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When numbers lie: the limits of the 20% rule in the EU Asylum Procedures Regulation

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Introduction

With the New Pact on Migration and Asylum becoming fully applicable in June 2026, the EU Commission is ramping up the preparations.

Arguably, one of the most complex instruments to implement will be the new Asylum Procedures Regulation (APR), Regulation (EU) No 1348/2024, which repeals the Recast Asylum Procedures Directive (RAPD, Directive 2013/32/EU). The implementation of the RAPD has been defined as "patchy" because of "lack of clarity in the underlying EU legal framework"; hence, the new Regulation attempts to comprehensively regulate numerous issues that were until now left to the Member States' discretion.

One of the main goals of the APR is the acceleration of asylum procedures, especially those concerning applications which are expected to be unfounded. The discipline of accelerated procedures is thus broadened and clarified, compared to that set out in the RAPD. The use of accelerated procedures becomes mandatory in the cases covered by Article 42 APR and they must be completed within three months (whereas the RAPD only requires that they are completed within "reasonable" time limits, as per Article 31(9)). A new ground of acceleration is introduced: under Article 42(1)(j) APR asylum applications from countries where the EU-wide protection recognition rate is 20% or lower may be handled through accelerated or border procedures. The Commission proposed to fast-track the implementation of this provisionthrough a targeted amendment of the Regulation, which would allow Member States to apply Article 42(1)(j) before June 2026. According to the Commission, this tool ensures that Member States can "adapt to changes in migration flows" and "process likely unfounded applications more swiftly". Bringing forward its application could reduce divergences in national practices, preparing the ground for the full implementation of the Pact.

The other element of the APR whose implementation the Commission proposed to fast-track is the designation of SCOs and safe third countries with subjective or territorial exceptions (Articles 59(2) and 61(2)). These provisions override the landmark CJEU decisions (in cases C-406/22, and joined cases C-758/24 and C-759/24), holding that Article 37 RAPD does not allow exceptions *ratione loci* or *ratione personae* to the definition of SCO. The Commission's proposal is also a tacit acknowledgement of how complex the designation of safe countries is on an EU level, as it requires detailed evaluation of the third country's legal and political system. Convergence among Member States is not easy to achieve: the SCO list drafted by the Commission, still pending approval, designates only seven countries, while national lists have an average of 16.

Fast-tracking these provisions and the 20% rule – which is, as explained further down, a ground for procedural acceleration complementary to the SCO concept – will not *per se* overcome the issues encountered with the SCO designation, but will ensure that at least part of the new procedural framework is swiftly implemented. Indeed, the Commission defines the recognition rate criterion as "more objective and easy-to-use", but will statistics really prove to be the solution? This contribution argues that the 20% mechanism, despite being

designed to ensure procedural harmonisation and swifter decision-making, risks undermining fundamental procedural guarantees of the EU asylum *acquis* by relying on statistical thresholds, detached from individual assessment and judicial review dynamics. Clarifying these procedural details is also crucial from a broader EU-law perspective, as they will have significant consequences on the uniform application of the Regulation and the protection of asylum seekers' fundamental rights in the EU.

What the Regulation says: the legislative framework

Article 42(1)(j) of the new Procedure Regulation states that the determining authority shall accelerate the examination procedure if the applicant is from a nationality "for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20 % or lower". An exception is provided if it is assessed that a significant change has occurred in the country of origin or that the applicant belongs to a category for whom the proportion is not representative. Under Article 42(3)(e), this is also one of the grounds to apply an accelerated procedure to unaccompanied minors, and under Article 45(1) it is one of the cases of compulsory application of border procedures.

The 20% recognition rate can be raised to 50% or reduced to 5% in cases of exceptional situation of mass arrivals, according to Article 11(3-4) of Regulation (EU) 2024/1359, the new Regulation on situations of crisis and force majeure; this provides a derogatory framework, applied as *lex specialis* to recalibrate procedures and obligations in situations of crisis and force majeure.

The mechanism is a novelty introduced with the APR; however, similar provisions have already been implemented in some Member States. These are not relevant as direct legal precedents, but as empirical evidence of whether and how quantitative threshold-based procedures can function in practice. For instance, *Migrationsverket*, the Swedish migration authority, developed in 2021 an *ad hoc* accelerated procedure (*Spår 4b*) for claims for nationalities with a recognition rate below 15%, applying the Aliens' Act provision (Chapter 8, Section 19 *Utlänningslag*) that states that manifestly unfounded claims can be dealt with in an accelerated procedure, issuing an immediately enforceable return order.

The APR regulates different "safe country" concepts – the effective protection in a third country (Article 57), the country of first asylum (Article 58), the safe third country (Article 59), the safe country of origin (SCO, Article 61), and the internal protection alternative (mentioned in Article 34 APR, regulated in Article 8 of Regulation (EU) 2024/1347) – so many that it has been pointed out how the new procedural rules imply that the majority of asylum seekers does not deserve a substantive examination, since most of the applications are "doomed to fail". Recital 56 clearly states that the safe country of origin and safe third country notions remain "applicable as a separate ground" from the 20% mechanism, restricting their respective scopes. Indeed, the

latter is based on mere calculations, which do not reflect the criteria used to designate safe countries: Articles 57 through 61 mention compliance with the 1951 Geneva Convention, the ECHR, and human rights instruments as *criteria* to define countries as safe, while the mechanism envisioned by Article 42 only relies on statistics. Therefore, not all third countries with a low recognition rate can be designated as safe, and vice versa. The procedural and substantial consequences of the application of these rules are also different: the 20% rule leads to acceleration (Article 42(1)(j) APR), compulsory localisation at the border (Article 43(1)) and the possibility for national authorities to declare unfounded applications manifestly unfounded (Article 39(4)); designation as a SCO entails acceleration (Article 42(1)(e)) and possible manifest unfoundedness (Article 39(4)); designation as safe third country inadmissibility (Article 38(1)(c)). Moreover, applicants have the possibility of providing elements justifying why safe country concepts are not applicable to them (Articles 58(2), 59(5)(a), and 61(5)(c)); for the 20% recognition rule is instead the determining authority which assesses that the proportion is not representative for the applicant's protection needs.

Despite these key differences, the 20% mechanism and safe countries concepts are built on the same assumption, the presumption that a country is safe for the applicant based on elements completely detached from the individual application. Therefore, they present the same challenges in their effective application, since using pre-collected data concerning collective situations may lead to ignoring not only the factual and fast-paced developing situation in third countries, but also the specificities of the individual case, which is against the fundamental functioning of the asylum system. This also entails that the same doubts about the possible discriminatory effect of the SCO concept could also be cast over the 20% rule. Finally, the effort shown by the European Commission to fast-track the application of this mechanism, while discussion on Safe Countries of Origin is ongoing, may strengthen the case of those who consider it a tool to surreptitiously consider more countries as safe without assessing the criteria stated in the Regulation itself.

What the Regulation does not say: blind spots in the text

Having highlighted the issues in what the Regulation does say, the matters left unaddressed are even more pressing. This section identifies three critical omissions of the APR in relation to the 20% rule.

Firstly, the APR does not clarify whether appeal decisions should be included in the calculation. Article 42(1)(j) only mentions "the determining authority granting international protection": under a strictly literal interpretation, this is only the first-instance administrative authority. It is stated that to determine whether the proportion is not representative for the applicant "significant differences between first instance and final decisions" are to be taken into account "*inter alia*". It is not explained how this should look like in practice, and it seems particularly complex to take appeal decisions (which Courts can take years to reach) into account in calculations updated every year and for procedures that should last only 3 months (if accelerated) or under 12 weeks (if border procedures). Therefore, unless the meaning of this sentence is explained before Member

States implement the measure, cases where judges have reformed the decision *in favorem migrantis* would not be included in the calculation, and procedural or substantial errors committed in the administrative phase would continue impacting subsequent applications. Moreover, long-term changes in case-law might be overlooked. While the 20% rule does not explicitly interfere with the right to an effective remedy, enshrined in Article 47 of the Charter of Fundamental Rights, in practice it grants only administrative decisions – and not judicial ones – the power to influence subsequent applications.

Secondly, the 20% recognition rate includes only decisions granting international protection (as explained in Recital 56), excluding national complementary protection statuses. In some frameworks these are of minor relevance: to cite a few examples, in Sweden a residence permit may be granted even though the requirements for a residence permit on any other basis are not met only in case of exceptionally distressing circumstances, and France, Belgium, and the Netherlands do not regulate a complementary humanitarian protection. In other Member States, by contrast, they are intrinsically part of the asylum system. For instance, in Italy Title II of decree 286/1998 contains "humanitarian provisions", disciplining the issue of residence permits not related to international protection or work or education reasons; Article 19 has been modified ten times over twenty-five years and has been the object of numerous decisions of the Italian Supreme Court (*Corte di Cassazione*), signaling a strong political disagreement on the topic. The current version (*protezione speciale*, special protection) prohibits the refoulement of people who could be subjected to discriminations prohibited by the Italian Constitution, torture or other inhumane or degrading treatments; until 2023 the expulsion of third-country nationals was also prohibited in case of reasonable grounds to believe that this would violate their right to private and family life. In the Italian system the analysis of special protection is a necessary step for the determining authority. Incidentally, it is also the most recognised during both administrative and appeal proceedings, and even in its reduced form after the latest reform it still protects situations closely linked to the refugee status and subsidiary protection. The exclusion of such decisions from the 20% mechanism will entail a significant compression of procedural guarantees for asylum seekers protected under the current regime and substantially ignore the largest share of protection statuses recognised by Italian authorities. Moreover, it would represent a covert application of the safe country concept with situations (torture, inhumane treatments, and such) that under the APR preclude the definition of the third countries concerned as safe.

Thirdly and lastly, the rate is calculated based on EU-wide statistics, provided by Eurostat, but based on decisions taken by national authorities, ignoring the striking differences in recognition rates and trends across the EU. Arguments over common lists of safe countries show how the EU asylum system is fragmented and heterogeneous. Even concerning countries like Syria, whose civil war caused a mass displacement that irreversibly changed the European asylum system, Member States have not found a common approach: after the fall of the Assad regime, some have already resumed examining asylum applications, while others are still waiting. This inconsistency has in the past caused issues like forum shopping and secondary movements inside the EU; the New Pact has promised to address it, however, practical improvements are yet to be seen. The 20% mechanism is already a way to apply accelerated and border procedures to undefined categories of people,

without taking into account the personal circumstances of the applicant, but collecting data on an EU level without first harmonising the system exacerbates this, since particularly low rates in one Member State might negatively affect asylum seekers across the EU.

Conclusions: how to go forward?

The goal of the New Pact on Migration and Asylum is to harmonise asylum procedures across the EU, and ensure they become "fast and efficient". This is achieved by accelerating asylum procedures through the analysed 20% rule, the SCO concept, border procedures, and border screening. Indeed, rather than solving structural issues of the EU asylum system – first and foremost, the Dublin system and the lack of a fair responsibility sharing mechanism – the Pact encouraged "an artificial need for consensus building or *de facto* unanimity", even when EU treaties only require qualified majority voting. Northern EU countries advocated for this acceleration, and some Southern Member States are already implementing it; on interstate solidarity instead no strong agreement was reached, and the result is asymmetric responsibility sharing (relocation of asylum seekers can be avoided providing economic or operational help, under the new Asylum and Migration Management Regulation). The same denomination of "Pact" is unusual in the post-Lisbon European Union: it is idiosyncratic that, more than twenty years after the birth of the European Union and ten years after outgrowing the pillars division, the EU would still need a Pact. The Pact is thus a compromise among Member States and the EU institutions; it is then clear why the European Commission is trying to fast-track those elements of the Pact which will not require additional negotiations. However, if the inconsistencies above highlighted are not timely addressed before implementation, they risk undermining the Regulation's goal of ensuring uniform application of EU asylum procedures.

It would be advisable not to fast-track the mechanism, but instead schedule consultations with national authorities and develop, possibly with the help of the European Asylum Agency, common interpretation guidelines of the relevant provisions, to ensure not only timely enforcement but also the respect for procedural guarantees for all asylum seekers and migrant people. This would be consistent with the principles of legal certainty and procedural fairness, as well as the right to an effective remedy, and ensure that accelerated and border procedures respect the minimum safeguards guaranteed by the EU *acquis*.

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