly, integrating large numbers of migrants. In light of this imbalance, one must question where the so-called "solidarity" truly comes into play.

The imbalance becomes particularly stark in light of Spain's own systemic limitations⁵⁵. Spanish border regions often suffer from inadequate reception infrastructure, a lack of trained personnel, and political obstacles to transferring individuals to mainland facilities. In the absence of a predictable redistribution scheme, the Spanish government remains heavily dependent on emergency mechanisms and ad hoc EU support⁵⁶, which often arrive too late or are too modest in scope.

The voluntary nature of the Solidarity Mechanism also has broader implications for the EU's political cohesion. Member States that are opposed to hosting migrants can maintain their stance while offering token financial contributions to avoid relocation obligations. Meanwhile, countries like Spain continue to shoulder disproportionate responsibilities while grappling with domestic challenges and reputational risks associated with the treatment of migrants at their borders, while other countries can

⁵⁴ In 2023, Poland reported the largest number of refusals (15 000 or 12% of the EU total), ahead of Hungary (13 000 or 10%) and Croatia (11 000 or 9%). Most of the refusals at land borders were recorded in Poland, at sea borders in France and at air borders in Ireland. Eurostat, 'Migration in Europe: 2024 Interactive Edition' (*Publications and Statistics*) <https://ec.europa.eu/eurostat/web/interactive-publications/migration-2024#irregular-migration-and-return> Accessed 25 May 2025.

⁵⁵ Galina Cornelisse and Giuseppe Campesi, 'Horizontal Substitute Impact Assessment' (EPRS | European Parliamentary Research Service Ex-Ante Impact Assessment Unit PE 694.210, August 2021) 110-114.

⁵⁶ Ibid.

“wash their hands” in relative silence. Naturally, this undermines the spirit of shared responsibility and exacerbates the geopolitical division within the Union.

Even though there are several issues that are worth criticizing, as demonstrated above, this does not entail that the EU should return to a model of forceful solidarity. A voluntary incentives-based path is the right one for the EU, and that the Pact is a reflection (albeit flawed) of what the EU’s migration regulation future looks like. The shortcomings of the Pact do not lie in its nature, but instead on the focus of the solidarity mechanisms themselves. Instead of, in practice, encouraging non-frontline states to pay in order to not take in migrants, the EU should be trying to incentivize those states to do precisely the opposite, by showing them that immigration does indeed benefit their societies, and that they will be rewarded for welcoming migrants in.

Consequently, to enhance the mechanism’s efficacy, several reforms could, and in our view should be considered. These can include monetary rewards for relocation, where per capita compensation is provided through EU funds to member states for each migrant taken in, which could be scaled based on the vulnerability level of the relocated individuals. They can also include tax or budgetary encouragement, where states receiving migrants benefit from discounts in contributing to the EU budget. Another solution would be the establishment of a migration bond or credit system, similarly to what is already done in environmental policies⁵⁷. Performance-based integration funding is also a possibility. Willing states would be rewarded not just for accepting migrants, but for efficiently integrating them into society. Lastly, solidarity pools with risk insurance could be created, through the development of an EU insurance fund that compensates states for sudden migration surges, if those states have shown prior solidarity with other states.

Naturally, none of the solutions presented are exempt from possible criticisms, and it is still too early to say with certainty that the current solidarity system will fail in the long term. However, we believe that they are avenues which would, if anything, be more successful in achieving states’ true compromise in solving the EU migration crisis.

The Solidarity Mechanism represents a step forward in the EU’s collective efforts to address migration, but its current design fails to provide the structural guarantees needed by frontline states like Greece, Malta, France, Italy, Poland, Portugal, and Spain. By prioritizing flexibility in the wrong direction, the EU risks perpetuating the very inequalities that the New Pact aims to resolve. If solidarity

⁵⁷Investopedia, 'Carbon Credit: Definition, How It Works, Types, and Examples' (*Investopedia Website*) https://www.investopedia.com/terms/c/carbon_credit.asp accessed 25 May 2025.

is to be more than a slogan, it must be anchored in attractive incentives, reliable funding, and operational readiness. Otherwise, the “burden” of Europe’s migration management will continue to fall disproportionately on the shoulders of a few, while the vast majority of EU countries silently remove themselves from the equation. Therefore, the solution must come primarily through meaningful incentives to take on migrants. Recent political developments in Europe have proven that forced solidarity simply does not satisfy the European population, and it is simultaneously apparent that the new misguided solidarity mechanism will likely leave the EU’s external border states to solve these challenges by themselves. Incentive-based politics must be directed at taking on migrants and meaningfully integrating them into society, rather than encouraging states to pay not to do so.

4 Conclusion

In sum, the EU’s New Pact on Migration and Asylum aims to address structural problems in the migration system, especially in frontline states like Spain. However, Spain’s case shows that implementation still falls short of justice and solidarity. Measures like the screening procedure and the solidarity mechanism risk violating fundamental rights and deepen inequalities among Member States.

At Spain’s borders, overcrowding, limited resources, and ambiguous practices reveal that the Pact may reinforce unlawful detention and exclusion. The legal fiction of non-entry allows Spain to bypass protection obligations, leading to condemned practices like summary returns. This undermines the EU’s cohesion and values. For the Pact to succeed, real harmonization and binding solidarity are needed, along with strong human rights protections. Without change, the system will collapse under inequality and vulnerability.

Moreover, the Spanish case highlights a disconnection between the institutional design of the Pact and its *de facto* implementation at the EU’s external borders. The seemingly administrative neutrality of the measures hides, in practice, a logic of securitization. Strengthening borders, though framed as a matter of efficiency, compromises the effective protection of human rights and entrenches practices previously condemned by international bodies. Rather than marking a turning point, the Pact risks solidifying dysfunctional dynamics, turning emergency procedures into permanent concerns.

In this light, the promise of a common European response becomes an illusion, unfolding into fragmented and unequal practices. The failure to secure effective solidarity and ensure uniform standards of reception undermines not only the credibility of the EU’s migration policy but also the

internal cohesion of the European project itself. The Pact must be accompanied by genuine political will, binding commitments, and a renewed focus on dignity and rights at Europe's borders.