

WHAT IS NEW IN THE NEW EU PACT ON MIGRATION AND ASYLUM

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Abstract

Following an extended period of preparation and numerous postponements, the European Commission finally presented on 23 September 2020 the New Pact on Migration and Asylum. What is new, however, and is there actually anything new in this massive document that integrates all aspects of EU's migration policies? Have the lessons of the „migratory“ crisis of recent years been learned and why is it that it has met with a series of criticisms from governments, policymakers, academics, and civil society organisations?

Keywords: migration; asylum; CEAS; European migration policy; European Union

Following an extended period of preparation and numerous postponements, the European Commission finally presented on 23 September 2020 the New Pact on Migration and Asylum.

On this occasion, the EU Commission President Ursula von der Leyen declared that the old system is no longer working and the Commission's Package on Migration and Asylum offers a fresh start¹. In her words, the pact offers „predictable and reliable migration management system“, which is expected to bring together all aspects of migration: border management and screening, asylum, and integration, return and relations with external partners². What is new, however, and is there actually anything new in this massive document which integrates all aspects of EU's migration policies? Have the lessons of the „migration“ crisis of recent years been learned and why is it that the document

¹ European Commission 2020

² Ibid

has met with a series of criticisms from governments, policymakers, academics, and civil society organisations? The present text aims to analyse the proposals which come as part of the package, by highlighting the trends in the development of European migration policy and in the relevant debate on its future.

Although the 2015 wave of asylum seekers in the aftermath of the war in Syria and the ensuing humanitarian situation were the largest since the 1990s, statistics show that the number of arrivals by far should not be such a great burden to the European Union. This has given to many, among them the Director-General of the International Organization for Migration, the reason to point out that the issue at hand is not so much about a refugee and/or migrant crisis, as about „emergency“ situation requiring swift political action³. It would not be an overstatement to describe the situation also as a crisis of solidarity – on the one hand between member states, and on the other as a manifestation of growing xenophobic tendencies among some of the citizens of the European Union, especially in the Eastern-European states, which are being successfully instrumentalised politically.

Migration has always been among the most affective policies⁴, difficult to compare with others due to its peculiar specifics. Balzack and Carrera also add that policies in this field are „probably the most dynamic, sensitive and hotly contested“. Representing an important part of national sovereignty, „these areas are fraught with national fears, rival ideologies and competing political sensitivities“⁵. Paradoxically, it is precisely due to this fact that migration is becoming a key element of European policy both in terms of policies, and in terms of politics.

In May 2015, the European Commission presented a European Agenda on Migration, with the aim of formulating adequate and harmonised policy responses at EU level. This set the course for EU action in the area of migration and asylum between 2015 and 2020⁶. In 2016, the European Commission has launched an overall reform of the general European asylum-granting system with the purpose of the further harmonisation of the EU asylum *acquis* (*ibid*). Two packages of proposals were presented within the framework of this reform. The European commission proposed an overhaul of the existing instruments of the Common European Asylum System, to turn Frontex into a European Coast and Border Guard and EASO into a full-fledged EU Agency for Asylum, and to introduce a Resettlement and Humanitarian Admission Framework⁷.

However, Member States failed to reach an agreement on key regulations, such as the reform of the Dublin system and the Asylum Procedures Regula-

³ Swing 2018

⁴ Krasteva 2014

⁵ *Ibid*

⁶ European Parliamentary Research Service 2021

⁷ Markard 2020

tion. An analysis, compiled on commission from the European Parliament, highlights that „human rights situation for migrants and refugees continues to be alarming“ and that the New Pact on Migration is being presented with the objective of addressing the identified structural shortcomings within the context of national reception, asylum and return systems of EU Member States⁸.

The New pact is composed of five legal instruments, three recommendations and one guidance document, namely: a new screening regulation; an amended proposal revising the Asylum Procedures Regulation; an amended proposal revising the Eurodac Regulation; a new asylum and migration management regulation; a new crisis and force majeure regulation; a new migration preparedness and crisis blueprint; a new recommendation on resettlement and complementary pathways; a new recommendation on search and rescue operations by private vessels; a new guidance on the Facilitators Directive⁹.

I shall attempt to analyse the numerous legislative proposals along four axes:

- revision of the Dublin Regulation, but retaining the „first state“ principle;
- mandatory, but flexible solidarity;
- security and returning;
- externalisation by way of strengthening partnerships.

The revision of the Dublin system is perhaps one of the most awaited reforms in CEAS. Criticisms have accompanied the Regulation (originally a convention) even from its inception, but the situation from 2015/6 has demonstrated not only how unjust it was, but also how ineffective in practice it is: in view of the fact that the majority of asylum-seekers arrive by land or by boats and that the Member State of the first arrival is responsible for their applications, the Dublin criteria may lead to structural overload of the countries along the external borders of the EU. Bearing the load of the states along the external borders is not only to the detriment of asylum seekers themselves, as well as of the states who will have to deal with the situation, but it also endangers the very existence of common policy in the area. Shared responsibility has remained unattainable, not in the last place because of the opposition of the countries from the Visegrad Quartet to all sorts of relocation mechanisms. The Commission’s original proposals – initially, for a mandatory crisis relocation mechanism to be added to ‘Dublin III’ and then a corrective allocation mechanism as part of ‘Dublin IV’, have failed¹⁰. In view of the difficulties encountered so far in finding a compromise, it is hardly a surprise that the Pact has retained the existing criteria and primarily the one of the first entry

⁸ European Parliamentary Research Service 2021

⁹ Ibid

¹⁰ Markard 2020

state. There are proposals for changes in the hierarchy of distribution criteria and greater flexibility¹¹.

Undoubtedly, solidarity was among the most discussed, but also the most controversial principles after the sudden change in the migration situation in Europe of 2015. It is no coincidence that many have described the crisis not as migration one, but as a crisis of solidarity, as was already mentioned. As written by Eva van de Rakt: „Already in 2015, we were dealing not with a „refugee crisis“, but with a crisis of European refugee policy“¹². The intense process of politicization of migration at national level and its instrumentalization by populist political actors and non-liberal governments has rendered impossible the implementation of the introduced mechanisms. A demonstrative example of this is the quota mechanism introduced in the summer of 2015, which not only failed to resolve the situation, but also aggravated the problems between individual Member States.

Therefore, it is not a surprise that the pact failed to raise the question of solidarity - an underlying principle of the European Treaties, introducing the notion of flexibility. What is the meaning of this in practice? Stripped of mandatory redistribution programmes, the new mechanism shall be available to all member-state facing intense migratory pressures. The mechanism shall be activated by the commission if a particular state makes a request and based on assessment of the situation. A plan for allocation between the member-states shall be proposed on the basis of this assessment - a number of migrants, market and labour needs etc., in proportion to their economy (GDP). The states which have refused to participate shall be given other opportunities to demonstrate solidarity, for example - by „sponsoring“ the returning of migrants to their countries of origin, i.e. certain member states could assume the responsibility for the return of an individual who has no right to stay, on behalf of another member state. This mechanism, of course, has become target for criticism not only because of the complexity of its realization but because of valid arguments for contradictions with the international law due to absence of common European list of „safe countries“. Another possibility available to member states refusing to accept asylum seekers would be to assist the frontline states with expertise or practical help. What happens in case of refusal from participation in these forms of flexible solidarity remains to be determined¹³. The tendency of securitization is not recent in European migration policy. It has evolved over the years by the introduction of various measures and institutions such as the Schengen Information System (SIS), Eurodac, the Integrated System of External Vigilance, Frontex, etc. Actually, the control of the external borders, which apparently is given exceptional significance in the Pact, is understood as shared responsibility. According to Margaritis Schinas, Vice-President of the European Commission in charge for coordinating the

¹¹ Robert Schuman Foundation 2020

¹² Rakt van de 2021

work on the Pact, quoted by Christopher Hein, this must be considered as a common, shared responsibility, for it would be unfair to delegate such a critical task to five or six countries of first entry¹⁴. An important role in this process is given precisely to Frontex, the European Border and Coast Guard Agency. This brings us back again to the burden borne by the frontline states, and to solidarity. As seen from the new mechanisms for flexible solidarity, there is a particular emphasis placed on repatriation. Externalization is no new tendency in European migration policy, either. The tendency can be traced back to the Conclusions of the Extraordinary European Council in Tampere (1999), and then is developed further in a series of documents such as The Hague Programme of 2004, the Stockholm Programme of 2009 and the EU Agenda of Migration of 2015, etc¹⁵. Externalization actually means placing migration management at the heart of the EU's external relations: „The examples include the EU-Turkey Statement or third country readmission arrangements with African countries such as Ethiopia, Ghana, Niger or Nigeria. They often come along with crisis-led funding instruments (EU trust funds), and give clear priority to expulsions, border management, countering human smuggling, and the facilitation of readmissions and returns“¹⁶.

So far, it is evident that what is really new in the Pact is at the most the reheating and intensifying of old tendencies or the seeking of euphemistic emendations which do not resolve the essential problems but cover them with the veil of new terminology.

The new beginning for the European migration policy was also promised among the priorities in the Political Guidelines for the Next European Commission (2019-2024). Some researchers even see the very idea to lay down this new beginning in a document designated as „pact“ as an attempt to overcome variance of opinion and the difficult dialogue between member states. In fact, neither is this a novel approach - thus, for example, in 2008 the European Council adopted a European Pact on Immigration and Asylum. According to some assessments, over a decade following the adoption of the Lisbon Treaty, the use of the terminology of a ‘Pact’ in the field of migration and asylum reintroduces intergovernmental logic in a policy field that is supposed to be ‘normalised’¹⁷. Many rallied around the opinion that almost one year after its publication it can be concluded that the Pact is in fact not a Pact at all.¹⁸. And researchers such as Sergio Carrera have concluded that „The Pact does not pursue a genuine Migration and Asylum Union. It runs the risk of pursuing intergovernmentalism, of establishing a European asylum

¹³ Ibid

¹⁴ Hein 2021

¹⁵ Ibid

¹⁶ Carrera 2020

¹⁷ Brouwer et al. 2021

¹⁸ Ibid.

system of asymmetric interstate solidarity and legitimising member states' policies focused on speed, localisation, and externalisation. EU member states should be held accountable to their legal responsibilities, including current CEAS and Schengen Borders Code standards. Solidarity towards individuals and the upholding of everyone's rights needs to be placed at the heart of EU policies"¹⁹.

In the years of development of the European Union, migration has always been a particularly sensitive topic. Differences in historical experience, in the social and economic context hinder the construction of a common European policy. Member states, however, are reluctant to surrender their sovereignty regarding the policies of crossing their territorial borders, but also concerning crossing of the nation's imaginary borders. Transference of prerogatives in relation to the policies in the field has been tentative. Even with respect to value-oriented fundamental issues, such as the right to asylum, there has been no progress in the building of a truly unified system. The crisis of 2015 has brought the issue back to the spotlight. It is no coincidence that the debates on the Pact continue and there is still no substantial progress within several presidencies. The most significant step forward is associated with the transformation of the European Asylum Support Office (EASO) into a European Union Agency of Asylum (EUAA), on which the European Parliament and the Council have agreed after ministers from Mediterranean countries pledged support to a temporary agreement. An analysis in the prestigious European publication Politico reminds that „the original proposal to reform EASO [appeared] in May 2016. It [came] in the wake of the migration crisis of 2015-2016 when the Commission put forward proposals with the [objective] of establishing what EASO's executive director Nina Gregori described on Tuesday as the 'only multinational asylum system in the world.' But it didn't take long to become clear that the task was Herculean. Last September, the Commission put forward a new proposal, the 'Migration pact,' after the negotiations hit a wall"²⁰.

Although a cause for joy, the breakthrough was not complete - Mediterranean countries agreed to accept the new mandate only partially. The inclusion of the so called „sunrise clause“ meant that the new measure would be fully implemented only after an agreement on the rest of the migration package is reached. According to sources of Politico, however, so far there has been no forthcoming agreements on other proposals, including the one for reform of Eurodac - the database for registration of fingerprints and other biometrical data from asylum seekers²¹.

A year after the pact was presented, on 29 September 2021, the European Commission presented a Report on Migration and Asylum, while simulta-

¹⁹ Carrera 2020

²⁰ Barigazzi 2021

²¹ Ibid

neously adopting a renewed EU action plan against migrant smuggling and a Communication on the application of the Employers Sanctions Directive. The communication of the commission states: „As part of the comprehensive approach to migration under the New Pact on Migration and Asylum, these initiatives aim to prevent organised exploitation of migrants and reduce irregular migration, in coherence with the New Pact’s aim to promote sustainable and orderly management of migration. The initiatives will address both persistent challenges in dismantling organised criminal groups, as well as the need to adapt to new challenges including state-sponsored migrant smuggling, in response to the situation at the EU’s external borders with Belarus“²².

Although, as asserted by the commission, „the EU has taken many actions to improve its capacity to live up to the evolving challenges of migration management“²³ ultimately the EU is once again unprepared for the new situation and the potential increase of the number of asylum seekers after the restoration of the Taliban regime in Afghanistan, and also in view of the new dynamics in Belarus, will again become object of ad hoc actions and not of a stable and effective common European system.

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²² European Commission, 2021

²³ Ibid

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