

Daniel Thym | Odysseus Academic Network (Eds.)

# Reforming the Common European Asylum System

Opportunities, Pitfalls, and Downsides of the  
Commission Proposals for a New Pact on Migration and Asylum



**Nomos**

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Universität  
Konstanz



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## Preface

Reforming the Common European Asylum System was never supposed to be an easy task. Upon presenting the New Pact on Migration and Asylum, Commissioner Johansson famously predicted: ‘I will have zero Member States saying it’s a perfect proposal’, while expressing the hope that a ‘balanced’ proposal in terms of national interests might support a pragmatic approach: ‘let’s work on this’. So it happened, and yet there is no realistic prospect of adoption in the foreseeable future. Views among Member States seem to be almost irreconcilably juxtaposed on core questions. One factor causing difficulties during negotiations is the sheer complexity of the different proposals stretching over dozens of pages with hundreds of highly complex provisions. Debates are complicated further by uncertainties over the practical feasibility of the reform package. States at the Southern borders doubt that swift border procedures and effective returns could be delivered, and countries further North worry about secondary movements. Sceptical voices among non-governmental organisations go as far as saying that a continuation of the status quo would be better than a ‘bad’ reform.

The volume published by Nomos will provide readers with a timely, profound, and well-written collection of high-quality contributions by experts from across Europe. Contributions amalgamate an in-depth knowledge with a style of argument that addresses a broader audience: fellow academics, students and PhD researchers, practitioners, and political actors. Our ambition is to combine attention to the legislative detail with an awareness of the broader picture in terms of policy developments and practical implementation on the ground. Attention to implementation is of crucial relevance indeed, as indicated by the dire state of hotspots and asylum procedures at the external borders, the reality of secondary movements, and the absence of effective judicial oversight in some Member States. Besides practical feasibility, policy developments will take centre stage. Authors will move beyond the contents of the Commission proposals and inspect preliminary outcomes of the debate in the Council’s working groups, together with critical voices from stakeholders and academics. We can expect the book to remain relevant, since political agreement in Brussels on the core pieces of legislation appeared beyond reach at the time of writing.

Comments throughout this volume allow readers to identify pitfalls of European asylum law and policy, many of which are not intricately linked to the fate of the Commission proposals. They draw our attention to legal and practical challenges at the external borders and explore the normative framework in terms of secondary legislation and human rights compliance. Detention at the external borders, operational powers of the agencies, the pros and cons of mandatory relocation, the political context of cooperation with third states, factors influencing secondary movements, and the definition of reception conditions are among the elements of asylum policy, which are discussed in the different chapters and require our attention irrespective of the fate of the proposals put forward by the Commission in the autumn of 2020. In this respect, this volume is about the status quo as much as it is about future reform.

The book builds upon a series of blogposts which was published by the EU Immigration and Asylum Law Blog of the Odysseus Network in the months following the publication of the Pact.<sup>1</sup> The series proved successful and was consulted by tens of thousands of individual visitors. Building on the success of the series, the contributors to this volume have committed to a fundamental revision and update of their contributions to take on board the lessons learned over the past year and the state of play of the negotiations. The edited volume is not, in other words, a simple re-publication of the blog series but a fundamentally revised collection. Parallel publication of the print edition and an open access version is meant to support broad readership across Europe. A passionate debate among many contributors took place at a conference organised by the Odysseus Network in Brussels on 9/10 September 2021. Interns of the Odysseus Network, notably Marco Paron Trivellato, and assistants of my chair at the University of Konstanz, in particular Kilian Umbach, deserve credit for their valuable support. We are grateful to the University of Konstanz for having provided us with the funds to make our publication available by means of open access.

Asylum legislation and corresponding policy developments are certainly no pleasant object of analysis, and the multifaceted political, ethical, and legal dimensions of any debate forbid the use of rosy language such as ‘enjoy reading’. Nevertheless, we hope that you will benefit from the contributions, be it as a source of information about highly complex rules, be it as a source of inspiration about potential ways forward. Feel free

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1 See <<https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym>> accessed 15 December 2021.

to contact the authors directly in case of comments; they will certainly appreciate your feedback.

Konstanz, 15 December 2021  
Prof. Dr. Daniel Thym





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# Never-Ending Story? Political Dynamics, Legislative Uncertainties, and Practical Drawbacks of the ‘New’ Pact on Migration and Asylum

*Daniel Thym\**

No one would maintain that European asylum policy is in a healthy state and that things should, on the whole, continue as they are. Core aspects of asylum policy resemble a stuttering—if not outright dysfunctional—engine more than a politically sustainable, practically functioning, and normatively balanced approach. The signs of malfunctioning and occasional failure are palpable. Think of the situation at the external borders, regular disputes about secondary movements, and the miserable reception conditions for asylum seekers in some hotspots. That is why the Commission had proposed legislative reform back in 2016, which the institutions failed to agree upon (with the exception of Frontex). The ‘new’ Pact on Migration and Asylum, proposed by the Commission in September 2020 with much fanfare, was meant to show a way out of the political impasse.

Contributions to this edited volume set out to explore the contents and the implications of the Commission’s policy proposals in light of developments in the year following their presentation. In doing so, they go beyond the legislative proposals that are at the centre of the political and academic debate. Indeed, the ‘Pact on Migration and Asylum’ transcends the legislative component—in the same way as the notion of an European ‘asylum policy’ is generally understood to be broader than the legislative instruments that make up the Common European Asylum System (CEAS). Asylum policy embraces cooperation with third states, the impact of entry and border controls on asylum seekers, return of unsuccessful applicants, and the integration of beneficiaries of international protection.<sup>1</sup>

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1 See the distinction between broader ‘asylum policy’ and the legislative instruments building the CEAS in the seminal European Council, Presidency Conclusions of the Meeting on 15 and 16 October 1999 in Tampere, paras 10-27.

Rereading the 28 pages of the political communication introducing the ‘new’ Pact in the autumn of 2020, one realises that only half of them concerned new legislation. The remainder focused on other aspects: cooperation with third states; databases and more powers for Frontex; measures against smuggling; legal pathways for refugees and economic migrants; and Schengen evaluation.<sup>2</sup> These other elements are proceeding besides asylum legislation, many of them with quite some success. Cooperation with third states is one of the most dynamic—and controversial—elements of asylum policy. One year after the presentation of the Pact, the Commission took stock and was optimistic that the EU would be able to reinforce and broaden existing cooperation frameworks.<sup>3</sup>

### 1. *Overarching Enquiries*

Three overarching questions define an overall assessment of the reform package and the state of play one year later. Firstly, one is bound to notice that political discussions on the legislative proposals are in a dire state (while cooperation with third states, in particular, develops dynamically). Will the legislative proposals have the same fate as the reform package that had been presented by the Commission in 2016? This introductory contribution will describe the relevant political factors. Nevertheless, we should be careful not to discard the debate as irrelevant even if the institutions failed to agree on new legislation. Contributions to this volume will shed light on core aspects of asylum policy, which retain their practical, political, and normative relevance irrespective of the adoption of new legislation. In that respect, an analysis of the Pact presents a specific angle to analyse core challenges of asylum policy at this juncture.

Secondly, anyone reading the newspaper realises that the law is not enough, as the situation at the external borders exemplifies: insufficient reception conditions on the Greek islands; the notorious failure of the takeback procedure under the Dublin Regulation; and reports about pushbacks by several countries. For our purposes, these examples illustrate that legislative reform is a necessary but ultimately insufficient condition for a functioning asylum system. We need to ensure that the law in the books is

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2 See Commission, ‘Communication on a New Pact on Migration and Asylum’ COM(2020) 609 of 23 September 2020.

3 See Commission, ‘Communication on the Report on Migration and Asylum’ COM(2021) 590 of 29 September 2021, 15-22.

being applied in practice. It is not enough to agree on a Directive and to assume that national authorities and domestic courts will ensure effective implementation on the ground. A common question contributions to this volume will have to answer is whether the reform proposals are capable of delivering on the ground what they promise on paper.

Thirdly, the Commission was eager to publicise the novelty factor of the ‘new’ Pact. The accompanying press release self-consciously proclaimed a ‘fresh start’ and conceded willingly that ‘[t]he current system no longer works’.<sup>4</sup> Many contributions will demonstrate that the nitty-gritty of the different proposals hardly justifies the self-conscious discursive framing of originality. Digging into the more than 300 pages, one is bound to discover rules that contradict the label of a ‘fresh start’. Once you take off the wrapping paper, the status quo ante reappears in important respects—not only with regard to the Dublin III Regulation, which the Commission proposes to repeal on paper, even though many provisions remain intact.

## *2. European Realpolitik: Respecting ‘Red Lines’*

Commissioner Johansson famously predicted upon presenting the Pact: ‘My guess is that I will have zero Member States saying it’s a perfect proposal... But I do hope that I’ll also have 27 Member States saying it’s a balanced approach and let’s work on this.’<sup>5</sup> So it happened. All governments agreed to start negotiating, which may be a small success in itself given that some Member States could possibly have rejected working on the proposal outright. One reason why they agreed to negotiate was the Commission’s decision to respect the red lines of national governments and to make a deliberate effort to balance countervailing interests.

This brings us right to the heart of the political disputes. It is widely known that the Visegrád countries have made crystal clear that they will not sign up for mandatory relocation in the form of ‘sharing people’. At the same time, we should be careful not to blame solely on the Visegrád countries. One hears repeatedly from people involved in the negotiations

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4 Commission, ‘A Fresh Start on Migration’ (Press Release IP/20/1706, 23 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706)> accessed 15 December 2021.

5 See Alexandra Brzozowski, ‘EU’s New Migration Pact to Request “Mandatory Solidarity” from Member States’ (EurActiv.com, 23 September 2020) <[www.euractiv.com/section/justice-home-affairs/news/eus-new-migration-pact-to-request-mandatory-solidarity-from-member-states](http://www.euractiv.com/section/justice-home-affairs/news/eus-new-migration-pact-to-request-mandatory-solidarity-from-member-states)> accessed 15 December 2021.

that other Member States, which do not receive many asylum seekers at present, hide behind Mr Orbán and others. They might be willing to compromise, including on solidarity by means of ‘sharing people’, but there is little appetite for widescale relocation in capitals across Europe. The Commission accepted that extensive relocation was not a realistic option, in particular for asylum seekers with little statistical chance of receiving a positive decision.<sup>6</sup> Much followed from this starting point.

Acknowledging that extensive relocation would not happen put the spotlight on the external borders. If you cannot relocate substantial numbers of asylum seekers, you must deal with them in the country of first arrival. We shall see that the infamous first entry rule, according to which countries at the external borders are responsible for asylum applications under the Dublin system, was here to stay even though it may be narrowed somewhat (for instance for search and rescue). Border procedures are an attempt to set up fair and effective procedures, although the Commission was probably aware that they would be extremely challenging to implement. Yet, she had little realistic alternatives...

Note that the continuation of the first entry rule almost inevitably entailed that the transfer of jurisdiction in case of secondary movements would similarly persist. Conservative German politicians reacted angrily to this element, which—like the continuation of the first entry rule—fell back behind the state of play of the negotiations on the Dublin IV Regulation. Asserting that the Pact would ‘strick[e] a new balance between responsibility and solidarity’<sup>7</sup> was correct insofar as the proposal embraced new elements (such as ‘return sponsorship’). However, it was a public relations stunt when it came to the heart of the political dispute about how to balance support for ‘frontline’ Member States (solidarity) with respect for European rules and the prevention of secondary movements (responsibility).

That is why I called the Pact an exercise in ‘European *Realpolitik*’ in a blogpost a few days after its presentation.<sup>8</sup> Notwithstanding the rhetoric emphasis on ‘solidarity’, ‘responsibility’, or a ‘fresh start’, the reform pack-

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6 Remember that even the Relocation Decisions (EU) 2015/1523 and (EU) 2015/1601 applied to nationals of countries, who usually receive international protection; if we look at arrivals in southern Italy or Spain, we realise that few cross this hurdle at present.

7 Commission Press Release (n 4).

8 See Daniel Thym, ‘European *Realpolitik*: Legislative Uncertainties and Operational Pitfalls of the “New” Pact on Migration and Asylum’ (EU Immigration and Asylum Law Blog, 28 September

age was about pragmatism, not principles. It is certainly not ‘beautiful’ in the sense of an ideal vision of how migration and asylum policy could possibly look like (even though EU politics has traditionally preferred such grand designs). Instead, it is defined by the needs and circumstances of relevant actors, not morals or ideology, in line with the lexical definition of what *realpolitik* is commonly understood to mean.<sup>9</sup>

The desire to respect the red lines of national governments in the politically sensitive domain of solidarity may be a sign of political pragmatism and practical wisdom. Nevertheless, the proposals will have to be judged not only in light of the prevailing political climate in the early 2020s. Established constitutional and normative principles that define any migration and asylum policy are equally important as a standard of reference and judgment for the policy debate. Human rights and refugee law have to be respected, practical feasibility remains an important yardstick, and the aspiration of solidarity both within the European Union (Article 80 TFEU) and worldwide (Recital 4 Refugee Convention) are equally important for the analyses throughout this volume.

### *3. Dead or Alive? Political Stalemate over the Legislative Proposals*

One year after the presentation of the new Pact, Commission President von der Leyen conceded in her State of the Union Address 2021 that ‘progress has been painfully slow’ while urging the European Parliament and the Council to ‘speed up the process’.<sup>10</sup> To do so would build trust among national governments and the European citizenry that the European Union was capable of successfully managing a crucial contemporary challenge by combining migration control with respect for human rights.<sup>11</sup> Slowness of the negotiations concerns, as we have seen, the legislative components, not other elements of the overall reform package, such as cooperation with third states.

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2020) <<https://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-and-operational-pitfalls-of-the-new-pact-on-migration-and-asylum>> accessed 15 December 2021.

9 See <<https://en.wikipedia.org/wiki/Realpolitik>> accessed 15 December 2021.

10 Ursula von der Leyen, 2021 State of the Union Address, ‘Strengthening the Soul of our Union’ (Speech/21/4701, 15 September 2021).

11 See also Daniel Thym, ‘Migrationssteuerung im Einklang mit den Menschenrechten’ (2018) 5-6 *Zeitschrift für Ausländerrecht* 193-200.

Commissioner Johansson was realistic enough to understand that no one would be happy—and the situation arguably got worse in the months following the presentation of the Pact. To be sure, the institutions diligently started discussing the different proposals. The European Parliament appointed rapporteurs, and draft reports on two core elements, the Amended Proposal for an Asylum Procedures Regulation and the Asylum and Migration Management Regulation, were tabled in October 2021.<sup>12</sup> Council working parties similarly started collecting the feedback of the Member States. After one year, files with comments of national governments were available (informally, at least), and several Council Presidencies had prepared draft compromise texts on selected instruments.<sup>13</sup> Nevertheless, adoption was anything but likely in the foreseeable future; it seemed, rather, as if the negotiations on core questions were blocked.

One element, which may help explain the ‘painfully slow’ progress was the sheer complexity of the documents making up the ‘new’ Pact on Migration and Asylum. Legislative proposals alone comprise more than 300 pages, and bureaucrats in national interior ministries had to dig deep into the small print to grasp the contents of the various proposals. Moreover, some of the changes are difficult to identify. A telling example is the Dublin III Regulation, which is to be replaced by the Asylum and Migration Management Regulation. It presents itself as a novel undertaking, even though many provisions are continued without major changes. For new instruments, the Commission does not use track change mode; one has to compare the contents of each article individually; their order was altered substantially, thus obscuring the degree of continuity or change.<sup>14</sup> For asylum procedures and Eurodac, the Commission tabled amended proposals, which have to be read together with the original documents

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12 See European Parliament, ‘Draft Report on the Proposal for an Asylum and Migration Management Regulation’ (Rapporteur: Tomas Tobé), PE698.950v01-00 of 11 October 2021; and European Parliament, ‘Draft Report on the Amended Proposal for an Asylum Procedures Regulation’ (Rapporteur: Fabienne Keller), PE698.950v01-00 of 13 October 2021; they presented the views of the rapporteurs only, before the input of members of other political groups.

13 See the diverse entries on ‘EU: Tracking the Pact’ in the news section of Statewatch, which informally publishes many confidential documents <[www.statewatch.org/news/](http://www.statewatch.org/news/)> accessed 15 December 2021.

14 See Commission, Proposal for an Asylum and Migration Management Regulation, COM(2020) 610 of 23 September 2020.



presented in 2016.<sup>15</sup> Even experts of migration law needed weeks to digest the material.

Discussions during the first months of 2021 witnessed increasing tensions between Mediterranean and Northern countries, which threatened to overshadow the principled opposition of the Visegrád countries (V4). Spain, Italy, Greece, Cyprus, and Malta were particularly outspoken in their principled criticism of core elements of the Commission proposals, insofar as asylum procedures at the external borders are concerned; they even created the label 'MED5' to present themselves as a uniform grouping (even though the interests and positions of governments may vary).<sup>16</sup> Countries further North quietly abandoned the voluntary relocation of those rescued at sea under the so-called Malta Declaration given the small overall number of asylum applications in Italy;<sup>17</sup> they also sent a strongly worded letter to Greece, complaining about secondary movements of asylum seekers and beneficiaries of international protection.<sup>18</sup> Statistics showed that the number of people filing another asylum claim in Germany was higher than the one for new arrivals on the Greek islands during the same period.

For the negotiations, increasing tensions between Mediterranean and Northern countries are toxic for the simple reason that these states sustain the European asylum system: they bear the brunt of responsibilities in terms of border controls, search and rescue, asylum procedures, return, and eventual integration.<sup>19</sup> If the Northern and Mediterranean countries

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15 See Commission, Amended Proposal for an Asylum Procedures Regulation, COM(2020) 611 of 23 September 2020; and Commission, Amended Proposal for a Eurodac Regulation, COM(2020) 614 of 23 September 2020.

16 See Nikolaj Nielsen, 'EU "Front-Line" States Want Clearer Migration Rules' (EU Observer, 26 November 2020) <<https://euobserver.com/migration/150196>> accessed 15 December 2021; and "Club Med" Countries Show United Front on Migration' (EurActiv.com, 22 March 2021) <[www.euractiv.com/section/justice-home-affairs/news/club-med-countries-show-united-front-on-migration/](http://www.euractiv.com/section/justice-home-affairs/news/club-med-countries-show-united-front-on-migration/)> accessed 15 December 2021.

17 On the previous practice, see Simone Penasa and Graziella Romeo, 'Sovereignty-based Arguments and the European Asylum System' (2020) 22 EJML 11, 20-26.

18 See the letter by Germany, France, Belgium, Luxembourg, the Netherlands and Switzerland dated 1 June 2021 <[www.statewatch.org/news/2021/june/whip-greece-into-shape-so-we-can-resume-migrant-removals-northern-schengen-states-demand](http://www.statewatch.org/news/2021/june/whip-greece-into-shape-so-we-can-resume-migrant-removals-northern-schengen-states-demand)> accessed 15 December 2021.

19 See also Ralf Lesser, Ann-Sophie Nienhoff and Nora Schmidt, 'Der "New Pact on Migration and Asylum" Neustart unter deutscher EU-Ratspräsidentschaft zur Reform des Gemeinsamen Europäischen Asylsystems' (2021) 4 Zeitschrift für Ausländerrecht 139, 142.

fail to compromise, an agreement might be impossible to reach. Remember also that there is a ‘silent majority’ of countries which, to varying degrees, are reasonably happy with the status quo for the simple reason that few asylum seekers move there at present. Like it or not, most national capitals define their national interest in terms of minimising the number of asylum applications. EU asylum policy may be dysfunctional in many respects, but not all Member States are equally affected by asymmetric migratory patterns.

Then again, politics are the art of the possible (in the words of Otto von Bismarck, Germany’s leading chancellor of the 19<sup>th</sup> century). EU institutions have a track record in endurance and stamina, having overcome a seemingly hopeless political stalemate. In that respect, external factors may have brought Member States closer together. The collapse of the Western-backed government in Afghanistan and the scandalous behaviour of the Belarusian dictator Lukashenko, who used migrants as an instrument to exercise political pressure during 2021,<sup>20</sup> might bring about new dynamics. After all, crises, real or perceived, have been opportunities for reform in Europe before. Countries like Lithuania or Poland realise that anyone can be affected by migratory movements, thus possibly supporting the willingness to compromise, although the outcome of any agreement in such context would be more restrictive than many observers might appreciate. Commission proposals on the instrumentalisation of migration and a reform of the Schengen Borders Code, presented in December 2021, show that the institutions are eager to sustain a dynamic debate.<sup>21</sup>

#### 4. *Breaking the Deadlock through ‘Mini-Deals’ and Majority-Voting?*

Political negotiations on complex portfolios, such as asylum policy, often pursue a package approach: nothing is agreed until everything is agreed. Even if the institutions succeed in closing the negotiations on individual

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20 See ‘Belarus plays on the EU’s migration concerns’ (FT.com, 22 August 2021), <[www.ft.com/content/7a036e79-69f9-410b-8faa-89607396afe9](https://www.ft.com/content/7a036e79-69f9-410b-8faa-89607396afe9)> accessed 15 December 2021.

21 See Commission Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM(2021) 752 of 1 December 2021; Commission Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum, COM(2021) 890 of 14 December 2021; and Commission Proposal for an Amendment of the Schengen Borders Code Regulation (EU) 2016/399, COM(2021) 891 of 14 December 2021.

chapters, formal adoption of the provisional agreement may be paused until the package as a whole can be agreed upon. As a matter of principle, such package approach has benefits: there are often practical connections between different reform proposals (for example, on return and border procedures); on other matters, compromises require a give-and-take in the mutual interest (for instance, solidarity in return for measures against secondary movements); linking different dossiers increases the room for compromise formulae, thus facilitating the resolution of the most protracted disputes by means of comprehensive deals.

At the same time, the package approach can result in never-ending debates and prevent the adoption of measures on which a political compromise exists already. As a political practice, it is not legally binding and could be overcome at any time provided a sufficient number of Member States in the Council supports the ‘unbundling’ of package deals.<sup>22</sup> Negotiations on the 2016 reform package were allegedly close to such ‘mini-deals’ on the Asylum Agency and selected other instruments during 2018/19, even though the adoption of these measures ultimately failed to muster sufficient political support. Successive Council Presidencies and the Commission pursued a similar strategy during 2021 and 2022: EU institutions reached a political agreement on the reform of the Asylum Agency (excluding those measures that are closely connected to the Pact), which was formally adopted by the Justice and Home Affairs Council at its meeting in December 2021; Eurodac reform was on the table, even though a majority of the Member States seemed to oppose the isolated adoption; moreover, the Screening Regulation and the Resettlement Framework Regulation were mentioned as potential ‘mini-deals’.<sup>23</sup> At the time of writing, none of these measures had formally been adopted, but the hope for trust-building by means of a step-by-step approach remained intact.

Core aspects of asylum reform, such as border procedures, solidarity, secondary movements, and asylum jurisdiction, will almost inevitably require a comprehensive reform package, which will ultimately have to be agreed upon at the highest political level. Heads of state or government may grasp how important asylum reform can be for the European project, and they are the appropriate forum for cross-sectoral compromise-building

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22 See also ECJ, *Istanbul Convention*, Opinion 1/19, EU:C:2021:832, paras 229-274 in the context of international treaties where the Council waits (voluntarily) until all national parliaments have ratified a treaty.

23 See Commission, ‘Report on Migration and Asylum’ (n 3) 15.

that connects asylum policy to other subject matters.<sup>24</sup> Nevertheless, it remains a question of diplomatic  *finesse*  to identify a window of opportunity for such grand compromise. Raising the matter to the European Council too quickly entails the risk of failure and hardening cleavages.

Finally, opposition of reticent Member States may be overcome by means of qualified majority voting in the Council.<sup>25</sup> Yet, we should be careful not to overestimate the potential of majority voting for three inter-related reasons. Firstly, deliberations in the Council and preparatory bodies are defined by an entrenched consensus culture. Conflictual voting rarely happens; negotiations habitually strive to take everyone on board.<sup>26</sup> Secondly, the prevalence of compromise-building does not mean, crucially, that qualified majority voting is practically irrelevant. Empirical studies demonstrate that the behaviour of national representatives changes when they cannot simply block decisions by means of a veto; the ‘shadow of the vote’ renders negotiating positions more flexible.<sup>27</sup> Thirdly, not all majority votes have the same bearing; governments may accept the final outcome even though they formally voted against an initiative (sometimes to demonstrate opposition to the domestic audience). Important asylum legislation may well be adopted by majority vote, but the degree of opposition and cleavage behind the vote matters.

Indeed, the ongoing constitutional conflict on the independence of the judiciary between, on the one side, the Commission and the Court of Justice and, on the other side, the Polish government and the Polish Constitutional Court exemplifies that constitutional conflicts are a risky undertaking. Do we really expect Hungary, Poland, and other Member States to grudgingly accept mandatory relocation adopted against their principled opposition by a majority in the Council? Of course, the Commission could press ahead with infringement proceedings and ask judges to authorise lump sums or penalty payments against Member States flatly refusing to comply with asylum legislation.<sup>28</sup> Such pressure is an indispensable means

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24 Note that discussion of the asylum dossier by the European Council does not entail that the majority requirements change; see ECJ, *Slovak Republic & Hungary v Council*, C-643/15 & C-647/15, EU:C:2017:631, paras 143-150.

25 On the ordinary legislative procedure, see Articles 78(2), 294 TFEU.

26 See Fiona Hayes-Renshaw, ‘The Council of Ministers: Conflict, Consensus, and Continuity’ in Dermot Hodson and John Peterson (eds), *Institutions of the European Union* (4th edn, OUP 2017) ch 4.

27 See Jonathan Golub, ‘In the Shadow of the Vote? Decision Making in the European Community’ (1999) 53 *International Organization* 733-764.

28 See Articles 258, 260 TFEU.

of law enforcement, also in the field of migration (as highlighted by the application for penalty payments against Hungary for disrespecting Court judgments on transit zones). Nevertheless, it can be risky to escalate tensions to the point of open conflict. The Hungarian Constitutional Court has shied away from openly confronting the Court of Justice on migratory matters for the moment,<sup>29</sup> but the potential of conflict remains real: between courts and with regard to the Hungarian and Polish government.

It can be an expression of political wisdom not to force a constitutional conflict EU institutions might not win, also considering that populist governments eagerly exploit migration to spur anti-European sentiment among the population.<sup>30</sup> To prevent such an escalation may be the logic behind the consensus culture and the inbuilt pressure to agree on a compromise. Doing so promotes compliance with legal obligations and ultimately prevents the Union from falling apart. As stated previously, none of this prevents recourse to majority voting in scenarios where the degree of political tensions remains manageable. Even in such scenarios, however, it is no foregone conclusion that a sufficient number of Member States is willing to actively support a compromise.<sup>31</sup> On many dossiers, there might quite simply not be a sufficient number of governments willing to vote 'yes'. Remember that many hide behind the principled opposition of the V4.

##### 5. *'Screening Light': Hardly a Novelty*

The remainder of this introductory contribution will discuss five themes, which highlight selected elements of the 'Pact'. Our assessment concentrates on those aspects of the legislative proposals that allow us to provide preliminary answers to the overarching enquiries presented at the outset. In doing so, our description follows the usual chronology of how instru-

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29 See Hungarian Constitutional Court, decision of 10 December 2021, X/477/2021, <<http://hunconcourt.hu/announcement/decision-of-the-constitutional-court-on-the-interpretation-of-the-provisions-of-the-fundamental-law-allowing-the-joint-exercise-of-powers>> accessed 15 December 2021; and Nóra Chronowski and Attila Vincze, 'Full Steam Back' (Verfassungsblog, 15 December 2021) <<https://verfassungsblog.de/full-steam-back/>> accessed 15 December 2021.

30 See Daniel Thym, 'The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53 CML Rev. 1545, 1567-1572.

31 Majority voting requires, in accordance with Article 16(3) TEU, an active vote in favour of 55% of the Member States (i.e. 15 out of 26, with Denmark not participating as a result of the opt-out), which represent 65% of the population.

ments are being applied in practice, from screening and border procedures to relocation and return. A decisive novelty, on which the Commission put much emphasis was the introduction, ‘for the first time’<sup>32</sup>, of pre-entry screening of anyone apprehended in the context of an unauthorised border crossing, or after search and rescue. The novelty factor is underlined by the proposal of a new instrument: the Screening Regulation.<sup>33</sup>

Closer inspection of the Proposal for a Screening Regulation demonstrates the limited novelty factor. Mandatory elements under Article 6(6) correspond by and large to what border authorities are obliged to perform already under the Schengen Borders Code, the Eurodac Regulation, or when registering an asylum application—with the exception of a health screening, which most countries introduced in response to the COVID-19 pandemic. The timeframe for the screening of five to ten days mirrors today’s prescription for the registration of asylum applications.<sup>34</sup> Screening is a smart new label but has little added value in practice.

An example illustrates this point. Screening would support fast asylum procedures if it helped clarify the identity of individuals. However, Article 10 concentrates on checking biometric and other information with existing databases. Reference to ‘data or information provided by or obtained from the third-country national concerned’<sup>35</sup> could possibly be read to require Member States to explore information on smartphones or to use software identifying the dialect spoken (both tools are used, amongst others, by the German Federal Migration and Asylum Office). Yet, the reference is so vague that it can hardly be interpreted to mandate such intense—and controversial—methods. Tellingly, the ‘standard debriefing form’ in the annex refers to an ‘initial indication’ of nationality. Screening would not be much more than initial registration and an identification attempt.

The debriefing form does not constitute a formal decision subject to legal remedies; instead, screening is designed to prepare decision-making. Depending on the individual case, formal decisions will take the form of an asylum procedure under the Asylum Procedures Directive 2013/32/EU (including border procedures and special rules for vulnerable groups, whenever applicable), refusal of entry in line with the Schengen Borders Code Regulation (EU) 2016/399, or a return decision in accordance with

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32 Commission Press Release (n 4).

33 Commission Proposal for a Screening Regulation, COM(2020) 612 of 23 September 2020.

34 See Article 6(1), (7) Asylum Procedures Directive 2013/32/EU.

35 Ibid Article 10(1)(b).

the Return Directive 2008/115/EC. Previous case law indicates that the legislature may establish such intermediary procedural steps provided that the initial conclusions can be challenged at a later stage in the context of legal remedies against the administrative decision that follows.<sup>36</sup>

A number of lacunae in the Commission Proposal could have negative repercussions on the rights of migrants and refugees, as Lyra Jakulevičienė will discuss in more detail in her chapter in this volume. Screening shall take place on the national territory but before the formal authorisation of entry (fiction of non-entry),<sup>37</sup> thus implicitly asking Member States to restrict movement within the territory. Nevertheless, there are no explicit provisions on restrictions of mobility—or even detention—besides a vague reference to national laws in Recital 12. While not any restriction on mobility amounts to detention, as we shall see, it is astonishing that the Commission refrains from proposing common standards. What is more, the Proposal remains unclear how the screening exercise would interact with asylum legislation, in particular, whether reception conditions and procedural guarantees under the Asylum Procedures Directive would start applying, in case of an asylum application, before or after the screening.

## 6. Agencies: Refraining from ‘More Europe’

Lacunae in the Proposal for a Screening Regulation are a first indication that the Commission deliberately leaves Member States legislative and practical leeway on crucial matters. Doing so might be a matter of political strategy: EU institutions circumvent divisive political negotiations, thus facilitating the adoption of the proposals; moreover, they could wash their hands of responsibility for restrictive national laws and practices later. After all, it would remain the choice of national parliaments on how to design implementing legislation. That is not to say, crucially, that the Commission is unaware of the potential of wrongdoing. It proposes a monitoring mechanism, to be established at the national level, to ensure compliance with domestic and supranational legislation, including fundamental rights, ‘in relation to the screening’ (not, however, for border pro-

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36 See ECJ, *Samba Diouf*, C-69/10, EU:C:2011:524, paras 40-44, 54, 57ff; and, by way of example, Article 17(2) Asylum Procedures Directive 2013/32/EU.

37 Article 4 Proposal for a Screening Regulation (n 33).

cedures, return, or the like).<sup>38</sup> We are left with an astonishing combination of European intervention and enhanced national responsibilities.

Our conclusion about the timid Europeanisation is reinforced by a comparison of the Pact with the non-paper of the incoming German Presidency, published one year before the Pact.<sup>39</sup> In the non-paper, the German government had put much emphasis on an ‘initial assessment’ of asylum claims at the external borders, to be followed by rejection in case of manifestly unfounded or inadmissible applications and, possibly, relocation for those with a high likelihood of success. By contrast, the Commission’s Proposal for a Screening Regulation does not prejudge the outcome of the asylum procedure. A debriefing form is to ‘point to’ any elements that might possibly influence the choice of procedure, and the decision whether or not to relocate someone is taken elsewhere.<sup>40</sup> In essence, screening would not be much more than a reinforced border check and asylum registration.

A comparison with the non-paper demonstrates another reform step the Commission does not dare to go. The incoming German Presidency had pondered autonomous decision-making of the Asylum Agency and Frontex, which could possibly have conducted the pre-screening independently in a few years, after initially supporting ‘frontline’ Member States. Enhanced powers of the agencies did not find their way into the Screening Regulation, which, rather, entrusts the task to national authorities, with the support of the agencies acting ‘within the[ir] mandate’<sup>41</sup>. However, the mandate of Frontex and the future Asylum Agency authorises support for host state decision-making only, on ‘whose behalf’ they may exceptionally be authorised to act.<sup>42</sup> Doing so effectively codifies the practice in the hotspots, as Lilian Tsourdi will explain in her contribution on the operational powers of the agencies in this volume.

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38 Ibid Article 7.

39 See German Government, ‘Outline for Reorienting the Common European Asylum System’ (Food for thought, 13 November 2019) <[www.statewatch.org/media/documents/news/2019/dec/eu-asylum-FoodForThought-GermanNoPaper.pdf](http://www.statewatch.org/media/documents/news/2019/dec/eu-asylum-FoodForThought-GermanNoPaper.pdf)> accessed 15 December 2021.

40 Article 14(2), (3) Proposal for a Screening Regulation (n 33).

41 Ibid Article 6(7).

42 See, for Frontex, Articles 43, 48(1)(b), (2), 82(4), (11) Frontex Regulation (EU) 2019/1896; and, for the future Asylum Office, Article 16a(2)(h) Amended Commission Proposal for an EUAA Regulation, COM(2018) 633 of 12 September 2018, read in combination with the political compromise enshrined in Council doc. 10555/17 of 27 June 2017; note that to act ‘on behalf of’ someone involves attribution of the agencies’ conduct to the host state.



At an intermediate level of abstraction, we may conclude that the Commission refrains from proposing an autonomous decision-making authority of the agencies, even in exceptional circumstances. Ultimate responsibility rests with domestic authorities. I am fully aware of the constitutional and practical challenges an autonomous decision-making power would entail. While Articles 77 and 78 TFEU can be read, in light of Court judgments, to embrace a competence for enhanced agency involvement,<sup>43</sup> autonomous decision-making would be challenging for the Court architecture. Specialised tribunals under the responsibility of the European Union would have to be set up in the European periphery.<sup>44</sup> That would take years and might pose myriad administrative difficulties, thus possibly discouraging the Commission from recommending ‘more Europe’ by means of greater agency involvement. What is more, doing so has the side-effect that the Commission can continue pointing to the primary responsibility of the Member States if something goes wrong on the ground.

Having said this, the agencies remain a crucial element in the EU’s toolbox for asylum reform. Agency involvement will not bring about a brave new world of compliance single-handedly, but they are the best instrument we have to influence developments on the ground. Frontex and the future Asylum Agency can support domestic authorities and provide for fundamental rights oversight (Poland, for instance, rejected the deployment of Frontex at the border towards Belarus during 2021 partly because it scorned the presence of fundamental rights monitors). The substantial increase of the justice and home affairs budget under the Multiannual Financial Framework 2021–27, agreed upon in parallel to the Pact, will considerably extend the leverage of agencies, and the diverse funds can be used as an incentive to support the compliance of the Member States.<sup>45</sup> Iris Goldner Lang will focus on the financial aspects of asylum reform in her contribution.

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43 See Roman Lehner, ‘Rechtliche Möglichkeiten zur Schaffung einer EU-Asylbehörde’ in Roman Lehner and Friederike Wapler (eds), *Die herausgeforderte Rechtsordnung: Aktuelle Probleme der Asylpolitik* (BWV 2018) 183-221; and Daniel Thym, ‘Legal Framework for Entry and Border Controls’ in Daniel Thym and Kay Hailbronner (eds), *EU Immigration and Asylum Law. Article-by-Article Commentary* (3rd edn, C.H. Beck/Hart/Nomos 2022), paras 7-8, 20a.

44 Cf Article 257 TFEU.

45 It may even serve as a leverage to incentivise change; at the time of writing during the autumn of 2021, the Commission was withholding funds from Greece until the government agreed to introduce a human rights monitoring mechanism.

## 7. Border Procedures: Administrative Bottleneck

In contrast to screening, new rules on border procedures are a substantial novelty, demonstrating the significance of our overarching enquiry about ‘the law is not enough’. On paper, a border procedure is a strict set of rules, which, nonetheless, embraces essential procedural guarantees, such as a personal interview and an individual assessment of each case, in line with Articles 11-13 Proposal for an Asylum Procedures Regulation of 2016, which the Pact leaves intact.<sup>46</sup> The Amended Proposal of 2020 reaffirms the need for a legal remedy that ‘shall provide for a full and ex nunc examination of both facts and points of law’<sup>47</sup>. Similarly, legal assistance shall be available to applicants at the external borders.<sup>48</sup> Jens Vedsted-Hansen will zoom in on these procedural aspects in his contribution. The proposals on emergency measures for the benefit of Latvia, Lithuania and Poland in response to the instrumentalisation of migrants by Belarus demonstrate that the Commission continues to believe in the model of fast procedures with lesser standards in the border area.<sup>49</sup>

For our purposes, another element should be highlighted. Unfortunately, the guarantees in the Asylum Procedures Regulation are not always complied with in practice—in the same vein as the Reception Conditions Directive, in relation to which the Pact endorses the state of play of the negotiation on the 2016 Proposal. Lieneke Slingenberg will remind us of core aspects of that proposal. When it comes to non-compliance, ECtHR and ECJ judgments on the deficiencies of the Hungarian transit zones are telling examples: they found various deficits in terms of reception conditions, detention, and asylum procedure (judges were careful to assess each aspect individually, thus distinguishing different elements and not following each claim of illegality).<sup>50</sup> Similarly, expedited procedures under Greek asylum legislation mostly do not qualify as border procedures for

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46 See Proposal for an Asylum Procedures Regulation, COM(2016) 467 of 13 July 2016.

47 Article 53(3) Amended Proposal for an Asylum Procedures Regulation (n 15).

48 Articles 14-17 Proposal for an Asylum Procedures Regulation (n 46).

49 See Article 2 Commission Proposal on provisional emergency measures (n 21); and Article 2 Commission Proposal addressing situations of instrumentalisation (n 21).

50 See ECtHR, judgment of 21 November 2019 [GC], No. 47287/15, *Ilias & Ahmed v Hungary*; ECtHR, judgment of 2 March 2021, No. 36037/17, *R.R. et al. v Hungary*; ECJ, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU & C-925/19 PPU, EU:C:2020:367; and ECJ, *Commission v. Hungary*, C-808/18, EU:C:2020:1029.

the purposes of Union law, since they fall foul—in theory and practice—of essential procedural guarantees in the Directive 2013/32/EU.<sup>51</sup>

Flagrant compliance and implementation deficits concern not only the rights of migrants. The Commission insists that the border procedure, including legal remedies, should be completed within twelve weeks in regular circumstances and 20 weeks in times of crisis.<sup>52</sup> To be sure, legislative amendments streamlining asylum procedures and shorter time-frames for legal oversight are meant to support compliance with these objectives.<sup>53</sup> Limiting legal oversight to one level of appeal complies with human rights.<sup>54</sup> In addition, new governance structures are meant to establish a permanent channel of communication between national governments and EU institutions. They may be a step in the right direction, although experience with the lacklustre performance of Schengen governance shows that the new governance mechanism might be sufficient to overcome structural compliance deficits.<sup>55</sup> Remember that Article 31(3) Asylum Procedures Directive 2013/32/EU obliges Member States to complete asylum procedures within six months. State practice often fails to deliver, not only on the Greek islands. Thus, the Commission's insistence on efficiency may have the same fate as the rights of refugees and migrants: the law on books does not always translate into administrative practices on the ground.

Entrenched non-compliance is a problem in its own right, and it has a knock-on effect on the political negotiations: stakeholders lose faith in the law. ECRE is highly critical of the new proposals.<sup>56</sup> Similarly, Mediterranean countries do not trust the time limits, while countries further North worry about continuous secondary movements. For that reason, ne-

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51 Greek Council for Refugees, 'Fast-Track Border Procedure (Eastern Aegean Islands)' (AIDA/ECRE, 10 June 2021) <<https://asylumineurope.org/reports/country/greece/asylum-procedure/procedures/fast-track-border-procedure-eastern-aegean>> accessed 15 December 2021.

52 See Article 41 Amended Proposal for an Asylum Procedures Regulation (n 15); and Article 4(b) Proposal for a Crisis and Force Majeure Regulation, COM(2020) 613 of 23 September 2020.

53 See, in particular, Articles 35a, 41a, 53-54 Amended Proposal for an Asylum Procedures Regulation (n 15); and the contribution by Jens Vedsted-Hansen to this volume.

54 Ibid Article 53(9); and ECJ, *Samba Diouf* (Fn. 36), para 69.

55 See Commission Recommendation (EU) 2020/1366 on a Migration Preparedness and Crisis Blueprint [2020] OJ C317/26, which applies immediately; and, for the future, Article 3-7 Proposal for an Asylum and Migration Management Regulation (n 14).

56 See the collection of comments #HARDLY ROCKET SCIENCE <<https://hardlyrocketscience.org>> accessed 15 December 2021.

gotiations take place at two levels. On the one hand, governments discuss the letter of the law, and they are concerned, on the other hand, about practices on the ground. Such two-level game renders any negotiations terribly complex and are another reason for the absence of an agreement. States know that practices on the ground often differ from the law in the books.

#### 8. Accommodation: 'Closed' or 'Controlled' Centres?

Notwithstanding the complexity of the legislative proposals, existing loopholes and ambiguities may cause confusion. A good example is the so-called 'fiction of non-entry', which the incoming German Presidency had proposed in its non-paper in line with an established category of German immigration laws.<sup>57</sup> Such 'fiction of non-entry' can create confusion; it often equates with formal rightlessness, even though statutory and human rights guarantees can be invoked in transit zones in scenarios where the border crossing has not been formally authorised. What matters is not whether human rights and legislation apply before the authorisation of entry, rather what they prescribe in substance. Indeed, the 'fiction of non-entry' usually involves a lesser degree of protection on the basis of distinct legislative rules for these matters.

Absence of detailed explanations, in the Pact, reinforced uncertainties about what the 'fiction of non-entry' entails for the rights of migrants during screening and border procedures.<sup>58</sup> The most important uncertainty concerns detention, which the Commission does not recommend to use systematically during screening and border procedures. Detention would, also in future, not be automatic; it requires an individualised decision subject to a legal remedy.<sup>59</sup> Recognising border procedures as a ground for detention does not support a different outcome, since any activation

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57 See German Government (n 39); and Section 13(2) Residence Act (*Aufenthaltsgesetz*) <[www.gesetze-im-internet.de/aufenthg\\_2004/\\_\\_\\_13.html](http://www.gesetze-im-internet.de/aufenthg_2004/___13.html)> accessed 15 December 2021; see also Daniel Thym, 'Für ein "Helsinki" im deutschen Migrationsrechtsdiskurs' (Verfassungsblog, 10 July 2018) <<https://verfassungsblog.de/fuer-ein-helsinki-im-deutschen-migrationsrechtsdiskurs>> accessed 15 December 2021.

58 See the general reference in Article 4 Proposal for a Screening Regulation (n 33); and Article 41(6) Amended Proposal for an Asylum Procedures Regulation (n 15).

59 See Articles 41(9)(d), 41a(5), (6) Amended Proposal for an Asylum Procedures Regulation (n 15).

of this option would still require an individualised assessment, including inspection of alternatives to detention.<sup>60</sup> These rules reiterate the contents of a Court judgment on detention in transit zones, which was based on existing legislation and could be overturned by means of a legislative amendment as a result.<sup>61</sup> Yet, the Commission does not propose such fundamental reversal.<sup>62</sup> Statutory rules on detention during asylum procedures will remain intact, even though detention for return purposes shall be facilitated, as Galina Cornelisse will reflect on in-depth.

This leaves us with an essential query: what is the difference between ‘detention’, subject to a tight legislative framework, and the ‘fiction of non-entry’, on which the Commission remains surprisingly nebulous? Arguably, the legal notion of detention provides some guidance. Not any ‘restriction’ of liberty, for instance in transit zones, will amount to ‘deprivation’ and ‘detention’. In line with settled case law, it has to be assessed in light of various factors when the ‘non-admission’ with the ensuing restriction of liberty turns into ‘detention’, for which the statutory guarantees in the Reception Conditions Directive require an individualised assessment.<sup>63</sup> Against this background, the silence on the part of the Commission on the consequences of the ‘fiction of non-entry’ may be perceived as a strategic choice. It deliberately creates room for manoeuvre for Member States to exploit legal uncertainties by means of strict practices on the ground. The end result may mirror the ambiguous preference for ‘controlled’ (not: ‘closed’) centres, the European Council had called for in June 2018.<sup>64</sup>

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60 Article 8(2), (3)(c), (4) Reception Conditions Directive 2013/33/EU are not altered substantially by the Commission Proposal for a Reception Conditions Directive, COM(2016) 465 of 13 July 2016.

61 See ECJ, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (n 50), paras 238-239 and 257-259.

62 On the room for manoeuvre under human rights law, see Jürgen Bast, Frederik von Harbou and Janna Wessels, *Human Rights Challenges to European Migration Policy: The REMAP Study* (Nomos 2021) ch 2; and Daniel Thym, ‘Expert Opinion on the Reform of the Common European Asylum System for the German Federal Ministry of the Interior’ (January 2017) 41-44 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3163014](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3163014)> accessed 15 December 2021.

63 See ECtHR, *Ilias & Ahmed v Hungary* (n 50), paras 211-249; and ECJ, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (n 50), paras 204-248.

64 European Council, Conclusions, EUCO 9/18 of 28 June 2018, para 6.

### 9. *Hotspots Reloaded: Another Moria?*

A few weeks before the Commission presented the Pact, a devastating fire destroyed the Moria camp on the Greek island of Lesbos, which had become an epitome for the failure of the European Union to deliver fair and efficient asylum procedures, appropriate reception conditions, and reasonably effective return policies at the external borders.<sup>65</sup> ‘No more Morias’ became a rallying cry for activists criticising EU asylum policy. It similarly continues to preoccupy the minds of officials in the Mediterranean countries who are concerned that the practical implementation of the Commission’s policy blueprint would effectively result in huge camps at the external borders with protracted limbo situations. Asylum procedures might last longer than 12 to 20 weeks, countries of origin or transit often refuse to take back those without protection needs, and beneficiaries of international protection might not be resettled to other Member States. As a result, many small Morias might emerge.

Several legislative proposals are meant to prevent such overcrowding. Surprisingly, the Commission re-erected a concept that was among the very first legislative instruments on asylum to be adopted in the early 2000s, only to be ignored in the institutional practice thereafter.<sup>66</sup> The Temporary Protection Directive 2001/51/EC is to be officially repealed, and the Commission proposes to replace the instrument with a novel form of ‘immediate protection’.<sup>67</sup> Immediate protection status is designed for those fleeing civil war and is meant to suspend asylum procedures for one year, thereby safeguarding precious administrative resources. Meltem İneli Ciger will introduce us to this genuine novelty factor and discuss uncertainties regarding the scope and implications of this innovative proposal for ‘immediate protection’.

Crucial additional elements to prevent overcrowding will be procedural restrictions mentioned previously, the effectiveness of return, and relocation. When it comes to return, Madalina Bianca Moraru, Elspeth Guild, and Paula García Andrade will explore the pitfalls of the legislative proposals and of ongoing cooperation with third states. With regard to relocation, Francesco Maiani will discuss the merits and limitations of the

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65 See ‘Moria migrants: Fire destroys Greek camp leaving 13,000 without shelter’ (BBC.com, 9 September 2021) <[www.bbc.com/news/world-europe-54082201](http://www.bbc.com/news/world-europe-54082201)> accessed 15 December 2021.

66 See Meltem İneli-Ciger, ‘Time to Activate the Temporary Protection Directive’ (2016) 18 EJML 1, 13-32.

67 See Article 11 Proposal for a Crisis and Force Majeure Regulation (n 52).

rather lacklustre solidarity mechanism in detail. He will show that the rules are extremely complex and would require permanent negotiations among the Member States about different forms of ‘flexible’ solidarity ranging from relocation over administrative support to so-called return sponsorships.<sup>68</sup> Search and rescue plays a critical role in many of these discussions; the Commission proposes a specific—and stronger—solidarity mechanism after disembarkation, although it might not survive the negotiations.<sup>69</sup> Moreover, measures on rescue operations and the criminalisation of private actors remain decidedly vague. Violeta Moreno-Lax will assess these diverse initiatives in her comments on search and rescue.

Somewhat ironically, the novel ‘return sponsorship’, which received much criticism, may eventually result in relocation if the sponsoring country fails to realise return within eight months, or four months in times of crises.<sup>70</sup> The Visegrád countries will scrutinise these rules carefully, in the same vein as the Mediterranean states will argue vehemently that the first entry rule is abandoned (something the Commission did not propose, unlike in the 2016 Proposal for a Dublin IV Regulation).<sup>71</sup> The flipside of the—largely unchanged—continuation of the Dublin criteria on asylum jurisdiction concerns the survival of the transfer of jurisdiction in cases of secondary movements, which the Pact essentially retains, subject to some limitations (again, in contrast to the 2016 Proposal).<sup>72</sup> Daniel Thym will assess what these choices mean for secondary movements. Highlighting the lack of innovation on asylum jurisdiction brings our comments full circle. Closer inspection of the legislative small-print demonstrated an almost staggering combination of change and continuity, as well as numerous political, practical, and normative pitfalls. One can hardly be surprised that the institutions have failed to agree on a swift compromise on these matters.

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68 See Articles 45-61 Proposal for an Asylum and Migration Management Regulation (n 14); and Articles 2-3 Proposal for a Crisis and Force Majeure Regulation (n 52); on the state of play of the negotiations among Member States, see Council doc. 10450/21 of 6 July 2021.

69 Ibid Articles 47-49.

70 Ibid Article 55(2); and Article 2(7) Proposal for a Crisis and Force Majeure Regulation (n 52).

71 Contrast *ibid* Article 21 to Commission Proposal for a Dublin IV Regulation, COM(2016) 270 of 4 May 2016.

72 Contrast *ibid*, Articles 27(1), 35(1), (2) to Article 9a Proposal for a Dublin IV Regulation, as discussed among Member States according to Council doc. 8895/18 of 17 May 2018.

10. *Conclusion: The Alternative is not the Status Quo*

It is sometimes said that the status quo might be better than a bad reform. From a purely legal-doctrinal perspective that is correct. If the Asylum Procedures Directive is not amended, it remains the law in the book and must be respected by domestic authorities as a matter of positive law. Having said this, failure of legislative reform might increase the appetite, among the Member States and the supranational institutions, for alternative policy responses, which complement or replace the need for legislative reform: externalisation is the most obvious alternative. Disagreement on how to deal with arrivals might result in their prevention by means of cooperation with third states. It's like the proverbial hot potato. Member States pass it around until it falls to the floor.

Those who do not want this to happen should accept that the only viable alternative to externalisation is a reasonably well-functioning Common European Asylum System, not a continuation of the status quo. The need for political compromise is even more warranted if we remember our introductory comments about 'the law is not enough'. Failure of legislative reform might result in gradual disintegration, with Member States taking supranational legislation less and less seriously. Read the signs of the wall. Greece has got away with inappropriate reception conditions for years; we all know the pushback allegations against Greece, Croatia, and Spain, as well as, more recently, Poland and Lithuania. Some—not necessarily all—of these measures are illegal, and they continue nonetheless. We might see more of the same if asylum legislation was blocked indefinitely. Political will would gradually replace the doctrinal force of the law.<sup>73</sup> That may be frustrating for legal academics, but it's better to face unpleasant news than to ignore it. Without a legislative reform which works reasonably well in practice, the European asylum system might go down the drain.

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73 See generally Luisa Marin, 'Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law' (2020) 22 EJML 60-81; Thym, 'The "Refugee Crisis"' (n 30), 1554-58; and Evangelia (Lilian) Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Back-sliding?' (2021) 17 European Constitutional Law Review 471-496.



# The New Pact on Migration and Asylum: What it is Not and What it Could Have Been

*Philippe De Bruycker\**

After the failure of the Agenda for Migration<sup>1</sup> of 2015 and in particular the impossibility to introduce solidarity in the Dublin system allocating responsibility to Member States for the examination of asylum applications, so much hope has been put into the New Pact on Migration and Asylum presented by the European Commission in 2020<sup>2</sup> that it can paradoxically be better understood by analysing what it is not. Regarding the format, it is not a programmatic document paving the way for the development of migration and asylum policies in the future (1.). Regarding the content, it is not a document trying to establish a consensus about new orientations of those controversial policies (2.). The question is then what it could have been (3.).

## *1. Not a Long-Term Programmatic Document*

It is striking that the Commission has not decided to use the opportunity of the European elections of 2019 to propose high level guidance for the new policy cycle. There was a good occasion to do so because the strategic guidelines for the planning of the area of freedom, security and justice had to be renewed. Indeed, it has been customary since the creation of the Area of Freedom, Security and Justice to adopt five-year programs for the development of policies in this area on the basis of article 68 TFEU following which “*The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice*”.

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1 COM(2015)240.

2 COM(2020)609.

This process started with the famous Tampere Conclusions adopted on 15 and 16 October 1999<sup>3</sup> by a European summit where the Heads of States and Government put in place the foundations of the area of freedom, security and Justice. These conclusions were followed by the Hague Programme of 2005<sup>4</sup> and the Stockholm of 2010<sup>5</sup>. These programs were extremely detailed and paved point by point the way for the development of the policies within the next five years. Due to the impossibility of the Agenda for Migration proposed by the Commission in 2015 to overcome the obstacle of the lack of solidarity and the deep political divisions between Member States on this issue, the process of five-year programs could have been relaunched at the occasion of the presentation of the New Pact by the Commission.

The only institution that has decided to follow the process foreseen by article 68 TFET is the Council of Ministers. A draft version of the guidelines<sup>6</sup> has been discussed at technical level in Council working groups during the first months of 2020. They were not adopted and this is actually not a surprise as they were so general and vague, and moreover did not tackle the main issue of solidarity abandoned to the Commission.

Instead of a five-year program providing important policy guidelines, we have with the New Pact a simple Commission communication (interestingly not addressed to the European Council) and a legislative package that is supposed to pass through the ordinary legislative procedure for the end of 2021 following a roadmap<sup>7</sup>. It is not easy to understand the institutional meaning of this choice. Does the Commission try to confiscate the policy programming without giving to the European Council the occasion to debate the main political orientations of the New Pact? Is the method consisting of five-year programs considered obsolete? Is migration not anymore a policy priority due to the sanitary and economic crisis? Or is the subject of the New Pact so controversial that it is better to avoid a possible failure of the European Council unable to adopt guidelines on migration and asylum?

What is clear is that the European Council does not envisage to play its programmatic role in the area of Justice and Home Affairs. This is in

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3 See Philippe De Bruycker, Marie De Somer and Jean-Luis De Brouwer (eds), *From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration: Towards a new European Consensus on migration* (European Policy Centre 2019).

4 OJEU, C 53, 3 March 2005.

5 OJEU, C 115, 4 May 2010.

6 Council Document 6330/10 of 14 February 2020.

7 Annex to COM(2020)609.

contrast with the New Strategic agenda for the period 2019-2024 where the European Council considered migration policy as the first of its four main priorities under the item “Protecting Citizens and Freedom”.

## *2. Not a Document Expressing a New Consensus*

Great expectations have been placed on the New Pact on migration and asylum to overcome the failure of the 2015 Agenda on Migration. Despite over 3 years of negotiations, it has been impossible to adopt the proposed legislative package, in particular the Dublin IV proposal<sup>8</sup>. The Member States divided between North and South, but also East and West, have been incapable of agreeing in Council on a common position concerning the relocation mechanism proposed by the Commission to inject solidarity into the Dublin III Regulation. There have therefore been no negotiations with the Parliament that had already defined its position in the so-called Wikström report<sup>9</sup>. The European Commission was thus expected to bring forth in the New Pact a proposal that could be the object of a consensus to overcome the profound divisions created by the relocation decision of the Council of 22 September 2015<sup>10</sup>.

Solidarity is therefore the most important element of the New Pact. Two elements of the proposal are fundamental: the solidarity mechanism is mandatory, but also flexible. The mandatory character is normal as solidarity is not a political favor, but a legal obligation foreseen by article 80 TFEU. The type of flexibility of the mechanism is surprising. Member States can choose either to relocate asylum seekers, either to sponsor return or to provide other types of help or funding and even external cooperation for migration management in countries of origin or of transit of migrants. Sponsoring the return of migrants means supporting the Member State in charge of return by providing for instance help for the voluntary return of migrants, for the readmission process or the organisation of a return flight.

Providing solidarity for returning migrants is logical. Member States under pressure need support at different stages of the migration policy to control their external borders, to receive asylum seekers and process their application, to provide protection to persons deserving asylum and

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8 COM(2016)270.

9 Report of 6 November 2017, A8-0345/2017, PE599.751v03-00.

10 Council decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy, OJEU, L 248 of 24 September 2020.

finally to return irregular migrants, including failed asylum seekers. What is strange is the option offered between relocation and return sponsorship. This alternative is made of two opposite elements, one consisting of receiving asylum seekers instead of the responsible Member State and another one consisting of returning migrants to their country of origin. On the basis of the New Pact, Member States opposed to relocation could actually do exactly the contrary by applying the same future Regulation on Asylum and Migration Management!<sup>11</sup>

This alternative offered by the Commission proposal does not reflect a consensus, but actually a disagreement between Member States. It may possibly satisfy the Member States part of the Visegrad group as the Commission eventually proposes the concept of flexible solidarity in the way that they have promoted it<sup>12</sup>, but it will not contribute to rebuild trust between the EU Member States that will remain profoundly divided about providing asylum. It is also not in line with the Bratislava Declaration of the European Council of September 2016 following which the objective is to “broaden EU consensus on long-term migration policy”. Such an arrangement is not a real pact made to reconcile different views, but a bad compromise made of contradictory elements.

The solidarity mechanism could have been organised in a different way by indeed allowing Member States not to take part in relocation, but by obliging them to improve reception conditions or supporting asylum procedures in other Member States under pressure. In other words, by releasing effectively some Member States of their obligation to relocate, but by requiring them to contribute positively to the asylum policy in order to reflect that it is common to all Member States.

### *3. What it Could Have Been*

Instead of a Commission communication detailing what should be done in the short term (2020-2021 following the roadmap accompanying the New Pact!) by mixing up key questions with so complex details and using sometimes a political cant, the New Pact on Migration and Asylum could have been a document laying down twenty years after the Tampere Conclusions new foundations for the migration and asylum policies in the long term in order to build a consensus between all Member States on

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11 COM(2020)610.

12 See <[www.visegradgroup.eu/flexible-solidarity](http://www.visegradgroup.eu/flexible-solidarity)> accessed 2 December 2021.

the basis of key principles. A draft document prepared by the European Commission to be discussed by the Member States in the Council after having consulted the European Parliament would have been endorsed by the European Council as conclusions on the basis of article 68 TFEU in view of the adoption of a new program for the development of the migration and asylum policies during the next five years.

A “fresh start” to use the words of the Commission about the presentation of its New Pact, would build upon what is a “common policy”. This notion is not used by accident in articles 77 to 79 TFEU. It has been elaborated and given precise content by the legal doctrine, in particular our colleague and French Member of the Odysseus Network Henri Labayle who has been the first to conceptualise it in a seminal paper<sup>13</sup> where he distinguished between its five components presented below.

The traditional answer to what is a common policy is **common legislation**. This explains why Commissioner Malmström considered in 2013 that the CEAS was in place with the adoption of a second generation of rules (the first generation were the minimum rules adopted between 2003 and 2005). After the failure of the 2016 package, the Commission proposes once again a new legislative package that will become, if those proposals are adopted, the third generation of rules in the area of asylum. The CEAS will never be achieved if nobody tries to understand what a “common system” means. The tropism of the EU for legislation does not allow us to understand what a common policy requires. Common legislation is a first element that is certainly necessary, but it is clearly insufficient. Much more is required to build a common policy.

**The second element is common objectives.** The EU legislative process tends to focus too quickly on the details of the envisaged provisions rather than on the objectives of the proposal. More political rather than technical debates must take place at the beginning of the legislative process in the Council and Parliament to provide with policy orientations the technical groups or committees that will negotiate the details of the legislation. The policy regarding legal migration provides a good example of what is at stake. Starting from the point that “the EU is currently losing the global race for talent” (page 23), the Commission envisages in the New Pact legal migration as a contribution to the skills and talents that the EU needs. It

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13 Henri Labayle, ‘Vers une politique commune de l’asile et de l’immigration dans l’Union européenne’ in François Julien-Laferrrière, Henri Labayle and Örjan Edström (eds), *The European Immigration and Asylum Policy, Critical assessment five years after the Amsterdam Treaty* (Bruylant 2004) 11-44.

proposes therefore to finalise the negotiations on the revision of the Blue Card Directive pending since 2016 that has recently been adopted and to adopt a “Skills and Talent package” made of a revision of the the Long-Term Residents directive (to provide them finally with a right to intra-EU mobility), and a review of the Single Permit directive (that remains totally unclear in the New Pact).

The adoption and implementation of these proposals would represent a substantial contribution of the EU to this policy. For the rest, the ambition of building a common policy for legal migration appears like a fantasy. A rational analysis taking into consideration the principle of subsidiarity would lead to the conclusion that legal migration should remain *mainly* a competence of Member States. Recognising this explicitly contrary to the European catechism of which a recent report of the European Parliament on New avenues for Legal Migration<sup>14</sup> provides a good example, could appease to a certain extent the politicised debate on migration with some Eastern Member States not used to migration flows and reluctant to open their societies to diversity.

**The third element is common implementation** contrary to the classical principle of indirect administration under EU law. The idea is that EU agencies are directly involved in the implementation of EU migration and asylum policies on the ground, prefiguring an integrated administration where the national and EU levels cooperate closely in the decision-making process. Some progress in this direction is best observed in the progressive transformation of Frontex into a “European Border and Coast Guard Agency”, particularly the 2019 regulation<sup>15</sup> allowing this agency to recruit its own border guards. Another example is the involvement of the European Asylum Support Office (EASO) personnel in national asylum procedures in Greece by interviewing asylum seekers and providing the Greek administration with a proposal for a decision regarding the admissibility of asylum applications.

The New Pact fails to provide a long-term view on this point. Common implementation could be presented as the tool allowing to solve in the future the problems created by the asymmetric burdens between Member States in the area of freedom, security and justice and the incapacity of some of them to face their obligations under EU law. European agencies

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14 Report on new avenues for legal labour migration of 26 April 2021, A9-0143/2021, PE657.255v02-00.

15 Regulation 2019/1896 of 13 November 2019 on the European Border and Coast Guard, OJEU, L 295 of 14 November 2019.

providing operational support to the concerned Member States are a vessel of solidarity that is widely accepted and easily implemented without raising administrative difficulties and political debates like relocation. The New Pact goes even against this evolution by proposing to organise the sponsorship of returns considered as a solidarity tool at the level of Member States through practical cooperation between Member States that will be complicated to implement (see the contribution of Lilian Tsourdi in this book). If Frontex is presented by the New Pact as the EU “operational arm of the return policy”, it is not proposed to fully use it as such despite it could provide a much more efficient solution.

**The fourth element is common funding.** The multiannual financial framework (MFF) for the period 2021-2027 has been discussed simultaneously as the New Pact. This coincidence underlines the financial dimension that the New Pact ignores. A fundamental evolution of EU funding of migration and asylum policies that is for the moment circumstantial, must be engaged and become structural. The increase of the budget allocated to migration and asylum policies under the new MFF compared to the previous one must be seen as one step in a necessary evolution in the long-term. This is not guaranteed as the idea to diminish the budget of Frontex has been discussed during the negotiations of the next MFF two years after the mandate of this agency has been expanded!

But it is not only about the total amount of the funding of migration and asylum policies. The current logic of distribution of the funds between Member States is not in keeping with the need for more financial solidarity. It is hard to understand why the Asylum and Migration Fund (AMF)<sup>16</sup> allocates more money than before to Germany during the 2021-27 period (because of the very high number of asylum seekers it received during the 2015/16 crisis) and less money to Greece compared to the 2014-2020 period<sup>17</sup>. One has to include in the system of redistribution currently based on burdens (e.g. the absolute number of asylum seekers in favor of Germany) a new element like the capacity of Member States (a relative number measured on the basis of criteria such as their GDP in favor of Greece).

Finally, **the fifth element is common position regarding third countries.** The Commission has never been clearer than in the New Pact about the desperate quest of the EU for a balanced partnership. Starting from the

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16 OJEU, L 251 of 15 July 2021.

17 Reflection paper published in 2019 by the UNHCR and ECRE on the new proposals for EU funds on Asylum, Migration and Integration 2021-2027, 19.

point that “both the EU and its partners have their own interests”, it insists strongly about the need for partnerships that must be “mutually beneficial” (page 17). However, three pages further, the Commission comes back with the EU priorities by considering that it “can support capacity building in line with partners’ needs” identified as “manage irregular migration, forced displacement and combat migrant smuggling, strengthening border management, facilitating voluntary returns to third countries (page 20) and “fostering cooperation on readmission” (point 6.5.). What is bred in the bone comes out in the flesh! If the EU wants to develop authentic partnerships to ensure the cooperation of third states, it must stop pretending that the fight against irregular migration is the starting point as a shared concern. It should also acknowledge that it cannot offer more opportunities for labor migration simply because its Member States do not want this. If the European Commission really wants a “fresh start”, it should look for other elements of bargaining that it can really offer to third states in their own interest.

#### *4. Conclusion*

The Commission has decided to present its New Pact for Migration and Asylum in the form of a simple communication. It is regrettable that it has not decided to use the renewal of the five-year programme for Justice and Home Affairs as the occasion to present its New Pact by building new foundations for the migration and asylum policies twenty years after the Tampere conclusions.

The main issue of the pact is solidarity. After a first attempt in 2015 to implement solidarity through relocation that has profoundly divided the EU between Western and Eastern Member States, it was the moment to try to establish a new consensus about this key issue. Solidarity is unfortunately not conceptualised by the New Pact as the object of an agreement as it is envisaged like a choice open to Member States between two contradictory elements, relocation on the one hand and return sponsorship on the other. This appalling way for implementing solidarity will not contribute to building a new consensus on the asylum policy in the EU, but on the contrary confirm all Member States in their own position.

There would have been another way to conclude a New Pact between the divergent views of the Member States by considering the elements needed to build a common policy. This requires to stop believing that common legislation is always the solution; to get rid of foolish ambitions like a common policy for legal migration in order to appease the worries



of some Eastern Member States; to consider common implementation through EU agencies and common funding as the best tools for more fair responsibility sharing between Member States; and finally to rebuild external relations in the area of migration and asylum as a fair cooperation that cannot be based on the fight against irregular migration by third countries in exchange of false promises for more labor migration by the European side.



# Into the Loop: The Doomed Reform of Dublin and Solidarity in the New Pact

Francesco Maiani\*

## 1. Introduction

In ongoing discussions on the reform of the CEAS, solidarity is a key theme. It stands front and centre in the New Pact on Migration and Asylum<sup>1</sup>: after announcing that the approach taken is “human and humane”, the quote opening the document stresses that Member States must be able to “rely on the solidarity of our whole European Union”.

In describing the need for reform, the Commission does not mince its words: “[t]here is currently no effective solidarity mechanism in place, and no efficient rule on responsibility”. It’s a remarkable statement: barely one year ago, the Commission maintained that “[t]he EU [had] shown tangible and rapid support to Member States under most pressure<sup>2</sup>” throughout the crisis. Be that as it may, we have been promised a “fresh start”. Thus, President Von der Leyen has announced on the occasion of the 2020 State of the Union Address that “we will abolish the Dublin Regulation<sup>3</sup>”, the 2016 Dublin IV Proposal<sup>4</sup> has been withdrawn, and the Pact proposes a “new solidarity mechanism” connected to “robust and fair management of the external borders” and capped by a new “governance framework”.

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1 Commission, ‘Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum’, COM(2020)609.

2 Commission, ‘Communication Reporting on the Implementation of the European Agenda on Migration’, COM(2019)481.

3 See Alexandra Brzozowski and Sarantis Michalopoulos, ‘Mandatory Relocation Still Point Out of Contention in New EU Migration Pact’, (Euractiv, 16 September 2020) <[www.euractiv.com/section/justice-home-affairs/news/mandatory-relocation-still-point-of-contention-in-new-eu-migration-pact/](http://www.euractiv.com/section/justice-home-affairs/news/mandatory-relocation-still-point-of-contention-in-new-eu-migration-pact/)> accessed 19 November 2021.

4 For analysis see Constantin Hruschka, ‘Dublin Is Dead! Long Live Dublin! The 4 May 2016 Proposal of the European Commission’, (*EU Immigration and Asylum Law and Policy Blog*, 17 May 2016) <<https://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/>> accessed 19 November 2021.

Unfortunately, this “fresh start” narrative stands in stark contrast with the substance of what is proposed – a textbook example of path-dependency. Yes, the Commission proposes to formally abolish the Dublin III Regulation and withdraws the Dublin IV Proposal. But the Proposal for an Asylum and Migration Management Regulation<sup>5</sup> (hereafter “the Asylum and Migration Management Proposal”) reproduces word-for-word the Dublin III Regulation, subject to amendments drawn ... from the Dublin IV Proposal! As for the “governance framework” outlined in Articles 3-7 of the Asylum and Migration Management Proposal, it’s a hodgepodge of declaratory provisions (e.g. Art. 3-4) and restatements of pre-existing obligations (Art. 5) which might eventually be moved to the preamble<sup>6</sup>, plus a few provisions purporting to authorize steps and procedures that actually require no legal basis (Art. 7). The one new item is a yearly monitoring exercise centered on a “European Asylum and Migration Management Strategy” (Art. 6). This seems as likely to make a difference as the “Mechanism for Early Warning, Preparedness and Crisis Management”, introduced with much fanfare with the Dublin III Regulation and then left in the drawer before, during and after the crisis of 2015/16.

Leaving the provisions just mentioned for future commentaries – after all, fearless interpreters might still find legal substance in there – this contribution focuses on four points: the proposed amendments to Dublin, the interface between Dublin and procedures at the border, the new solidarity mechanism, and proposals concerning *force majeure*. *Caveat emptor!* It is a jungle of extremely detailed and sometimes obscure provisions: do not expect an exhaustive summary, nor firm conclusions on every point.

## 2. “Hello Old Friend”: The Dublin System’s New Clothes

To borrow from Mark Twain, reports of the death of the Dublin system have been once more greatly exaggerated. As noted, Part III of the Asylum and Migration Management Proposal (Articles 8-44) is for all intents and purposes an amended version of the Dublin III Regulation, and most of the amendments are lifted from the 2016 Dublin IV Proposal.

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5 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council from the Commission on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]’, COM(2020)0279.

6 Council of the European Union, ‘Pact on Migration and Asylum – Progress Report’, document 9178/21, 8.

A first group of amendments concerns the responsibility criteria. Some expand the possibilities to allocate applicants based on their “meaningful links” with Member States: Article 2(g) expands the family definition to include siblings, opening new possibilities for reunification; Article 19(4) enlarges the criterion based on previous legal abode (i.e. expired residence documents); in a tip of the hat to the Wikstroem Report<sup>7</sup>, Article 20 introduces a new criterion based on prior education in a Member State.

These are welcome if limited concessions to a more “user-friendly” allocation of responsibility, and it is disheartening to witness the stiff resistance that they are meeting in Council<sup>8</sup> or, more surprisingly, in EP quarters<sup>9</sup>. In other cases, advertised progress does not actually materialize in the proposal. The Commission has announced “streamlined” evidentiary requirements to facilitate family reunification. These would be necessary indeed: evidentiary issues have long undermined the application of the family criteria<sup>10</sup>. Unfortunately, the Commission is not proposing anything new: Article 30(6) of the Asylum and Migration Management Proposal corresponds in essence to Article 22(5) of the Dublin III Regulation.

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7 European Parliament, 'Report on the Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States By a Third-Country National or a Stateless Person (Recast)', A8-0345/2017. For comment, see Francesco Maiani and Constantin Hruschka, 'The Report of the European Parliament on the Reform of the Dublin System: Certainly Bold, But Pragmatic?' (*EU Immigration and Asylum Law and Policy Blog*, 20 December 2017) <<https://eumigrationlawblog.eu/the-report-of-the-european-parliament-on-the-reform-of-the-dublin-system-certainly-bold-but-pragmatic/>> accessed 19 November 2021.

8 General Secretariat of the Council, Note to Delegations, 'Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] - Articles 1-2, 8-27 - Comments From the Delegations', document 11617/21.

9 European Parliament, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (COM(2020)0610 – C9-0309/2020 – 2020/0279(COD))', 2020/0279(COD), in particular amendments 32, 33 and 79.

10 See Francesco Maiani, 'The Protection of Family Unity in Dublin Procedures, Towards a Protection-Oriented Implementation Practice' (Centre Suisse pour la Défense des Droits des Migrants, 2019) <<https://centre-csdm.org/wp-content/uploads/2019/10/MAIANI-Dublin-Study-CSDM-14.10.2019.pdf>> accessed 19 November 2021.

Besides, while the Commission proposes to expand the general definition of family, the opposite is true of the specific definition of family applicable to “dependent persons”. Under Article 16 of the Dublin III Regulation, applicants who e.g. suffer from severe disabilities are to be kept or brought together with a care-giving parent, child or sibling residing in a Member State. Due to fears of sham marriages, spouses have been excluded and this is legally untenable and inhumane, but instead of tackling the problem the Commission proposes in Article 24 to worsen it by excluding siblings, too. The end result is paradoxical: persons needing family support the most will be deprived – for no apparent reason other than imaginary fears of “abuses” – of the benefits of enlarged reunification possibilities. “[H]uman and humane”, indeed.

The fight against secondary movements inspires most of the other amendments to the criteria. In particular, Article 21 of the Proposal maintains and extends the much-contested criterion of irregular entry while clarifying that it applies also to persons disembarked after a search and rescue (SAR) operation. Unsurprisingly, this is proving controversial<sup>11</sup>. The Commission also proposes that unaccompanied children be transferred to the first Member State where they applied if no family criterion is applicable (Article 15(5)). This would overturn the *MA* judgment of the ECJ<sup>12</sup> whereby in such cases the asylum claim must be examined in the State where the child *last* applied and is present. It’s not a technical fine point: while the case-law of the ECJ is calculated to spare children the trauma of a transfer, the proposed amendment would subject them again to the rigours of Dublin.

Again to discourage secondary movements, the Commission proposes – as in 2016 – a second group of amendments: new obligations for the applicants (Articles 9-10). Applicants must in principle apply in the Member State of first entry, remain in that State for the duration of the Dublin procedure and, post-transfer, remain in the State responsible. Moving to the “wrong” State entails losing the benefits of the Reception Conditions Directive, subject to “the need to ensure a standard of living in accordance with” the Charter. It is debatable whether this is a much lesser standard

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11 General Secretariat of the Council, Note to Delegations, ‘Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] - Articles 1-2, 8-27 - Comments From the Delegations’, document 11617/21, 6, 12, 62,73 and 97.

12 CJEU, *MA, BT and DA v Secretary of State of the Home Department*, C-648/11, ECLI:EU:C:2013:367, [2013].

of reception. More importantly: as reception conditions in line with the Directive are seldom guaranteed in several frontline Member States, the prospect of being treated “in accordance with the Charter” elsewhere will hardly dissuade applicants from moving on.

The 2016 Proposal foresaw, as further punishment, the mandatory application of accelerated procedures to “secondary movers”. This rule disappears from the Asylum and Migration Management Proposal, but it remains in Article 40(1)(g) of the 2016 Proposal for an Asylum Procedures Regulation<sup>13</sup>. Furthermore, the Commission proposes deleting Article 18(2) of the Dublin III Regulation, i.e. the guarantee that persons transferred back to a State that has meanwhile discontinued or rejected their application will have their case reopened, or a remedy available. This is a dangerous invitation to Member States to reintroduce “discontinuation” practices that the Commission itself had once condemned as incompatible with effective access to status determination<sup>14</sup>.

To facilitate responsibility-determination, the Proposal further obliges applicants to submit relevant information before or at the Dublin interview. Late submissions are not to be considered. Fairness would demand that justified delays be excused. Besides, it is also proposed to repeal Article 7(3) of the Dublin III Regulation, whereby authorities must take into account evidence of family ties even if produced late in the process. All in all, then, the Proposal would make proof of family ties harder, not easier as the Commission claims.

A final group of amendments concern the details of the Dublin procedure, and might prove the most important in practice.

- Some “streamline” the process, e.g. with shorter deadlines (e.g. Article 29(1)) and a simplified take back procedure (Article 31). Controversially, the Commission proposes again to reduce the scope of appeals against transfers to issues of ill-treatment and misapplication of the family criteria (Article 33). This may perhaps prove acceptable to the ECJ in light of its old *Abdullahi* case-law<sup>15</sup>. However, it contravenes Article 13 ECHR, which demands an effective remedy for the violation of *any* Convention right.

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13 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU’, COM(2016)467.

14 CJEU, *Commission of the European Communities v Hellenic Republic*, C-130/08, ECLI:EU:C:2008:584 [2008].

15 CJEU, *Shamso Abdullahi v Bundesasylamt*, C-394/12, ECLI:EU:C:2013:813, [2013].

- Other procedural amendments aim to make it harder for applicants to evade transfers. At present, if a transferee absconds for 18 months, the transfer is cancelled and the transferring State becomes responsible. Article 35(2) of the Proposal allows the transferring State to “stop the clock” if the applicant absconds, and to resume the transfer as soon as he reappears.
- A number of amendments make responsibility more “stable” once assigned, although not as “permanent” as the 2016 Proposal would have made it. Under Article 27 of the Proposal, the responsibility of a State will only cease if the applicant has left the Dublin area in compliance with a return decision. More importantly, under Article 26 the responsible State will have to take back even persons to whom it has granted protection. This would be a significant extension of the scope of the Dublin system, and would “lock” applicants in the responsible State even more firmly and more durably. Perhaps by way of compensation, the Commission proposes that beneficiaries of international protection obtain “long-term status” – and thus mobility rights – after three years of residence instead of five. However, given that it is “very difficult in practice<sup>16</sup>” to exercise such rights, the compensation seems more theoretical than effective and a far cry from a system of free movement capable of offsetting the rigidities of Dublin.

These are, in short, the key amendments to the Dublin rules that are foreseen in the proposal. While it’s easy enough to comment on each individually, it is more difficult to forecast their aggregate impact. Will they – to paraphrase the Commission – “improv[e] the chances of integration” and reduce “unauthorised movements” (recital 13), and help closing “the existing implementation gap”<sup>17</sup>? Probably not, as none of them strays very far from the rules applying currently.

Taken together, however, they might well aggravate the distributive imbalances caused by the Dublin system. Dublin “locks in” the responsibilities of the States that receive most applications – traditional destinations such as Germany or border States such as Italy – leaving the other Member

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16 Commission, ‘Report to the European Parliament and the Council on the Implementation of Directive 2003/109/EC Concerning the Status of Third-Country Nationals Who Are Long-term Residents’, COM(2019)161.

17 Commission, ‘Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on a New Pact on Migration and Asylum’, COM(2020)609.



States relatively unaffected<sup>18</sup>. Apart from possible distributive impacts of the revised criteria and of the new obligations imposed on applicants, first application States will certainly be disadvantaged by the combination of shortened deadlines, security screenings (see below), streamlined take backs, and “stable” responsibility extending to beneficiaries of protection. Under the “new Dublin rules” – sorry for the oxymoron! – effective solidarity will become more necessary than ever.

### *3. Border Procedures and Dublin*

Building on the current hotspot approach, the Proposals for a Screening Regulation<sup>19</sup> and for an Asylum Procedures Regulation<sup>20</sup> outline a supposedly new “pre-entry” phase. This is examined in-depth in a separate chapter by Lyra Jakuleviciene, but the interface with infra-EU allocation deserves mention here.

In a nutshell, persons irregularly crossing the border will according to this Proposal be screened for the purpose of identification, health and security checks, and registration in Eurodac. Protection applicants may then be channelled to “border procedures” in a broad range of situations. This will be mandatory if the applicant: (a) attempts to mislead the authorities; (b) can be considered, based on “serious reasons”, “a danger to the national security or public order of the Member States”; (c) comes from a State whose nationals have a low Union-wide recognition rate (Article 41(3) of the Asylum Procedure Proposal).

The purpose of the border procedure is to assess applications “without authorising the applicant’s entry into the Member State’s territory”<sup>21</sup>. Therefore, it might have seemed logical that applicants subjected to it be excluded from the Dublin system – as is the case, ordinarily, for relocations (see below). Not so: under Article 41(7) of the Proposal, Member States

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18 Commission, ‘Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on a New Pact on Migration and Asylum’, COM(2020)609, 6.

19 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council: Introducing a 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’, COD(2020)0278.

20 Commission, ‘Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU’, COD(2016)0224.

21 *Ibid.*, 4.

may apply Dublin in the context of border procedures. This weakens the idea of “seamless procedures at the border” somewhat. However, from the standpoint of both applicants and border States, it is better than a watertight exclusion. Indeed, applicants may still benefit from the criteria based on “meaningful links”, and border States are not “stuck with the caseload” so to speak. I would normally have qualms about giving Member States discretion in choosing whether Dublin rules apply or not. But as it happens, Member States who receive an asylum application already enjoy that discretion under the so-called “sovereignty clause”, i.e. Article 17(1) of the Dublin III Regulation. *Nota bene*: according to well-settled case-law, in exercising discretion under the sovereignty clause Member States apply EU Law and must therefore observe the Charter<sup>22</sup>. The same principle must certainly apply under the proposed Article 41(7).

The only true exclusion from the Dublin system is set out in Article 8(4) of the Asylum and Migration Management Proposal. Under this provision, Member States must carry out a security check of all applicants as part of the pre-entry screening and/or after the application is filed. If “there are reasonable grounds to consider the applicant a danger to national security or public order” of the determining State, the other criteria are bypassed and that State becomes responsible. Attentive readers will note that the wording of Article 8(4), which refers to “reasonable grounds” to consider the applicant a danger for the determining State, differs from that of Article 41(3) of the Asylum Procedure Proposal, which instead refers to “serious grounds” to consider the applicant a danger for the Member States as a whole. It is therefore unclear whether the security grounds to “screen out” an applicant from Dublin are coextensive with the security grounds making a border procedure mandatory<sup>23</sup>. Be that as it may, a broad application of Article 8(4) would be undesirable, as it would entail a large-scale exclusion from the guarantees that applicants derive from the Dublin system. The risk is moderate however: by applying Article 8(4) widely, Member States would be increasing their own share of responsibilities under the system. As twenty-five years of Dublin practice attest, this is unlikely to happen.

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22 CJEU, *N. S. and Others*, C-411/10, ECLI:EU:C:2011:865, [2011].

23 For an attempt to partially bridge the gap, see Council of the European Union, ‘Note on Draft Regulation of the European Parliament and of the Council, on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]’, document 10450/21, 10.

#### 4. “Mandatory” and “Flexible” Solidarity under the New Mechanism

For the aspects examined so far, the Asylum and Migration Management Proposal does not differ significantly from the 2016 Dublin IV Proposal, which did not itself fundamentally depart from existing rules and which, may I add, went down in flames in inter- and intra-institutional negotiations. Any hopes of a “fresh start”, then, are left for the new solidarity mechanism.

Unfortunately, solidarity is a difficult subject for the EU: financial support has hitherto been a mere fraction of Member State expenditure in the field<sup>24</sup>; operational cooperation has proved useful but cannot tackle all the relevant aspects of the unequal distribution of responsibilities among Member States; relocations have proved extremely beneficial for thousands of applicants, but are intrinsically complex operations and have also proven politically divisive. This, along with the heavy bureaucracy involved, an inadequate scope of application, and the failure to systematically gain the trust and willing cooperation of the applicants, has severely undermined their application<sup>25</sup> and further condemned them to be small scale affairs relative to the realities and needs on the ground. The same goes *a fortiori* for *ad hoc* initiatives – such as those that followed SAR operations over the last two years<sup>26</sup> – which furthermore lack the predictability that is necessary for sharing responsibilities effectively. To reiterate what the Commission stated, there is currently “no effective solidarity mechanism in place”.

Perhaps most importantly, the EU has hitherto been incapable of accurately gauging the distributive asymmetries on the ground, to articulate a clear doctrine guiding the key determinations of “how much solidarity”

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24 Iris Goldner Lang, ‘Financial Framework’ in Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer (eds), *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration* (European Policy Centre 2019), 17.

25 For an in-depth assessment see European Parliament, ‘Study on the Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece’ (PE583132, 2017). See also CJEU, *Commission v Poland (Temporary Mechanism for the Relocation of Applicants for International Protection)*, C-715/17, ECLI:EU:C:2020:257, [2020].

26 Eleonora Frasca and Francesco Luigi Gatta, ‘The Malta Declaration on Search & Rescue, Disembarkation and Relocation: Much Ado About Nothing’ (*EU Immigration and Asylum Law and Policy Blog*, 3 March 2020) <<https://eumigrationlawblog.eu/the-malta-declaration-on-search-rescue-disembarkation-and-relocation-much-ado-about-nothing/>> accessed 19 November 2021.

and “what kind(s) of solidarity”, and to define commensurate redistributive targets on this basis<sup>27</sup>. What better time than now?

Alas, the opportunity to elaborate a solidarity doctrine for the CEAS has been completely missed. Conceptually, the New Pact does not go much farther than platitudes such as “[s]olidarity implies that all Member States should contribute<sup>28</sup>”. As Daniel Thym aptly observed<sup>29</sup>, “pragmatism” is the driving force behind the Proposal: the Commission starts from a familiar basis – relocations – and tweaks it in ways designed to convince stakeholders that solidarity becomes “compulsory” or “flexible” as required to suit their policy preferences<sup>30</sup>. It’s a complicated arrangement and I will only describe it in broad strokes, leaving the crucial dimensions of financial solidarity and operational cooperation for Iris Goldner Lang and Lilian Tsourdi to examine in their respective chapters.

The mechanism operates in three “modes”. In its basic mode, it is to replace *ad hoc* solidarity initiatives following SAR disembarkations (Articles 47-49 of the Asylum and Migration Management Proposal):

- The Commission determines, in its yearly Migration Management Report, whether a State is faced with “recurring arrivals” following SAR operations and determines the needs in terms of relocations and other contributions (capacity building, operational support proper, cooperation with third States).
- The Member States are “invited” to notify the “contributions they intend to make”. If offers are sufficient, the Commission combines them and formally adopts a “solidarity pool”. If not, it adopts an imple-

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27 Lilian Tsourdi, ‘EU Agencies’ in Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer (eds), *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration* (European Policy Centre 2019), 34; Francesco Maiani, ‘Responsibility Allocation and Solidarity’ in Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer (eds), *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration* (European Policy Centre 2019), 107.

28 Commission, ‘Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on a New Pact on Migration and Asylum’, COM(2020)609.

29 See Daniel Thym’s chapter ‘Never-Ending Story? Political Dynamics, Legislative Uncertainties, and Practical Drawbacks of the “New” Pact on Migration and Asylum’ in this volume.

30 See also Sergio Carrera, ‘Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum’ (CEPS Policy Insights, September 2020), 2-3 <[www.ceps.eu/wp-content/uploads/2020/09/PI2020-22-New-EU-Pact-on-Migration-and-Asylum.pdf](http://www.ceps.eu/wp-content/uploads/2020/09/PI2020-22-New-EU-Pact-on-Migration-and-Asylum.pdf)> accessed 19 November 2021.

menting act summarizing relocation targets for each Member State and other contributions as offered by them. Member States may react by offering other contributions instead of relocations, provided that this is “proportional” – one wonders how the Commission will tally e.g. training programs for Libyan coastguards with relocation places.

- If the relocations offered fall 30% short of the target indicated by the Commission, a “critical mass correction mechanism<sup>31</sup>” will apply: each Member State will be obliged to meet at least 50% of the quota of relocations indicated by the Commission. However, and this is the new idea offered by the Commission to bring relocation-skeptics onboard, Member States may discharge their duties by offering “return sponsorships” instead of relocations: the “sponsor” Member State commits to support the benefitting Member State to return a person and, if the return is not carried out within eight months, to accept her on its territory.

Peeling the onion, it would appear that we are dealing with “half-compulsory” solidarity in terms of relocations. Indeed, under Article 48(2) of the Proposal Member States are obliged to cover at least 50% of the relocation needs set by the Commission through relocations or sponsorships, and the rest with other contributions.

Be that as it may, after the “solidarity pool” is established and the benefitting Member State requests its activation, relocations can start:

- The eligible persons are those who applied for protection in the benefitting State, with the exclusion of those who are subject to border procedures (Article 45(1)(a)). Also excluded are those whom Dublin criteria based on “meaningful links” – family, abode, diplomas – assign to the benefitting State (Article 57(3)). These rules imply that the benefitting State must carry out identification, screening for border procedures and a first (simplified?) Dublin procedure before it can declare an applicant eligible for relocation. Persons eligible for return sponsorship are “illegally staying third-country nationals” (Article 45(1)(b)).
- The eligible persons are identified, placed on a list, and matched to Member States based on “meaningful links”. The transfer can only be refused by the State of relocation on security grounds (Article 57(2)(6) and (7)), and otherwise follows the modalities of Dublin transfers in

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31 Commission, ‘New Pact on Migration and Asylum. Questions and Answers’ (Press corner, 23 September 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_1707](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1707)> accessed 19 November 2021.

almost all respects (e.g. deadlines, notification, appeals). However, contrary to what happens under Dublin, missing the deadline for transfer does not entail that the relocation is cancelled (see Article 57(10)).

- After the transfer, applicants will be directly admitted to the asylum procedure only if it has been previously established that the benefitting State would have been responsible under criteria other than those based on “meaningful links” (Article 58(3)). In all the other cases, the State of relocation will have to run a further Dublin procedure and, if necessary, transfer again the hapless applicant to the State responsible (see Article 58(2)). As for persons subjected to return sponsorship, the State of relocation will pick up the application of the Return Directive where the benefitting State left off (or so I read Article 58(5))<sup>32</sup>.

If the Commission concludes that a Member State is under “migratory pressure”, at the request of the concerned State or of its own motion (Article 50), the mechanism operates as described above except for one main point: beneficiaries of protection also become eligible for relocation (Article 51(3)). Thankfully, they must consent thereto and are automatically granted the same status in the relocation State (see Articles 57(3) and 58(4)).

If the Commission concludes that a Member State is confronted with a “crisis”, rules change further (see Article 2 of the Proposal for a Migration and Asylum Crisis Regulation):

- Applicants subject to the border procedure and persons “having entered irregularly” also become eligible for relocation. These persons may then undergo a border procedure post-relocation (see Article 41(1) and (8) of the Proposal for an Asylum Procedures Regulation).
- Persons subject to return sponsorship are transferred to the sponsor State if their removal does not occur within four – instead of eight – months.
- Other contributions are excluded from the palette of contributions available to the other Member States (Article 2(1)): it has to be either relocation or return sponsorship.
- The procedure is faster, with shorter deadlines.

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32 See also European Council on Refugees and Exiles, ‘ECRE Comments on the Commission Proposal for a Regulation on Asylum and Migration Management’ (ECRE, February 2021), 18 <<https://ecre.org/wp-content/uploads/2021/03/ECRE-Comments-RAMM.pdf>> accessed 19 November 2021.

It is an understatement to say that the mechanism is complex, and its exact implications are unclear. For the time being, I would make four general comments.

- To begin with, it is not self-evident that this is a good “insurance scheme” for its intended beneficiaries. As noted, the system only guarantees that 50% of the relocation needs of a State will be met. Furthermore, there are hidden costs: in “SAR” and “pressure” modes, the benefitting State has to screen the applicant, register the application, and assess whether border procedures or (some) Dublin criteria apply before it can channel the applicant to relocation. It is unclear whether a 500 lump sum is enough to offset these costs (see Article 79 of the Asylum and Migration Management Proposal). Besides, in a crisis situation, these preliminary steps might make relocation impractical – think of the Greek registration backlog in 2015/6. Perhaps, extending relocation to persons “having entered irregularly” when the mechanism is in “crisis mode” is meant precisely to take care of this. Similar observations apply to return sponsorship. Under Article 55(4) of the Asylum and Migration Management Proposal, the support offered by the sponsor to the benefitting State can be rather low key (e.g. “counselling”) and there seems to be no guarantee that the benefitting State will be effectively relieved of the political, administrative and financial costs associated to return. Moving from costs to risks, it is clear that the benefitting State bears all the risks of non implementation – in other words, if the system grinds to a halt or breaks down, it will be Moria all over again. In light of past experience, one can only agree with Thomas Gammelthoft-Hansen that relying on the mechanism to provide effective solidarity would be a “big gamble<sup>33</sup>”. Other aspects examined below – the vast margins of discretion left to the Commission, and the easy backdoor opened by the *force majeure* provisions – appear to further reduce reliability and predictability.
- Indeed, as just noted the mechanism gives the Commission practically unlimited discretion at all critical junctures. The Commission will determine whether a Member States is confronted to “recurring arrivals”, “pressure” or a “crisis”. It will do so under definitions so open-textured, and criteria so numerous, that it will be basically the master of its own

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33 Lauren Chadwich and Lillo Montalto Monella, ‘What Is the EU’s New Migration Pact and How Has It Been Received?’ (*Euronews*, 25 June 2020) <[www.euronews.com/2020/09/24/what-is-the-eu-s-new-migration-pact-and-how-has-it-been-received](http://www.euronews.com/2020/09/24/what-is-the-eu-s-new-migration-pact-and-how-has-it-been-received)> accessed 19 November 2021.



determinations (Article 50 of the Asylum and Migration Management Proposal). The Commission will determine unilaterally relocation and operational solidarity needs. Finally, the Commission will determine – we do not know how – if “other contributions” are proportional to relocation needs. Other than in the most clear-cut situations, there is no way that anyone can predict how the system will be applied<sup>34</sup>.

- Furthermore, the mechanism reflects a powerful fixation with and unshakable faith in heavy bureaucracy. Protection applicants may undergo up to three “responsibility determination” procedures and two transfers before finally landing in an asylum procedure: Dublin “screening” in the first State, matching, relocation, full Dublin procedure in the relocation State, then transfer. And this is a system that should not “compromise the objective of the rapid processing of applications” (recital 34)! Decidedly, the idea that in order to improve the CEAS it is above all necessary to suppress unnecessary delays and coercion<sup>35</sup> has not made a strong impression on the mind of the drafters. The same remark applies *mutatis mutandis* to return sponsorships: whatever the benefits in terms of solidarity and of heightened return “muscle” vis-à-vis countries of origin and transit, one wonders if it is very cost-effective or humane to drag a person from Member State to Member State so that they can each try their hand at expelling her.
- Lastly and relatedly, applicants and other persons otherwise concerned by the relocation system are given no voice. They can be “matched”, transferred, re-transferred, but subject to few exceptions their aspirations and intentions remain legally irrelevant. In this regard, the “New Pact” is as old school as it gets: it sticks strictly to the “no choice” taboo on which Dublin is built. What little recognition of applicants’ actorness had been made in the Wikstroem Report<sup>36</sup> is gone. Objectifying migrants is not only incompatible with the claim that the approach taken is “human and humane”. It might prove fatal to the administrative efficiency so cherished by the Commission. Indeed, failure to

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34 For a similar comment, see European Parliament, ‘Study Report on The European Commission’s New Pact on Migration and Asylum, Horizontal Substitute Impact Assessment’ (European Parliamentary Research Service PE694.210, August 2021), 131.

35 European Parliament, ‘New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection’ (requested by the LIBE Committee, PE509989, 2014), 9.

36 Maiani and Hruschka, ‘The Report of the European Parliament on the Reform of the Dublin System: Certainly Bold, But Pragmatic?’ (n 7).



engage applicants is arguably *the* key factor in the immutably dismal performance of the Dublin system<sup>37</sup>. Why should it be any different under this solidarity mechanism?

##### 5. *Framing Force Majeure or Inviting Defection?*

In addition to addressing “crisis” situations, the Proposal for a Migration and Asylum Crisis Regulation<sup>38</sup> includes separate provisions on *force majeure*.

Thereunder, any Member State may unilaterally declare that it is faced with a situation making it “impossible” to comply with selected CEAS rules, and thus obtain the right – subject to mere notification – to derogate from them. Member States may obtain in this way longer Dublin deadlines, or even be exempted from the obligation to accept transfers and be liberated from responsibilities if the suspension goes on more than a year (Article 8). Furthermore, States may obtain a six-month suspension of their duties under the solidarity mechanism (Article 9).

The inclusion of this proposal in the Pact – possibly an attempt to further placate Member States averse to European solidarity? – beggars belief. Legally speaking, the whole construction is redundant: under the case-law of the ECJ, Member States may derogate from *any* rule of EU Law if confronted with a genuine case of *force majeure*<sup>39</sup>. However, putting this black on white amounts to inviting (and legalizing) defection in the name of unilaterally declared reasons of national interest<sup>40</sup>, as if Member States

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37 Maiani, ‘Responsibility Allocation and Solidarity’ (n 27), 112. For fresh figures see: European Council on Refugees and Exiles, ‘The Implementation of the Dublin III Regulation in 2020’ (Asylum Information Database, September 2021) <[https://asylumineurope.org/wp-content/uploads/2021/09/AIDA\\_Dublin-Update-2020.pdf](https://asylumineurope.org/wp-content/uploads/2021/09/AIDA_Dublin-Update-2020.pdf)> accessed 19 November 2021.

38 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum’, COD (2020)0277.

39 CJEU, *Commission v Italy*, C-101/84, ECLI:EU:C:1985:330, [1985]. See also, in relation to Article 72 TFEU specifically: CJEU, *Commission v Poland (Temporary Mechanism for the Relocation of Applicants for International Protection)*, C-715/17, ECLI:EU:C:2020:257 [2020], para 147.

40 See also: European Council on Refugees and Exiles, ‘Comments on the Commission Proposal for a Regulation Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum’ (ECRE, February 2021), 18 <<https://ecre>

needed this kind of encouragement<sup>41</sup>. The only conceivable object of rules of this kind might have been to proceduralize *force majeure* and subject any derogations to prior authorization by the Commission. However, there is nothing of the kind in the Proposal. The end result is paradoxical: while Member States are (in theory<sup>42</sup>!) subject to Commission supervision when they conclude arrangements aiming to facilitate the implementation of Dublin rules, a mere notification will be enough to authorize them to unilaterally tear a hole in the fabric of “solidarity” and “responsibility” so painstakingly – if not felicitously – woven in the Pact.

## 6. Concluding Comments

We should have taken Commissioner Ylva Johansson at her word when she said that there would be no “Hoorays”<sup>43</sup> for the new proposals. Past the avalanche of adjectives, promises and fancy administrative monikers hurled at the hapless reader – “faster, seamless migration processes”; “prevent the recurrence of events such as those seen in Moria”; “critical mass correction mechanism” – one cannot fail to see that the “fresh start” is essentially an exercise in repackaging.

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.org/wp-content/uploads/2021/03/ECRE-Comments-COM2020-613-V2-2.pdf> accessed 19 November 2021.

- 41 The crisis developing at the EU borders with Belarus constitutes a prime example, see: European Council on Refugees and Exiles, ‘Legal Note 11: Extraordinary Responses: Legislative Changes in Lithuania’ (ECRE, 2021) <<https://ecre.org/wp-content/uploads/2021/09/Legal-Note-11.pdf>> accessed 19 November 2021. On the belated and ambiguous reaction of the Commission so far, see: Josephine Joly and Shona Murray, ‘EU Executive Summons Polish, Lithuanian, Latvian Ambassadors Over Belarus Border Crisis’ (Euronews, 15 October 2021) <[www.euronews.com/2021/10/15/eu-executive-summons-polish-lithuanian-latvian-ambassadors-over-belarus-border-crisis](http://www.euronews.com/2021/10/15/eu-executive-summons-polish-lithuanian-latvian-ambassadors-over-belarus-border-crisis)> accessed 19 November 2021. And: Commission, ‘Statement by President von der Leyen On the Situation at the Border Between Poland and Belarus’ (Press corner, 8 November 2021) <[https://ec.europa.eu/commission/press-corner/detail/en/statement\\_21\\_5867](https://ec.europa.eu/commission/press-corner/detail/en/statement_21_5867)> accessed 19 November 2021.
- 42 Vinzent Vogt, ‘Family Life Temporarily Not Available – Bilateral Limits on Family Unity Within the Dublin-System’ (Verfassungsblog, 13 July 2017) <<https://verfassungsblog.de/family-life-temporarily-not-available-bilateral-limits-on-family-unity-within-the-dublin-system/>> accessed 19 November 2021.
- 43 Michael Peel and Sam Fleming, ‘EU to Step Up Pressure Over Migrant Returns’ (Financial Times, 18 September 2020) <[www.ft.com/content/05837dfe-1739-4aae-9a37-ace94f588327](http://www.ft.com/content/05837dfe-1739-4aae-9a37-ace94f588327)> accessed 19 November 2021.

On responsibility-allocation and solidarity, the basic idea is one that the Commission incessantly returns to since 2007<sup>44</sup>: keep Dublin and “correct” it through solidarity schemes. I do sympathize to an extent: realizing a fair balance of responsibilities by “sharing people” has always seemed to me impracticable and undesirable<sup>45</sup>. Still, one would have expected that the abject failure of the Dublin system, the collapse of mutual trust in the CEAS, the meagre results obtained in the field of solidarity (per the Commission’s own appraisal) would have pushed it to bring something new to the table.

Instead, what we have is a slightly milder<sup>46</sup> version of the Dublin IV Proposal – the ultimate clunker in the history of Commission proposals – and an ultra-bureaucratic mechanism for relocation, with the dubious addition of return sponsorships and *force majeure* provisions. The basic tenets of infra-EU allocation remain the same – “no choice”, first entry – and none of the structural flaws that doomed current schemes to failure is fundamentally tackled<sup>47</sup>: solidarity is beefed-up but appears too unreliable and fuzzy to generate trust – including to the Member States that are most interested in it<sup>48</sup>; there are interesting steps forward on “genuine links”, alas strongly resisted by some Member States in Council and even in the EP, but otherwise no sustained attempt to positively engage applicants; administrative complexity and coercive transfers reign on.

Pragmatism, to quote again Daniel Thym<sup>49</sup>, is no sin. It is even expected of the Commission. This, however, is a study in path-dependency. Instead of moving the discussion forward, it merely takes it roundabout in a seemingly endless loop. Granted, by defending the *status quo*, wrapping it in shiny new paper, and making limited concessions to key policy actors, the Commission may eventually carry its proposals through in one form or another. This will matter little, however. Without substantial corrections,

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44 Commission, ‘Green Paper on the Future Common European Asylum System’, COM(2007)301, 10.

45 Francesco Maiani, ‘The Reform of the Dublin System and the Dystopia of “Sharing People”’ (2017) 24(5) Maastricht Journal of European and Comparative Law 622–645.

46 For an analysis of the Dublin IV Proposal see: Hruschka, ‘Dublin Is Dead! Long Live Dublin! The 4 May 2016 Proposal of the European Commission’ (n 4).

47 Maiani, ‘Responsibility Allocation and Solidarity’ (n 27), 107.

48 La Moncloa, ‘New Pact on Migration and Asylum: Comments by Greece, Italy, Malta and Spain’ (La Moncloa, Paper 251120/2020, 2020) <[www.lamoncloa.gob.es/s/presidente/actividades/Documents/2020/251120-Non%20paper%20Pacto%20Mi%20gratorio.pdf](http://www.lamoncloa.gob.es/s/presidente/actividades/Documents/2020/251120-Non%20paper%20Pacto%20Mi%20gratorio.pdf)> accessed 19 November 2021.

49 Thym (n 29).

without true and workable innovations, the “new” Pact will be a reform only in name. It will leave the CEAS and its inhabitants in their current straits and fail to solve even just one of its structural flaws, while degrading legal protection in many respects.

It might be best to leave the reform of the Dublin Regulation alone, or any other legislative grand scheme, and to invest elsewhere what political and administrative resources the EU and its Member States still have: in the gradual deployment of feasible forms of solidarity, and in the indispensable task of securing the full implementation of EU standards and rules as they stand, in line with the values and principles enshrined in the Treaty and the Charter. Working towards this modest but worthwhile objective should keep us all – institutions, academia, civil society – busy for many years to come.

# Border Control and the Right to Liberty in the Pact: A False Promise of ‘Certainty, Clarity and Decent Conditions’?

Galina Cornelisse\*

## 1. Introduction

When presenting the new Pact on Migration and Asylum in September 2020, the Commission wrote that its underlying rationale is the need for a new, durable European framework: ‘one that can provide certainty, clarity and decent conditions for the men, women and children arriving in the EU.’<sup>1</sup> Particularly when it comes to the detention and accommodation of migrants at the borders of Europe, the last ten years have shown structural weaknesses in EU law and its implementation, precisely with regard to ‘certainty, clarity and decent conditions.’ Thus, certainty and clarity are negated by the numerous instances of *de facto* detention that occur at the borders of Europe,<sup>2</sup> or the vague legal framework governing the situation in the hotspots.<sup>3</sup> What’s more, the conditions that prevail in some of Europe’s immigration detention centres, or in other places where people are deprived of their liberty or where their freedom of movement is restricted, are a far cry from any possible interpretation of the term decency.<sup>4</sup> Thus,

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1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609, 1.

2 European Parliament Research Service, ‘Asylum Procedures at the Border. European Implementation Assessment’ (PE 654.201, November 2020); Galina Cornelisse and Marcelle Reneman, ‘Border procedures in the Commission’s New Pact on Migration and Asylum: A case of politics outplaying rationality?’ (2021) 26 *European Law Journal* 181-198; and Gruša Matevžič, ‘Crossing a Red Line, How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry: Case Studies on Bulgaria, Greece, Hungary, and Italy’ (Hungarian Helsinki Committee, 2019).

3 Izabella Majcher, ‘The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty’ (*Border Criminologies*, 5 April 2018) <<https://ssrn.com/abstract=3204379>> accessed 5 December 2021.

4 Fundamental Rights Agency, ‘Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the “hotspots” set up

proposals for new laws and policies that aim to enhance certainty, clarity and decent conditions in this area are long overdue.

In this contribution I discuss those elements of the New Pact and its accompanying legislative and non-legislative initiatives that touch on detention and freedom of movement of third-country nationals. After setting out the content of the proposals in some detail (Section 2), I investigate these through the lens of fundamental rights compliance (Section 3). I argue that the proposals do not sufficiently contemplate the implications of the link between border control and the liberty of individuals. The absence of a thorough and well-thought-out legal framework regulating detention and freedom of movement at the borders of Europe means that the promise of certainty, clarity and decent conditions can only be translated in practice if substantial changes to the proposed legislation are made, some of which I flesh out in the conclusions to this contribution (Section 4).

## 2. *Detention, Freedom of Movement and the Pact: An Overview*

Whereas before 2011, EU law had not harmonised the use of detention in the context of migration and asylum procedures,<sup>5</sup> currently the majority of instruments that form part of the common framework regulating asylum and migration policy contain provisions on detention, a development which is deepened in the Pact. In this section, I provide a brief overview of the instruments included in the Pact that, if adopted, would have an impact on practices of detention or restrictions on liberty. I discuss the new instruments presented in September 2020 together with the earlier proposals for a recast of the Return Directive<sup>6</sup> and for a recast of the Asylum Reception Conditions Directive<sup>7</sup>, because the Commission foresees the adoption of these latter instruments as part of the Pact.

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in Greece and Italy' (February 2019); and Alberto Barbieri, 'Time to rethink large refugee centres in Europe' (2021) 6 *The Lancet Public Health*.

5 CJEU, *Arslan*, Case C-534/11, ECLI:EU:C:2013:343.

6 Commission Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final of 12 September 2018 ('Proposal for a recast Return Directive').

7 Proposal for a Directive of the European Parliament and the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final of 13 July 2016.

a) *Screening*

In the first place, the Commission proposes new migration management tools at external borders which include harmonised procedures to decide swiftly upon arrival. Thus, a “pre-entry phase” is established consisting of a screening and a border procedure for asylum and return,<sup>8</sup> all of which have implications for the personal liberty of migrants. The screening procedure, in which migrants who do not satisfy the conditions for entry in the Schengen Borders Code, will be registered and screened to establish their identity and to carry out health and security checks, may take up to five days. In exceptional circumstances, this period may be extended by another five days.<sup>9</sup>

The Proposal for a Screening Regulation itself is opaque with regard to the question whether screening at the external border requires detention, although the Commission also writes elsewhere that ‘during the screening, migrants would be *held* by competent national authorities.’<sup>10</sup> The Proposal, however, ‘leaves the determination in which situations the screening requires detention and the modalities thereof [...] to national law.’<sup>11</sup> It is nonetheless made clear that Member States are ‘required to apply measures pursuant to national law to prevent the persons concerned from entering the territory during the screening’, which ‘in individual cases may include detention’.<sup>12</sup> Article 3 of the Proposal explicitly obliges Member States to make sure that during the screening, persons ‘shall not be authorised to enter the territory of a Member State’.

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8 Commission Staff Working Document, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund], SWD(2020) 207 final, 72.

9 Art 6(3) of Commission Proposal for a Regulation of the European Parliament and of the Council introducing a 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, COM(2020) 612 (‘Proposal for a Screening Regulation’). To what extent the screening procedure is a redecoration of existing practices is discussed by Lyra Jakulevičienė in this volume.

10 Commission Staff Working Document, SWD(2020) 207 final, 71.

11 See the Explanatory Memorandum to the Proposal for a Screening Regulation (n 9), 9.

12 See Recital 12 of the Proposal for a Screening Regulation (n 9).

b) *Asylum Border Procedure*

On the basis of the screening, the third-country nationals will be referred to the suitable procedure, which can be an asylum procedure or a return procedure, or a mere refusal of entry.<sup>13</sup> If persons are channelled in the asylum procedure, their asylum applications will be assessed either in a normal procedure or in a border procedure. The border procedure provides Member States with the possibility (and in some cases the *obligation*) to examine ‘asylum claims with low chances of being accepted rapidly without requiring legal entry to the Member State’s territory.’<sup>14</sup> Hence, one of the defining characteristics of a border procedure is that the applicant is not (yet) authorised to enter the Member State’s territory. In this respect the proposed border procedure is similar to the current border procedure in Article 43 of the Asylum Procedures Directive 2013/33 now in force.<sup>15</sup> The new Article 41(6) in the Amended Proposal for an Asylum Procedures Regulation makes explicit that ‘applicants subject to the asylum border procedure shall not be authorised to enter the Member State’s territory’.<sup>16</sup> The border procedure should be as short as possible but no longer than 12 weeks. After that period of time, applicants have a right to enter the territory.<sup>17</sup> More specifically with regard to the location of the border procedure, the Commission writes that it ‘would be more flexible than it currently is, allowing for the holding of applicants not only at the border or in proximity to the border, but also at other locations, should capacity become stretched.’<sup>18</sup>

However, just as with regard to the screening procedure, it is not unequivocally clear how the refusal of entry of applicants relates to their right to personal liberty. According to Recital 40f in the Amended Proposal for

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13 Commission Communication on a New Pact on Migration and Asylum, COM(2020) 609, 4.

14 European Commission, ‘New Pact on Migration and Asylum - Building on the progress made since 2016: Questions and Answers’ (23 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_1723](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1723)> accessed 1 December 2021.

15 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29 June 2013.

16 Amended Proposal for a Regulation of the European Union and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020)611, 14.

17 Ibid, art 41.

18 Staff Working Document, SWD(2020) 207 final, 72.



an Asylum Procedures Regulation, ‘the border procedure for the examination of an application for international protection can be applied without recourse to detention.’ Nevertheless, the Recital continues: ‘Member States should be able to apply the grounds for detention during the border procedure in accordance with the Reception Conditions Directive.’ Whereas the use of detention during the screening phase is thus left to national law, it is to be regulated by EU law during the border procedure: Article 8 under d of the Proposal for a recast of the Reception Conditions Directive provides for detention in order to decide in the context of a border procedure on the applicants right to enter the territory.<sup>19</sup>

*c) Return Border Procedures*

If an asylum border procedure is used and the application is rejected, a return border procedure will follow. The Commission presents the joint asylum and return border procedure as an important migration management tool to prevent unauthorised movements.<sup>20</sup> The return border procedure is detailed in the same legislative instrument as the asylum border procedure, namely in the amended Proposal for an Asylum Procedures Regulation. As such, it replaces the return border procedure that was included in the 2018 proposal for a recast Return Directive.<sup>21</sup> Once again, the proposal does not provide clarity to what extent such procedures involve restrictions on freedom of movement or deprive returnees of their personal liberty: Article 41a in the Proposal states that persons whose applications are rejected in the asylum border procedure ‘shall be kept for a period not exceeding 12 weeks in locations at or in proximity to the external border or transit zones; where a Member State cannot accommodate them in those locations, it can resort to the use of other locations within its territory.’

In spite of the use of the term “kept” in this provision, the Commission reflects neither in the proposed Asylum Procedures Regulation, nor in any other document, systematically on how return border procedures relate to the right to personal liberty of returnees. More specifically, it fails to

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19 This ground for detention is also provided for in the legislation currently in force: Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180/96, 29 June 2013 (‘Reception Conditions Directive 2013/33’).

20 Commission Communication on a New Pact on Migration and Asylum, COM(2020) 609, 4.

21 See for more on this Madalina Moraru in this volume.

address the question under which conditions these procedures involve deprivations of liberty. In the Staff Working Document, it merely writes that ‘irregular migrants in a return border procedure would not be subject to detention as a rule. However, when it is necessary to prevent irregular entry, or there is a risk of absconding, of hampering return, or a threat to public order or national security, they may be subject to detention.’<sup>22</sup> The Commission thus suggests that a return border procedure is possible without the use of detention.

With regard to the grounds for detention, the proposed Article 41a in the amended proposal for an Asylum Procedures Regulation distinguishes between two groups: those who were detained during the asylum border procedure and those who were not. The former ‘may continue to be detained for the purpose of preventing entry into the territory of the Member State, preparing the return or carrying out the removal process’; the latter ‘may be detained if there is a risk of absconding within the meaning of the Return Directive, if they avoid or hamper the preparation of return or the removal process or they pose a risk to public policy, public security or national security.’ For both groups, detention shall be maintained for as short a period as possible, as long as removal arrangements are in progress and executed with due diligence. The period of detention shall not exceed 12 weeks, a period that needs to be included in the maximum period of detention under the Return Directive 2008/115.

#### *d) Detention in the Recast Return Directive*

This brings us to the proposal for a recast of the Return Directive tabled by the Commission on 12 September 2018. According to the Commission, the proposed recast consists of targeted amendments aimed at maximising the effectiveness of EU return policy, whilst safeguarding the fundamental rights of irregular migrants.<sup>23</sup> This has resulted in stricter rules on preventing absconding and unauthorised movements, most conspicuously by introducing an extra ground for the detention of irregular migrants: detention is also permissible if ‘the third-country national concerned poses a risk to public policy, public security or national security.’<sup>24</sup> Moreover, Member States are obliged to establish a maximum period of detention of

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22 Staff Working Document SWD(2020) 207 final, 72.

23 See the explanatory memorandum to the recast Return Directive.

24 Art 18 of the Proposal for a recast Return Directive (n 6).

at least three months, a change that the Commission justifies by referring to the ineffectiveness of return policies.<sup>25</sup> Changes have also been proposed with regard to the risk of absconding and the mandatory denial of a period of voluntary return. These also have clear implications for the right to liberty of returnees, but for reasons of scope these will not be fleshed out here.<sup>26</sup>

*e) Detention and Freedom of Movement in Asylum and Transfer Procedures*

Additional changes to the legal framework regulating detention and accommodation of applicants for international protection are foreseen in the Proposal for an Asylum and Migration Management Regulation,<sup>27</sup> replacing the current Dublin Regulation 604/2013.<sup>28</sup> Whereas detention on the basis of current law is only permissible if there is a significant risk of absconding,<sup>29</sup> the Proposal for an Asylum and Migration Management Regulation uses merely ‘risk of absconding’ in Article 34. Changes are also made to the time limits applicable to the transfer procedures if detention is used – in most cases resulting in stricter time limits for submitting and replying to requests and carrying out transfers. If these time limits are not obeyed, the third country national concerned should be released.

The Commission Proposal for the recast Reception Conditions Directive which was already touched upon above in the context of border procedures also introduces changes regarding the legal framework regu-

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25 Ibid, Explanatory Memorandum, page 8.

26 See for more on this: Galina Cornelisse and Madalina Moraru, ‘Judicial dialogue about the Return Directive: Which role for courts in an era of executive governance?’ (*EU Immigration and Asylum Law Blog*, 1 September 2020) <<https://eumigrationlawblog.eu/judicial-dialogue-about-the-return-directive-which-role-for-courts-in-an-era-of-executive-governance/>> accessed 1 December 2021.

27 Proposal for a Regulation of the European Parliament and the Council on asylum and migration management and amending Council Directive concerning the status of third-country nationals who are long-term residents, COM(2020) 610 (‘Proposal for Asylum and Migration Management Regulation’).

28 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/31, 29 June 2013.

29 Art 28 Dublin Regulation 604/2013. See also CJEU, *Al Chodor*, Case C-528/15, ECLI:EU:C:2017:213.

lating both freedom of movement and detention in the general asylum procedure. Just as in the current Reception Conditions Directive 2013/32, freedom of movement within the territory of the Member State or within an area assigned to them is the general rule. The proposal for the recast however *requires* Member States to *assign a specific place of residence* if this is necessary for reasons of public interest or public order, for the swift processing and effective monitoring of the application, for the swift processing and effective monitoring of transfer procedures or in order to effectively prevent the applicant from absconding.<sup>30</sup>

Such necessity may in particular present itself if the applicant did not make an application for international protection in the Member State of first irregular entry or legal entry. The Proposal defines absconding as the action by which an applicant, in order to avoid asylum procedures, either leaves the territory where he or she is obliged to be present or does not remain available to the competent authorities. A *risk* of absconding is defined as the existence of reasons in an individual case, which are based on objective criteria defined by national law, to believe that an applicant may abscond.<sup>31</sup> The proposal makes explicit that ‘all decisions restricting an applicant’s freedom of movement need to be based on the particular situation of the person concerned, taking into account any special reception needs of applicants and the principle of proportionality.’ Moreover, ‘applicants must be duly informed in writing of such decisions and of the consequences of non-compliance.’<sup>32</sup>

The importance that the Commission attaches to measures restricting freedom of movement is reflected in the fact that an *additional* ground for detention has been added in Article 8 of the proposed recast: if an applicant has been assigned a specific place of residence but has not complied with the obligation to reside there and there is a continued risk that the applicant will abscond, the applicant may be detained in order to make sure the obligation to reside in a specific place is complied with. This is only possible if the applicant was aware of the obligation and the consequences of non-compliance. The length of the detention must be proportionate and detention is no longer permissible if there are no longer reasons for believing that the applicant will not fulfil the obligation to reside in a particular place.<sup>33</sup> All the requirements for lawful detention and

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30 Proposal for a recast Reception Conditions Directive (n 7), art 7.

31 Ibid, art 2.

32 Ibid, Explanatory Memorandum, page 13.

33 Ibid, page 10.

applicable guarantees as laid down in the current Reception Conditions Directive 2013/33 remain unchanged.

*f) Derogation in Times of Crisis*

The Proposal for a Migration and Asylum Crisis Regulation<sup>34</sup> concerns provisions adapting the new migration management tools at the border in exceptional situations, some of which have repercussions for the right to liberty. Thus, in the case that a mass influx of irregular arrivals would overwhelm a Member State's asylum, reception or return systems and thus jeopardise the functioning of the CEAS, derogations are allowed from the proposed Asylum Procedures Regulation, making it possible to extend the duration of the asylum border procedure and the return border procedure with another 8 weeks.<sup>35</sup> The preamble of the Proposal for a Migration and Asylum Crisis Regulation clarifies that it should be possible to use detention during this period as well, in accordance with Article 41a of the Proposed Procedures Regulation when it concerns the return border procedure (and presumably on the basis of the recast Reception Conditions Directive in cases of the asylum border procedure). Moreover, the Crisis instrument introduces two cases, additional to the ones set in the proposal for a recast Return Directive, in which the existence of a risk of absconding in individual cases can be presumed, unless proven otherwise. Such a presumption may subsequently provide the basis for using detention on the basis of Article 18 of the proposed recast of the Return Directive. The two additional grounds are (1) explicit expression of intent of non-compliance with return-related measures, or (2) when the applicant, third-country national or stateless person concerned is manifestly and persistently not fulfilling the obligation to cooperate.<sup>36</sup>

Also significant in the context of crisis management is the Migration Preparedness and Crisis Blueprint,<sup>37</sup> which is not a legislative instrument but a recommendation by the Commission on an EU mechanism for

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34 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613.

35 Proposal for a Migration and Asylum Crisis Regulation, art 4 and 5.

36 Ibid.

37 Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for Preparedness and Management of Crises related to Migration ('Migration Preparedness and Crisis Blueprint'), C(2020) 6469, OJ L 317/36.

‘Preparedness and Management of Crises related to Migration’. Although the recommendation does not explicitly mention detention or accommodation, some of its aspects reflect the current operational coordination in the hotspots between Member States and the EU and its agencies, such as EASO, Frontex and Eurojust. Indeed, the Blueprint aims to consolidate the operational cooperation developed so far, by establishing a framework which supports a more coordinated use of the relevant legislation in order to avoid crisis situations such as in 2015 and to ensure the effective functioning of national migration systems. It provides for two stages in such coordination: the preparedness stage and the crisis stage.

The toolbox for the *crisis stage*, provided in the Annex to the Recommendation, provides several measures to be taken at external borders. Most relevant for accommodation and detention are the following measures: ‘Hotspots and reception centres are established at the points of high pressure staffed by relevant national authorities and supported by the EU Agencies with the necessary migration and security information systems.’<sup>38</sup> The Commission also ‘deploys staff to Member States at the EU external borders to assist in the coordination of the response actions.’ Moreover, ‘EASO deploys, in coordination with Member States, relevant staff and equipment to assist on reception and asylum’, and ‘Europol deploys, in coordination with Member States, [...] officers to perform security checks of arriving migrants.’<sup>39</sup> Frontex is also given a role in the toolbox ‘by deploying return specialists and by organising and coordinating return operations by charter and scheduled flights including with return escorts and return monitors.’<sup>40</sup> The mobilisation of EASO, Frontex, and Europol to work together with the authorities of frontline Member States in the hotspot approach ‘to help to fulfil their obligations under EU law and swiftly identify, register and fingerprint incoming migrants’ was first put forward in the 2015 European Agenda on Migration,<sup>41</sup> and further developed in the Regulation on the European Border and Coast Guard.<sup>42</sup>

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38 Ibid, 36.

39 Ibid.

40 Ibid.

41 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, COM(2015)240 final, 4.

42 Regulation of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295/1.

### 3. *Fundamental Rights Compliance*

With regard to all proposed measures discussed above, the Commission pays some attention to compliance with the right to liberty and freedom of movement. For example, the Explanatory Memorandum to the Crisis Regulation states that these rights are ‘protected given that, if detention is used in the context of the derogatory rules to the asylum and return border procedure, such derogatory rules can only be applied in a strictly regulated framework and for a limited time.’<sup>43</sup> In a similar fashion, the Commission writes with regard to the proposal for a recast of the Reception Conditions Directive that it is ‘fully compatible with Article 6 of the EU Charter of Fundamental Rights, read in the light of Article 5 of the European Convention on Human Rights and relevant jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights.’<sup>44</sup> And the Staff Working Document underlines that detention in the return border procedure ‘could be used only in individual cases, as a last resort (no effective alternatives available), for the shortest possible period of time and provided that procedures by national authorities are conducted with due diligence, and in any case not exceeding the maximum duration of the border procedure (12 weeks for asylum, 12 weeks for return).’<sup>45</sup> It is striking however, that in the Staff Working Document, the relatively brief section on reinforcing migrants and asylum seekers’ rights unapologetically presents measures that do not even come close to reinforcing rights, but instead restrict them.<sup>46</sup> Thus, it is acknowledged that the refusal of entry to the territory inherent to a border procedure has an impact on the right to liberty, but is nevertheless ‘necessary to discourage applicants with abusive claims to enter the Union without a valid reason.’<sup>47</sup>

#### *a) Containment at External Borders and De Facto Detention*

When it comes to compliance with the right to personal liberty, perhaps the most striking trait of the Pact is the implicit blurring of the lines

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43 Proposal for a Migration and Asylum Crisis Regulation, 12.

44 Proposal for a recast Reception Conditions Directive (n 7), Explanatory Memorandum.

45 Staff Working Document SWD(2020) 207 final, 85.

46 Section 5.5. of Staff Working Document SWD(2020) 207 final, on a ‘fairer and more effective system to reinforce migrants and asylum seekers’ rights’.

47 *Ibid.*

between detention and restrictions on freedom of movement, a tendency that is arguably typical for contemporary migration governance and that has been highlighted by scholars calling attention to containment practices beyond the premises of detention sites.<sup>48</sup> The most pertinent question raised by such practices is to what extent our current fundamental rights framework is capable of addressing the resulting challenges. Screening and border procedures are characterised by the refusal of entry. At the same time, applicants for international protection have a right to remain under EU law and they cannot be returned before the existence of a risk of refoulement is assessed.<sup>49</sup> Moreover, Article 18 of the Charter provides for the right to asylum. This particular construction inevitably impacts on the liberty of applicants who apply for asylum at the border or in a transit zone. Indeed, in these procedures, entry is refused precisely in order to prevent free movement within the territory of the Member State (and potential subsequent irregular movements across the EU).

To what extent policies of non-entry at the external border as foreseen in the screening and border procedures (both asylum and return) interfere with the right to personal liberty raises complex issues of fact and law – questions the answers to which, as we have seen over the past few years, may vary depending on which court in Europe answers them.<sup>50</sup> The particular legal constellation of EU law is such that in most cases, the “holding” of applicants for asylum at the border or in transit zones before entry is granted, will amount to deprivation of liberty, and not as mere restrictions on freedom of movement.<sup>51</sup> In this context, it is worth highlighting that

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48 Martina Tazzioli and Glenda Garelli, ‘Containment beyond detention: The hotspot system and disrupted migration movements across Europe’ (2020) 38(6) *Environment and Planning D: Society and Space*.

49 CJEU, *Gnandi*, Case C-181/16, ECLI:EU:C:2018:465. See also art 9 of Reception Conditions Directive 2013/33 (n 19).

50 Thus, containment of applicants for asylum in the Rösztke transit area was deemed to constitute detention by the Court of Justice in *FMS*, Case C-924/19, ECLI:EU:C:2020:367 and *Commission v Hungary*, Case C-808/18, ECLI:EU:C:2020:1029 whereas such containment under almost comparable circumstances in *Ilias and Ahmed* was not qualified as such by the Grand Chamber of the ECtHR (*Ilias and Ahmed v Hungary* App no 47287/15, ECtHR, 21 November 2019).

51 Galina Cornelisse, ‘Borders, Procedures and Rights at Rösztke: Reflections on Case C-924/19 (PPU)’ (*European Database of Asylum Law*, April 2020) <[www.asylumlawdatabase.eu/en/journal/borders-procedures-and-rights-rösztke-reflections-case-c-92419-ppu](http://www.asylumlawdatabase.eu/en/journal/borders-procedures-and-rights-rösztke-reflections-case-c-92419-ppu)> accessed 1 December 2021; and Galina Cornelisse, ‘Territory, Procedures and Rights: Border Procedures in European Asylum Law’ (2016) 35 (1) *Refugee Survey Quarterly* 74-90. See also Galina Cornelisse and Marcelle



in 2013, the Commission was of the opinion that border procedures could 'be used only in exceptional circumstances, since they imply detention.'<sup>52</sup> Moreover, in the Explanatory Memorandum of the 2016 Proposal for the APR, the Commission also wrote that border procedures 'normally imply the use of detention throughout the procedure'.<sup>53</sup> There is no justification in the Pact for the change of position on such a crucial aspect of the proposed Asylum Procedures Regulation, which now maintains that asylum border procedures for the can be applied without recourse to detention.<sup>54</sup>

Addressing all the intricacies of the legal qualification of a stay at the border or in the transit zone would go beyond the scope of this contribution.<sup>55</sup> For now it suffices to highlight that the CJEU has defined detention in this particular policy context as '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.'<sup>56</sup> The possibility to leave this area will not call into question the assessment of a situation as detention, if this is not a legal possibility or results in forfeiting the right to asylum.<sup>57</sup>

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- Reneman, 'Legal assessment of the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection' (European Parliament Research Service, PE 654.201, November 2020).
- 52 Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council on the adoption of a proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, COM(2013) 411 final, 4.
- 53 Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM(2016) 467 final, 15.
- 54 It is likely that political, not legal, reasons are behind this change, as border procedures in particular were one of the stumbling blocks in reaching political agreement over the 2016 Proposal for the APR. See Council of the European Union, 'Note from the Presidency to: Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)', 13376/18, LIMITE, 19 October 2018.
- 55 This issue is delved out in detail, including the way in which such containment relates to the 1951 Refugee Convention, in the legal study underlying the European implementation assessment of border procedures in the EU. Cornelisse and Reneman, 'Legal assessment of the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection' (n 51).
- 56 CJEU, *FMS*, Case C-924/19, ECLI:EU:C:2020:367 and *Commission v Hungary*, Case C-808/18, ECLI:EU:C:2020:1029.
- 57 See also Opinion of AG in CJEU, *FMS*, Case C-924/19, ECLI:EU:C:2020:294.

At the same time, it is well known that in human rights law, the distinction between a deprivation of liberty (detention) and a restriction on freedom of movement is one of 'degree or intensity and not one of nature or substance.'<sup>58</sup> Nonetheless, once a situation is qualified as detention, a number of safeguards kick in. Most notably is the habeas corpus guarantee, giving the detainee the right to have the lawfulness of the detention speedily reviewed by a court and to have the detention lifted if it is unlawful.<sup>59</sup> Although safeguards are not absent in EU law when it concerns restrictions on freedom of movement, they are less robust. Article 7 of the proposal for the recast Reception Conditions Directive requires that 'measures restricting freedom of movement are proportionate and based on the individual behaviour and particular situation of the person concerned.' Moreover, such measures, provided that they 'affect applicants individually' should ultimately be the subject of 'an appeal, in fact and in law, before a judicial authority.' Even leaving aside the question what is meant with the qualification that measures should 'affect applicants individually' to merit judicial review, the scope, intensity and possible outcomes of such review, as well as the speed with which it should be carried out, are entirely left to national law.

Lesser procedural protection when freedom of movement of applicants is restricted to a particular area, for example in cases of a particular geographical restriction,<sup>60</sup> makes sense in many cases, especially when compared to a full-blown detention regime in an immigration detention centre. The problem is however, that precisely with regard to practices of containment at the border, the difference between detention and restrictions on freedom of movement can be difficult to draw. The result is that practices that are qualified as detention by one Member State, may not be seen as such by another.<sup>61</sup> This jeopardises the uniformity of EU law, seeing that applicants in similar situations have different procedural protection at their disposal: for example, judicial review of the lawfulness of a deprivation of liberty is not enjoyed uniformly by individuals across

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58 *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980).

59 Art 5(4) ECHR and see also CJEU, *Mahdi*, Case C-146/14 PPU, ECLI:EU:C:2014:1320

60 Alexandra Bousiou, 'From Humanitarian Crisis Management to Prison Island: Implementing the European Asylum Regime at the Border Island of Lesbos 2015-2017' (2020) 22 (3) *Journal of Balkan and Near Eastern Studies* 431-447.

61 Cornelisse and Reneman, 'Legal assessment of the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection' (n 51).

the EU. More fundamentally, also under the current legal framework, the complexity surrounding the stay of third-country nationals at borders or in transit zones results in numerous instances of *de facto* detention in Europe, be it at border posts, transit zones, reception centres, boats, islands or airports.<sup>62</sup>

The proposals in the Pact do not in any way address this problem, which may partly be due to the fact that the transposition of current EU law has not been evaluated by the Commission. Presenting the screening and border procedures as a panacea for problems encountered at external borders therefore raises more questions than it answers. The asylum and return border procedures as proposed in the Asylum Procedures Regulation will inevitably augment existing problems in this field. Moreover, the proposal for the Screening Regulation, by leaving it entirely up to national law whether or not to use detention during the screening phase, flaunts a complete ignorance of the challenges encountered at the borders of Europe when it comes to respecting the fundamental rights of migrants. By not addressing these in a sustained manner, the Pact cannot be said to bring about certainty and clarity for the men, women and children arriving in the EU. As regards decent conditions: the last years have shown that conditions of detention at the border or in transit zones raise particular problems and it is not clear how the Commission envisages addressing these.

*b) Accommodation at the Borders and Hotspots: A “System to Match the Scale of the Challenge”?*

The Commission portrays the will to make the New Pact a reality as ‘the only way to prevent the recurrence of events such as those seen in Moria [...]: by putting into place a system to match the scale of the challenge.’<sup>63</sup> Statements such as these seem incongruous when we consider that the ‘more efficient, seamless and harmonised migration management system’<sup>64</sup> as proposed in the Pact largely replicates the modus operandi as currently employed at the hotspots; albeit without introducing clear measures to

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62 Matevžič (n 2).

63 Commission Communication on a New Pact on Migration and Asylum, COM(2020) 609.

64 Staff Working document, SWD(2020) 207 final, 70.

prevent well-documented violations of human rights.<sup>65</sup> Thus, the current hotspots are places where migrants are screened and then channeled in the proper procedures. This channeling, minus the operational coordination and support (which is foreseen in times of crisis in the Blueprint) is precisely what the Commission proposes to do now at all external borders. The Pact in its current form actually promotes the model of large hosting centres at the external borders of the European Union.<sup>66</sup> The dangers that accommodation in these types of centres pose for the physical and mental health of migrants are well documented<sup>67</sup> and it remains unclear how the Commission envisages countering these risks.

Moreover, as mentioned above, it is remarkable that it does not pay structural attention to the way in which these policies relate to detention, except from heedless statements, such as ‘irregular migrants in a return border procedure would not be subject to detention as a rule.’<sup>68</sup> Now, how does that rule relate to the obligation by Member States to keep returnees from entering the territory if their return cannot be arranged yet? And what are the prospects for proper implementation of that rule considering the complete lack of evaluation of current practices? For example, in Greece, under the fast track border procedure at the Aegean islands, appellants whose appeals are rejected ‘are immediately detained upon the notification of the second instance negative decision.’<sup>69</sup> With regard to Italy, the CPT has reported that migrants who did not express the intention to apply for international protection ‘and against whom a refusal of entry (rejection) order or a removal order had been issued, could remain in the ‘hotspots’ for days or even weeks, and potentially until their forced return or transfer to a CPR, without any judicial control.’<sup>70</sup> How such

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65 Fundamental Rights Agency, ‘Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy’ (February 2019).

66 Ecorys in collaboration with Galina Cornelisse and Giuseppe Campesi, ‘The European Commission’s New Pact on Migration and Asylum: European Substitute Impact Assessment (European Parliament Research Service, PE 694.210, August 2021).

67 Barbieri (n 4).

68 Staff Working Document, SWD(2020) 207 final, 73.

69 Greek Council for Refugees, ‘Country Report: Fast-track border procedure (Eastern Aegean islands)’ (AIDA Database, 10 June 2021).

70 Council of Europe, Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT/Inf (2018), 7 to 13 June 2017), 13 and 16.

problems can be prevented from occurring in the future is not discussed by the Commission, not even when presenting the extension of periods allowed for screening and border procedures in times of crisis, as foreseen in the Crisis Regulation. Moreover, how the Pact envisages to improve the living conditions in the hotspots remains unclear.

The current framework undergirding the hotspot approach seems to be replicated in the proposals in another way as well: the extra ground for detention in the proposal for the recast Reception Conditions Directive as discussed above mirrors practice in Greece, where applicants for asylum who violated the geographical restriction applied to them are upon arrest transported back to the Islands and detained (albeit without a legal basis in Greek law).<sup>71</sup> In a similar fashion, the added grounds for assigning applicants for asylum a specific place of residence in Article 7 of the Reception Conditions Directive reflect current practice at the hotspots.

#### *4. Conclusions*

If the EU genuinely wishes to set up a ‘system to meet the scale of the challenge’,<sup>72</sup> more sustained reflection is needed on the way in which the proposed, novel instruments of migration management pose challenges to the effective protection of fundamental rights. No-one can be unaware of the systematic infringements of the right to liberty and substandard living conditions suffered by those held at the borders of Europe. A policy that fails to engage sincerely with the question how to prevent these violations from occurring in the future cannot be taken seriously. Without having carried out a proper evaluation of the current instruments employed at the borders of Europe, the Commission presents the new migration management tools as a solution. This, together with the fact that it failed to produce an impact assessment of the proposals and the Pact as a whole, is in contradiction with its own Better Regulation guidelines.<sup>73</sup> The absence of an impact assessment is particularly striking seeing the potentially se-

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71 Greek Council for Refugees, ‘Country Report: Greece’ (AIDA Database, 31 December 2018).

72 Commission Communication on a New Pact on Migration and Asylum, COM(2020) 609, 28.

73 Commission Staff Working Document, Better Regulation Guidelines, SWD (2017) 350. See also Cornelisse and Reneman, ‘Border procedures in the Commission’s New Pact on Migration and Asylum: A case of politics outplaying rationality?’ (n 2).

rious effects on fundamental rights of migrants, a few of which I have highlighted in this contribution. In the substitute impact assessment that was carried out by the EPRS in 2021, the negative impact of pre-entry procedures in particular on the right to liberty was clearly illustrated.<sup>74</sup> In this respect, it is significant that in the recent draft report by the LIBE Rapporteur on the Proposal for a Screening Regulation, key amendments are proposed, such as the removal of the fiction of non-entry.<sup>75</sup> More generally, when it comes to the negotiations of the Pact, the implementation of a legal concept of non-entry into the territory and the systematic use of detention as well as possible alternatives to it, remain a topic of intense political disagreement, also within the Council.<sup>76</sup> It is not a topic which is about to decrease in political or humanitarian salience; quite the contrary, as is shown by the current developments at Eastern external borders.<sup>77</sup>

The question that lingers after a thorough examination of those elements of the Pact that have repercussions for the right to liberty: for what precisely does the Proposal provide a solution? For it contains disappointingly little – if any – answers for the men, women and children who are detained at the borders of Europe without a formal detention order or under conditions that cannot be described as decent by any stretch of the imagination, nor for those who dwell in the hotspots after they have been formally released from detention but ‘still trapped under conditions highly similar to those of detention.’<sup>78</sup> The Pact contains surprisingly little elaboration to the guarantees that are traditionally the most pertinent when it comes to fundamental rights protection: judicial remedies. Such remedies should be taken onboard in the proposed legislation, with specific regard

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74 Ecorys in collaboration with Cornelisse and Campesi (n 66).

75 Committee on Civil Liberties, Justice and Home Affairs, Draft Report on the proposal for a regulation of the European Parliament and of the Council introducing a 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 (COM(2020) 612), 15 November 2021.

76 Presidency, Pact on Migration and Asylum - Progress Report, Council Document 8540/21, LIMITE, 24 May 2021.

77 See *R.A. and Others v Poland* App no 42120/21 (ECtHR, 28 August 2021); and *H.M.M. and Others v. Latvia* App no 42165/21 (ECtHR, 25 August 2021) on interim measures for persons refused entry at the external borders of Poland and Lithuania.

78 Spyros-Vlad Oikonomo and the Greek Council of Refugees, ‘Borderlines of Despair: First-line reception of asylum seekers at the Greek borders’ (25 May 2018), 21.

to the complexities that are introduced when the lines between restrictions on freedom of movement and deprivation of liberty are blurred.

This can be done for example by ensuring that, when Member States employ policies of non-entry, a decision in writing should qualify the measures preventing entry as *either* detention *or* restrictions on freedom of movement. The decision should moreover provide reasons in fact and law, not only for the restriction itself but also for its *qualification*. In addition, *both* detention and restrictions on freedom of movement, if these are decided by an administrative authority, should be subject to a *speedy* judicial review, and the *scope* of such review should be such as to enable the judicial authority to substitute its own decision for that of the administrative authority with regard to the qualification of the measure. Additionally, the judicial authority should be able to take into account any element that it considers necessary for assessing the lawfulness of the restricting measures, including its conditions.<sup>79</sup> Seeing that the rule of law and the protection of individual rights in the EU largely depends on a ‘decentralised judicial architecture’,<sup>80</sup> robust judicial remedies before national judges are called for in order to ensure that the desired “clarity, certainty and decent conditions” do not remain an empty promise.

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79 Cornelisse and Reneman, ‘Legal assessment of the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection’ (n 51); and Cornelisse and Reneman, ‘Border procedures in the Commission’s New Pact on Migration and Asylum: A case of politics outplaying rationality?’ (n 2).

80 Volker Roeben, ‘Judicial Protection as the Meta-norm in the EU Judicial Architecture’ (2020) 12 Hague Journal on the Rule of Law (2020) 29-62.





# Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?

*Lyra Jakulevičienė\**

The New Pact on Migration and Asylum<sup>1</sup> announced by the European Commission on 23 of September 2020 contains a new piece of legislation: a Proposal for a Regulation introducing a screening of third country nationals at the external borders and amending some related regulations<sup>2</sup> (hereafter Proposal for a Screening Regulation, Proposal). From the first outlook it seems that a novelty – a pre-entry screening – procedure is introduced. A more thorough analysis raises several questions. Firstly, is this novelty really new, and if not, is it worthwhile investing almost 0.5 billion euros in re-decorating old practices that did not work? Second, will the measures proposed be adequate to address the challenges and meet the objectives indicated, or will they raise more legal and practical issues than the existing ones? Last, but not least, how realistic are such provisions to be implemented once adopted?

## *1. Novelties of the Proposal or Re-Decoration of Existing Practices?*

The objective of the Proposal for a Screening Regulation is two-fold: a) to identify the persons, establish health and security risks at soonest; and b) to direct the persons to relevant procedures, be it either asylum or return (Art. 1). If compared with the current obligations of European Union (hereafter EU) Member States at the borders, it is evident that identity, registration and security checks, as well as preliminary vulnerability assess-

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1 Commission, ‘Communication on a New Pact on Migration and Asylum’ COM(2020) 609 of 23 September 2020.

2 Commission, ‘Proposal for a Regulation introducing a screening of third country nationals at the external borders’ COM(2020) 612 of 23 September 2020.

ments are happening anyway on the basis of the Schengen Borders Code<sup>3</sup> and the national legislation. While the Schengen Borders Code does not provide for any specific obligations concerning medical checks of third country nationals apprehended during border surveillance, health checks have been recently introduced by the Member States in response to the COVID-19 pandemic. With regard to medical checks the Proposal is making such checks mandatory for all third country nationals apprehended during border surveillance or disembarked following a search and rescue operation, although in practice the Member States already carry out such health checks.<sup>4</sup> Thus many elements included in the Proposal correspond largely to what border authorities are already requested to do under the existing legislative framework.

What might be new indeed is the projected outcome of such screening procedure and its implications for the entire asylum and return process, and the individuals concerned. The Commission has justified the proposal with the need to “streamline” procedures “upon arrival”.<sup>5</sup> This reflects on national trends post-2015 in some of the Member States to shift towards a more process-oriented approach, whereby, for example, rather than viewing return as a distinct procedure that starts after the asylum procedure has finished, several Member States are moving towards a model in which tasks and steps are taken across the continuum between registration and possible return.<sup>6</sup> The Proposal envisages that the outcome of the screening will be direction of the persons to appropriate procedures – either asylum procedures or returns and also it will impact on whether to channel asylum seekers to border or regular asylum procedures. It will be discussed below to what extent this is a novelty and whether it raises legal questions.

Pre-screening procedures are not new as such. They are employed, for instance, in Australia (so-called ‘enhanced screening process’, which ‘screens in’ to the refugee status determination and complementary protection system), although they have been criticized as risking to exclude those with legitimate claims for protection due to too short interviews, absence of legal advice, lack of written record of the proceedings and

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3 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77/1.

4 European Parliament, ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’ (Study, July 2021), 53.

5 Ibid 52.

6 Hanne Beirens, ‘Chasing Efficiency: Can operational changes fix European asylum systems?’ (Migration Policy Institute, February 2020), 53.

other setbacks.<sup>7</sup> Similar swift identification, registration and fingerprinting experiences were in the hotspots in Greece and Italy established in the aftermath of the 2015-2016 migration ‘crisis’ in Europe and the Proposal could be seen as an adaptation and generalisation of the border control practices under this ‘hotspot approach’,<sup>8</sup> which, according to *Maiani*, have failed to produce any tangible results.<sup>9</sup> As Evaluation of the Proposal concludes, the Proposal does not address the main bottlenecks of this approach as identified by existing evaluations and scholarly research on its implementation,<sup>10</sup> but rather further reinforces these.<sup>11</sup> Will the pre-entry screening in the EU result in a different outcome?

## *2. Are Asylum Seekers no Longer a Privileged Group of Migrants in Europe?*

The screening procedure under the Proposal for a Screening Regulation would apply to three groups of persons: migrants who have entered in unauthorised manner, asylum seekers who entered without authorisation and persons disembarked after a search and rescue operation (Art. 3 and 5). During the screening process these persons would not be considered as being authorised entry into the Member State territory (Art. 4(1)). What is particularly striking in the proposal is the elimination of a fine line that exists in international and EU law between persons seeking international protection and other migrants, as all of them will undergo the same proce-

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7 Australian Human Rights Commission (June 2013) <<https://humanrights.gov.au/sites/default/files/document/publication/enhanced-screening.pdf>> accessed 12 September 2021.

8 European Parliament, ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’ (n 4), 48.

9 Francesco Maiani, ‘Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?’ (EU Migration Law Blog, 3 February 2016) <<https://eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/>> accessed 29 October 2021.

10 European Council for Refugees and Exiles, ‘The implementation of the hotspots in Italy and Greece. A Study’ (2017); EU Agency for Fundamental Rights, ‘Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the “hotspots” set up in Greece and Italy’ (2019); Elisa Pascucci and Emma Patchett, ‘Hotspots: Questioning the Future of Europe through Its Borders’ (2018) 14 (4) *Journal of Contemporary European Research* 324, recited from European Parliament, ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’ (n 4), 53.

11 European Parliament, ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’ (n 4), 53.

ture. This differentiation follows a legal rationale, as persons who seek protection are subject to special treatment with regard to entry and stay in the host country as confirmed by the existence of a special international instrument – the 1951 United Nations (hereafter UN) Convention Relating to the Status of Refugees<sup>12</sup> and recognition of asylum seekers in the European Court of Human Rights (hereafter ECtHR) jurisprudence as particularly vulnerable category of migrants in need of special protection.<sup>13</sup>

In contrast to that legal distinction, the Proposal builds on the premise that asylum seekers and migrants are the same category of unauthorised entrants and disregards the fact that asylum seekers' need for protection overrides the entry requirements, as confirmed by Art. 6(5)(c) of the Schengen Borders Code, non-application of responsibility to illegal entry as per Art. 31 of the 1951 Geneva Convention and ample jurisprudence of the European courts. Other migrants under international and EU law do not have the same rights of entry or special treatment as protection seekers even though they are protected under general human rights instruments. The proposal blurs up this distinction by placing both groups of persons under the same legal regime instead of clearly differentiating them, as their chances to stay in the EU are very different. This approach does not in itself violate the mentioned obligations, as long as persons are directed to an asylum procedure. But it could overall promote stereotypes that asylum seekers and irregular migrants are the same and could lead to wrong practices whereby protection seekers are treated by the border guard authorities in the same way as other migrants who arrive in an unauthorised way disregarding their protection needs.

This is reinforced by retaining a certain level of ambiguity in the proposal as to the relationship of the screening procedure with derogation from entry requirements for asylum seekers under Art. 6(5)(c) of the Schengen Borders Code (reference to international obligations). The Proposal mentions exclusion from the screening of persons authorised entry under this derogation by an individual decision (Recital 14) but then includes them into screening under Art. 3(2). The Presidency compromise proposal presented in May 2021 further refers to this situation by including also third country nationals who make an application for international protection and benefit from an authorisation to enter on humanitarian

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12 United Nations, Treaty Series (189) 137.

13 *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011); *Tarakbel v Switzerland* App no 29217/12 (ECtHR, 4 November 2014); *A.S. v Switzerland* App no 39350/13 (ECtHR, 30 June 2015).

grounds or international obligations under Art. 6(5)(c) of Regulation (EU) 2016/399.<sup>14</sup> If understood in this way, the Proposal would then also include asylum seekers whose entry is authorised, not only those arriving in an irregular manner, thereby depriving the recital 14 of the Proposal of its meaning. In addition, this relationship would be clearer if the Proposal would specifically exclude those persons from screening who are manifestly in need of international protection as per international obligations of the Member States (e.g. nationalities over 50% for recognition for international protection), while conducting screening for all others where such needs are not so clear.

### *3. Potential Legal Problems of the Proposed Measures*

Further we will explore whether the measures proposed are adequate to address the challenges and meet the objectives indicated, or will raise more legal and practical issues than the existing ones?

#### *a) Mere Information Gathering that Substantially Affects the Status and Rights of the Person?*

The Proposal for a Screening Regulation envisages that the screening ends with a de-briefing form completed by the authorities responsible for screening, to be transmitted to asylum or return authorities respectively (Art. 14(1)). In this form they should indicate any elements that might be relevant for determining the submission of persons to border or accelerated examination procedures (Art. 14(2)). There is a possibility also that the person is not referred to any procedures, but is refused entry (Art. 14(1)). The amended proposal for Asylum Procedures Regulation 2020<sup>15</sup> confirms these three outcomes of the screening (recital 40): a) channelling of the applicant to the appropriate asylum procedure, b) return procedure or c) refusal of entry.

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14 Presidency compromise proposal, recital 2, Brussels (17 May 2021) <[www.statewatch.org/media/2436/eu-council-screening-regulation-compromise-8814-21.pdf](http://www.statewatch.org/media/2436/eu-council-screening-regulation-compromise-8814-21.pdf)> accessed 30 October 2021.

15 Amended Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 of 23 September 2020.

Although it is claimed that screening as such is a mere information gathering, which does not entail any decision affecting the rights of the person concerned,<sup>16</sup> the analysis of the text of the Proposal speaks to the contrary. The screening authorities will thus ‘decide’ to which authorities to refer the applicant and point to the elements of the border or accelerated examination procedure (Art. 14(2)). At the same time the European Commission is proposing an amendment of Proposal for Asylum Procedures Regulation issued in 2016 for a more flexible use of the border procedures. It would in essence channel to the border procedure the asylum claims that are clearly abusive (misleading authorities, withholding information), constitute a security or public order threat, or concern nationalities with a low recognition rate for international protection (below 20%).<sup>17</sup> Would the asylum authorities need other information to channel applicants to border procedures, or could decide automatically on the basis of the screening information? Considering that border procedure could be initiated based on nationality or security information only, such screening referral could amount to automatic exclusion of low merit cases or lead to border procedures, thus would substantively affect the rights of the person. On the other hand, if the Proposal for a Screening Regulation genuinely aims to speed up the asylum procedures, then it should also either exclude from screening or prioritise referral to regular asylum procedures applicants with nationalities of high recognition rate for international protection (e.g. over 50% or so). This is regrettably overlooked by the Proposal despite some practices of the Member States and UNHCR proposals on manifestly well-founded cases.<sup>18</sup> For instance, since the end of 2015, Germany operates a cluster procedure in “arrival centres”,<sup>19</sup> where procedures are conducted rapidly in different clusters, including for countries of origin with a high protection rate from 50% upwards.

Furthermore, screening should be seen as contributing to the entire asylum process and cannot be assessed separately from the amended pro-

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16 Explanatory Memorandum, Commission Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM(2020) 612 of 23 September 2020 <[https://ec.europa.eu/info/sites/default/files/communication-screening-third-country-nationals\\_en.pdf](https://ec.europa.eu/info/sites/default/files/communication-screening-third-country-nationals_en.pdf)> accessed 15 September 2021.

17 Recital 40b, Amended Proposal for Asylum Procedures Regulation 2020.

18 UNHCR, ‘Fair and Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union’ <[www.refworld.org/pdfid/5b589eef4.pdf](http://www.refworld.org/pdfid/5b589eef4.pdf)> accessed 17 September 2021.

19 ECRE, ‘Accelerated, prioritised and fast-track asylum procedures. Legal frameworks and practice in Europe’ (May 2017) <[www.ecre.org/wp-content/uploads/2017/05/AIDA-Brief\\_AcceleratedProcedures.pdf](http://www.ecre.org/wp-content/uploads/2017/05/AIDA-Brief_AcceleratedProcedures.pdf)> accessed 30 October 2021, 7.

posal for the Asylum Procedures Regulation 2020, as its objective is to ensure a seamless link between border control, asylum process and return procedures. Given that decisions will be taken on the basis of screening as demonstrated above, it could be seen as promoting fast-track border procedures focusing on low recognition rate countries (easy-to-use criteria in the words of the Commission), which have been widely criticized by international organizations and courts. Such procedures are viewed as placing the applicant at serious procedural disadvantage as lawyers, NGOs and courts do not have same access to the borders as in regular procedures and might result in the underestimation of the procedural guarantees provided by international, European and national legal frameworks. The short time limits of such fast-track procedures (5 days) and the nature of the debriefing form (not a formal decision, information only) might undoubtedly affect the procedural guarantees available to migrants and asylum seekers at the borders. For instance, the High Court judge in the 2015 judgment<sup>20</sup> in the UK called fast-track rules as incorporating structural unfairness. In February 2019, the Fundamental Rights Agency underlined that such fast-track procedures substantially undermine the fundamental rights of migrants.<sup>21</sup> The EASO report on border procedures confirms the trend that under the current legislative framework, which envisages the use of border procedures in cases that appear to have less merit, the cases channelled into the border procedure demonstrate lower recognition rates compared to regular procedures.<sup>22</sup> The legal problems hence may result from screening, as the applicants on the basis of minimal information would be channelled to the border procedures that are based on the premise that asylum application is unfounded and where the defence possibilities for the applicant are more limited due to absence or lack of lawyers and NGOs at the borders. The Australian experiences with screening procedures and Greece practices in the hotspots demonstrate that.

In addition, as the screening may end with overall refusal of entry under Art. 14 of the Schengen Borders Code, screening would indeed result in affecting the rights of the person substantially. The Proposal for a Screening

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20 'Fast-track asylum system "unlawful", High Court rules' (BBC.com, 12 June 2015) <[www.bbc.com/news/uk-33113132](http://www.bbc.com/news/uk-33113132)> accessed 12 September 2021.

21 European Union Agency for Fundamental Rights, 'Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (n 10).

22 EASO, 'Border Procedures for Asylum Applications in EU+ Countries' (European Asylum Support Office, 2020) <[www.easo.europa.eu/sites/default/files/publication\\_s/Border-procedures-asylum-applications-2020.pdf](http://www.easo.europa.eu/sites/default/files/publication_s/Border-procedures-asylum-applications-2020.pdf)> accessed 29 October 2021, 20.

Regulation retains some degree of silence on the link to ensuring the requirements of Art. 14(2), (3) of the Schengen Borders Code, including a substantive decision by competent authorities and the right to a legal remedy. It is silent, in particular, whether that decision is to be taken in the context of the very short screening procedure or thereafter. If both were integrated, the adoption of the refusal of entry in such a short time limit without legal support to the person could lead to a risk that non-entry decisions might result in refoulement of some third country nationals. While the Proposal refers to such individuals subject to non-entry decision who did not apply for international protection, guarantees for submitting application at the border following unauthorised entry may not always be present as could be seen from some Member States' common practice that has been recently condemned by the ECtHR.<sup>23</sup> Also, the Proposal overly relies on the legal fiction of persons being actually in the territory albeit not authorised entry during the screening process (Art. 4(1)), but it has to be made clear that this fiction would not effectively relieve Member States from their obligations under the human rights instruments or the EU Charter of Fundamental Rights<sup>24</sup> as concerns the treatment of third country nationals within their jurisdiction. States do not have the liberty to withdraw their territorial jurisdiction due to both the nature of state territory in international law and the overarching duty to meet standards of fairness wherever there is an exercise of state power.<sup>25</sup>

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23 *M.K. and Others v Poland* App nos 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020); *M.A. and Others v Lithuania* App no 59793/17 (ECtHR, 11 December 2018).

24 Charter of Fundamental Rights of the European Union, OJ C 326/391, 26 October 2012; see also ECRE, 'Policy Note 30: Screening out rights? Delays, detention, data concerns and the EU's proposal for a pre-entry screening process. A summary of ECRE's assessment of the Screening Regulation COM (2020) 612 and its proposed amendments' (2020) <[www.ecre.org/wp-content/uploads/2020/12/Policy-Note-30.pdf](http://www.ecre.org/wp-content/uploads/2020/12/Policy-Note-30.pdf)> accessed 27 October 2021, 3.

25 Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 (2) *Columbia Journal of Transnational Law* <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2484&context=articles>> accessed on 27 October 2021, 247; See also *Anuur v France* App no 19776/92 (ECtHR, 25 June 1996), para 52 (international zone of airport does not have extraterritorial status, thus applicants are subject to French national law); and more recently with regard to so called "transit zones", which the Court has considered as being under the State's effective control irrespective of the domestic legal qualification - *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 2017), para 54.



Thus, even if the outcome of the screening procedure will not result in a formal decision, but only in a debriefing form on the information collected, such information will be essential for the further examination of the asylum applications under the proposed Asylum Procedures Regulation or even result in a non-entry decision. Considering that the outcome of screening substantively affects the rights of the person, it may create legal problems due to its abrupt nature, lack of formal decisions and thus procedural guarantees, and leave some persons without access to protection. In this context, either such ‘referral’ should be formalised and subject to legal remedies, or referrals should be done immediately without screening on the basis of submission of asylum application (at least for manifestly well-founded cases). Furthermore, even if we would consider screening as a pure collection of information, it involves collection of personal data, which requires effective remedies and could be a separate issue of discussion.<sup>26</sup> If screening is absorbed by the asylum procedure for asylum applicants, the competent authorities would then compile the information that is necessary to objectively decide on the type of the procedures and all procedural safeguards would fully be applied. Particularly, if we consider that e.g. verification or establishment of identity or security risks during screening would be done by checking national and European databases only (Art. 10) and not employing anything new. If such option would be seen as not sufficiently addressing abuses of the procedure then we should not pretend that the screening is a pure collection of information and not a decision-making tool that may create risks of underestimation of procedural guarantees.

*b) Exploitation of Security Information and the ECtHR Approach*

Secondly, among the screening elements verification of risk to security is envisaged (Art. 11). However, the Proposal is not very clear as to the consequences of establishing such risk. Two possible outcomes could be envisaged. One possible outcome may be that domestic authorities are asked to adopt the decision on refusal of entry under the Schengen Borders Code if no asylum application is made (Art. 6(1)(e)). The second possible outcome

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26 For an analysis on border screening processing from a right to privacy perspective in international human rights law see Elif Mendos Kuskonmaz, ‘Border management and technology: a challenge to the right to privacy’ in Graham Hudson and Idil Atak (eds), *Migration, Security and Residence: Global and Local Perspectives* (Routledge, 2021) 272.

is based on the Amended Proposal for Asylum Procedures Regulation: the establishment of security or public order risk could serve as a basis to channel the application to the border procedures. In this respect the Member States' practice of using this information for the purpose of faster rejection of asylum applications on security grounds may be problematic with regard to Art. 19 of the EU Charter of Fundamental Rights and Art. 3 of the ECHR, as security risks cannot outweigh the protection needs according to the ECtHR when it comes to deportation,<sup>27</sup> thus security risk information could only be used to specially deal with a person but not for the merits of the claim.

*c) Position of Vulnerable Persons Less Predictable?*

On the one hand the Proposal requires ensuring that special needs of the applicants are identified at early stage,<sup>28</sup> on the other - it is not clear how these needs, if at all collected, will be channelled to the relevant authorities. The overall situation of vulnerable persons is not particularly certain in the Proposal, firstly, as concerns the identification of special needs, if compared with existing legislation. For instance, the recast Reception Conditions Directive and recast Asylum Procedures' Directive provide for mandatory<sup>29</sup> and systematic assessment<sup>30</sup> of vulnerability in the beginning of the procedures and throughout. While the Proposal contains a lower level of obligation to assess vulnerabilities (special needs), namely that health procedures (vulnerability assessment is part of it) may be dispensed at the border, if the relevant competent authorities are satisfied that no preliminary medical screening is necessary.<sup>31</sup> Furthermore, the Proposal

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27 *Chahal v The United Kingdom* App no 70/1995/576/662 (ECtHR, 15 November 1996); *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008); *X v Sweden* App no 36417/16 (ECtHR, 9 January 2018); *M.K. and Others v Poland* App nos 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020).

28 Art. 1, Art. 6 (6a), Art. 9 (2), (3), (4) of the Proposal.

29 Art. 22 (1) of recast Reception Conditions Directive: "That assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures. " Also, Art. 24 (1) of recast Asylum Procedures' Directive.

30 Art. 22 (1) of recast Reception Conditions Directive: "Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure." Also, Art. 24 (4) of recast Asylum Procedures' Directive.

31 Art. 9 (1) of the Proposal.

envisages that vulnerabilities or special reception or procedural needs shall be carried out only as needed or where relevant.<sup>32</sup> This discretion left to the authorities might have an impact on persons with special needs whose vulnerabilities are not evident. Secondly, even if the obligation to identify special needs exists, it is not clear what kind of information will be collected and how this information would be channelled to further procedures, as the debriefing form – the outcome of screening, refers to immediate care needs only.<sup>33</sup> Therefore, no clear outcome of identification of vulnerabilities' process, except provision of immediate care, is yet envisaged, and this may further weaken the standards applicable to persons with special needs, if compared with those set by current EU law.

*d) Inconsistencies with other Instruments on Reception Conditions*

The Proposal envisages that there is no access to Reception Conditions Directive before the screening process is completed,<sup>34</sup> but requires that during the screening process all persons concerned should be guaranteed a standard of living complying with the EU Charter of Fundamental Rights and have access to emergency health care and essential treatment of illnesses.<sup>35</sup> However, what the standard is, remains within national discretion. Thereby, new zones excluded from EU harmonisation seem to be created. Furthermore, this position is inconsistent with the current Reception Conditions Directive, which provides for access to reception conditions from the moment of application for international protection.<sup>36</sup> Neither is it compatible with the proposal for a recast Reception Conditions Directive, where it was clarified that the directive applies since the wish to apply for international protection is expressed not from its registration or formal lodging, along with the interpretation by the Court of Justice of

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32 Art. 9 (2) of the Proposal.

33 Art. 13 of the Proposal contains no reference to special needs at all, while annex to the Proposal refers to „immediate care“ only, para 10.

34 Recital No. 16 of the Proposal reads as follows: “Article 26 and 27 of the Asylum Procedures Regulation should apply only after the screening has ended. This should be without prejudice to the fact that the persons applying for international protection at the moment of apprehension, in the course of border control at the border crossing point or during the screening, should be considered applicants.”

35 Recital 27 of the Proposal.

36 Art. 17(1) of the Reception Conditions Directive.

the European Union (hereafter CJEU) of the Asylum Procedure Directive 2013/32/EU and the recast Reception Conditions Directive 2013/33/EU.<sup>37</sup>

*e) Prevention of Absconding without Detention? Mission (Im)possible?*

The Proposal refers to the need to prevent absconding. The applicants will be expected to stay at the borders as they would not be considered having been authorized to enter, and will have the obligation to remain in the designated facilities during the screening.<sup>38</sup> Despite the lack of evidence and reliable data on the scope, scale and dynamics of onward movements in the EU, the Commission opts here for introducing an obligation for Member States to hold the third country nationals – and asylum seekers in particular – at the border, by extending to air and land borders a practice already experimented with under the hotspot approach in relation to unauthorised entry by sea.<sup>39</sup> Though *Daniel Thym*<sup>40</sup> indicates that the Commission opted against generalised detention and without it being automatic, the Proposal leaves the choice of detention to the national authorities, which may spark extensive use of it for most of the applicants preventing their onward movement into the EU territory. The measures envisaged do not shed a light as to how they could prevent absconding without extensive resort to detention. As ECRE reports, in practice, Member States already use formal or de facto detention for almost all applicants when a border procedure is applied. It also warns that Member States will call this “reception” or “accommodation” leading to the worst-case scenario from a fundamental rights perspective: de facto detention with detainees deprived of the safeguards that apply in formal detention regimes.<sup>41</sup> Just one year after the proposal was made, some

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37 ECJ, *Ministerio Fiscal v VL*, C-36/20 PPU [2020], ECLI:EU:C:2020:495.

38 Art. 4 and 8(1)(b) of the Proposal, Art. 41(6) of the Amended Proposal for the Asylum Procedures Regulation 2020.

39 European Parliament, ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’ (n 4), 56.

40 Daniel Thym, ‘European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the “New” Pact on Migration and Asylum’ (EU Migration Law Blog, 28 September 2020) <<https://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/>> accessed 29 October 2021.

41 ECRE, ‘Policy Note 30: Screening out rights? Delays, detention, data concerns and the EU’s proposal for a pre-entry screening process. A summary of ECRE’s

practices in the Member States already confirm the materialisation of such risks.<sup>42</sup>

Besides that, a question remains if the obligation to remain in facilities would amount to detention or not. This might raise some legal issues as concerns the exceptional nature of detention and the individual approach to it in international and EU law, as explored by *Galina Cornelisse*.<sup>43</sup>

#### *4. Implementation Practicalities of Proposed Measures*

According to the Proposal for a Screening Regulation, the collection of data is supposed to speed up the asylum procedure, but it is not clear how it will, as information collected in the screening would be minimal (unless this will be sufficient to abruptly reject applications in the border procedure). Although the screening procedure is supposed to last for up to 5 days at external borders (in exceptional situations to be extended to 10 days) and up to 3 days within the territory, the experience in Greece has shown that it is not realistic to meet such short deadlines. Processing of cases of third country nationals at the borders also depends on many additional factors that might delay the processes (capacities and competences of the authorities, availability of additional medical, legal, interpretation and other staff, numbers of people arriving at the borders, etc.). For instance, recent Greek experience has demonstrated that border procedures raised administrative burdens for the authorities and significantly prolonged the procedures for the applicants for asylum. Even the presence of EASO case-

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assessment of the Screening Regulation COM (2020) 612 and its proposed amendments' (n 24), 3.

- 42 E.g., situation in Lithuania, where amendments to the legislation in summer 2021 introduced a possibility of automatic detention of migrants arriving in extraordinary situation of mass influx. Although the term “accommodation” is used, it in fact falls within the definition of detention and in practice provides for the automatic detention of asylum applicants in the event of an “extraordinary situation”, see ECRE, ‘Legal Note 11: Extraordinary Responses: Legislative Changes in Lithuania, 2021. ECRE’s assessment of recent changes to asylum legislation in Lithuania and their impact, with reference to compliance with EU and international law’ (3 September 2021) <<https://ecre.org/wp-content/uploads/2021/09/Legal-Note-11.pdf>> accessed 15 October 2021, 6.
- 43 Galina Cornelisse, ‘The Pact and Detention: An Empty Promise of “certainty, clarity and decent conditions”’ (EU Migration Law Blog, 6 January 2021) <<https://eumigrationlawblog.eu/the-pact-and-detention-an-empty-promise-of-certainty-clarity-and-decent-conditions/>> accessed 29 October 2021.

workers in the fast-track border procedures in Greece has not prevented an average seven-month duration of the procedure between full registration and the issuance of a first instance decision, which was far beyond the two weeks envisaged by law. Another lesson from Greece was that most of the applicants were recognised as vulnerable and hence channelled to the regular asylum procedures (out of 39,505 decisions taken in 2017-2019, 25,967 persons were admitted as vulnerable), thus pre-screening in the border procedure did not make a lot of sense for making procedures faster for vulnerable individuals.<sup>44</sup>

Secondly, the Proposal for a Screening Regulation envisages the location of the screening at or in proximity to the external borders (Art. 6), which will require adjustment of the infrastructure at the border in a short term and establishment of processing centres along the borders in the long run, including the possibility of using hotspot areas. The experience in Greece has shown that despite the good intentions to process the cases in an efficient manner, there is a high risk that the persons (who will be expected to stay at the borders under a fictitious concept of not yet being authorised to enter, and will have the obligation to remain in the designated facilities during the screening) will likely accumulate at the borders, including also those who are referred to asylum procedures and likely not to be moved inside the territory (as concerns border and accelerated asylum procedures). While this could be practicable for Member States to concentrate third country nationals in one place for the purpose of return, it is questionable how these persons will be contained there likely against their will and in what conditions. The worst outcome of this regulation that everybody would like to avoid would be creating more Moria camps with complex new problems at European borders. The Proposal has ample potential for that, in particular, if we read it in combination with the solidarity and fair sharing of responsibility mechanisms. If the latter do not work, the screening and subsequent border procedures in greater migratory pressures might result in persons getting stuck in border areas.<sup>45</sup>

Thirdly, the operation of the screening process at the border would require boosting accommodation conditions and the presence of staff, including medical, legal, trained and qualified staff to deal with minors.

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44 Greek Council for Refugees, 'Country Report: Fast-track border procedure (Eastern Aegean islands)' (10 June 2021) <<https://asylumineurope.org/reports/country/greece/asylum-procedure/procedures/fast-track-border-procedure-eastern-aegean/>> accessed 15 October 2021.

45 European Parliament, 'The European Commission's legislative proposals in the New Pact on Migration and Asylum' (n 4), 54.

The availability of doctors at the border areas has proved to be problematic in case of the Greek hotspots where the authorities had to rely instead on military ones.<sup>46</sup> In times of the pandemic, the lack of doctors is very evident particularly in some countries and the feasibility to attract them to work at the borders might raise practical difficulties and thus delays.

One new element for such border procedures is the requirement of an independent monitoring mechanism for fundamental rights in relation to the screening that the Member States are required to establish as per Proposal for a Screening Regulation (Art. 7). While this is a positive addition to the border procedures, generally criticized for failing to meet procedural requirements, it also poses questions as to its practicability. Such mechanism would require access to independent institutions, regular monitoring of the procedures, thus presence of lawyers, NGOs or other monitors at the borders. Such border monitoring initiatives operate in a few Member States, but they cover only a small percentage of persons at the border.

##### *5. Greater Role for the EU Agencies not Developed?*

Finally, the Proposal for a Screening Regulation envisages cooperation among all relevant authorities with support from EU agencies (Art. 6(7)). This part is new – except for the already tested experience with EASO involvement in asylum procedures in Greece, Italy, Cyprus and Malta<sup>47</sup> – but remains largely unexplored as to its functionality in the Proposal. Indeed, if developed, it could serve as a sort of European task force on asylum and return, and support the authorities in ensuring swift processing and guaranteeing fundamental rights of persons at the borders. This could be particularly relevant in case of persons disembarked after search and rescue operations. Regretfully, the Commission did not pick up on the idea of the German Presidency<sup>48</sup> that the future Asylum Agency and the European Border and Coast Guard Agency could possibly have a mandate to conduct the pre-screening independently or in support of the ‘frontline’ Member

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46 European Union Agency for Fundamental Rights, ‘Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the “hotspots“ set up in Greece and Italy’ (n 10).

47 European Asylum Support Office, Operational Support <[www.easo.europa.eu/operational-support/types-operations](http://www.easo.europa.eu/operational-support/types-operations)> accessed 28 October 2021.

48 Outline for reorienting the Common European Asylum System (13 November 2019) <[www.statewatch.org/media/documents/news/2019/dec/eu-asylum-FoodForThought-GermanNoPaper.pdf](http://www.statewatch.org/media/documents/news/2019/dec/eu-asylum-FoodForThought-GermanNoPaper.pdf)> accessed 17 October 2021.

States. On the other hand, some international organisations observe that past experience of EU agencies' presence in rolling out national border procedures did not guarantee fairness and effectiveness. However, these experiences and learnings could contribute to setting up a more effective European support mechanism at the borders.

## 6. *Concluding Remarks*

In responding whether such a proposal if adopted and when implemented would reduce the numbers of migrants entering the EU, or make return procedures more effective or asylum procedures faster, the answer does not look very promising due to legal uncertainties concerning the outcomes that could undermine the rights of migrants and protection seekers. The Proposal evidently sets up some theoretical concepts, wishes and ways to optimisation of the procedures, but its practical implementation remains in doubt. Moreover, the hotspots experience has not been sufficiently considered in designing the screening procedure, because a number of rules remind of the old practices exercised in a doubtfully successful way. At the same time the proposal has a clear potential for risk of overcrowding at the borders; limited appropriate living conditions and too abrupt decisions on entry to materialise. While these issues might create more legal concerns than benefits for the entire system (including reliance on highly controversial legal fiction of non-entry), the Proposal for a Screening Regulation needs to be seen in a broader context of promoting border and accelerated procedures in the Commission's asylum and migration package.

Even if nothing is wrong in collecting the information on third country nationals entering the EU as early as possible, the question remains if a separate instrument is needed for that. Such information gathering is happening already now and provisions on improving it could be incorporated in both asylum and return procedures by amending the Schengen Borders Code, the proposal for Asylum Procedures Regulation, the proposal for recast Return Directive<sup>49</sup> and other relevant instruments.

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49 Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/634 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634>> accessed 30 October 2021.



The pre-entry screening seems to set the basis for the operation of these procedures by re-decorating some existing practices under a new merger of procedures, but without addressing the core issues at stake. The attempt in the Proposal to ensure a seamless link between the asylum and return procedures reflects not a novelty, but rather an embedment of some Member States' practices that reflect on a potential shift of a paradigm of asylum procedures. If we really want to diversify the flows at the border and optimise the process then, as a minimum, screening of manifestly-founded cases into asylum procedures immediately would be one of the solutions that could be practically realised, as well as more active engagement of the EU agencies in procedures at European borders thereby leaving less discretion to the Member States to deviate in their approach, as these deviations cannot bring a better result for the entire EU.



# Border Procedure on Asylum and Return: Closing the Control Gap by Restricting Access to Protection?

Jens Vedsted-Hansen\*

## 1. Introduction

One of the novelties in the New Pact on Migration and Asylum<sup>1</sup> is the proposal to establish a ‘seamless procedure’ at external borders that will be applicable to all non-EU citizens attempting to cross these borders without the requisite authorisation. In its entirety, the proposed border procedure will comprise three elements: pre-entry screening, an asylum procedure and, where applicable, a ‘swift return procedure’. The overall aim of this proposal is explained by the Commission as being to ‘close the gaps between external border controls and asylum and return procedures ... thereby integrating processes which are currently separate’.<sup>2</sup>

First, the *pre-entry screening* will be established under a separate Proposal for a Screening Regulation<sup>3</sup> that was presented by the Commission as part of the legislative package accompanying the EU Pact. In addition, the *asylum border procedure* aimed at examining asylum applications and the *return border procedure* for carrying out return of asylum seekers whose application has been rejected in the asylum border procedure are dealt with in the Amended Proposal for an Asylum Procedure Regulation<sup>4</sup>

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1 European Commission, ‘Communication on a New Pact on Migration and Asylum’, COM(2020) 609 final, 23 September 2020.

2 Ibid 4.

3 European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council introducing a 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’, COM(2020) 612 final, 23 September 2020.

4 European Commission, ‘Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’, COM(2020) 611 final, 23 September 2020.

simultaneously launched in order to change the 2016 Proposal for an Asylum Procedure Regulation.<sup>5</sup>

While this chapter will primarily focus on the latter two proposals that must be seen in conjunction, the content and impact of these procedural devices should be considered in light of the Proposal for a Screening Regulation. The pre-entry screening will necessarily interact with the asylum and return procedures at external borders, as described by Lyra Jakulevičienė in her contribution to this volume.<sup>6</sup> In that context it should be stressed from the outset that ‘closing the gap’ by way of stipulating an obligation on Member States to issue a return decision immediately after a decision rejecting an application for asylum, or even simultaneously in the same decision, in order to secure quick return of asylum seekers upon rejection of their application, is in and of itself clearly a useful step, as already proposed by the Commission in the 2018 Proposal for a recast Return Directive.<sup>7</sup>

Nonetheless, the problem to be analysed here is the inherent risk of undermining legal safeguards by diluting the crucial distinction between rigorous substantive examination of the application for asylum on the one hand, and channelling applicants into various types of border procedures on the basis of initial presumptions on the absence of need for international protection on the other. In this connection, linking the asylum border procedure to certain proposed criteria for accelerated examination of applications may seem to be particularly risky. The following will first present the objective and the underlying assumptions of the New Pact as far as the border procedure and its various components are concerned (sections 2 and 3). Next, specific novelties of the proposed standards on accelerated examination and admissibility decisions in the context of the asylum border procedure will be discussed (sections 4, 5 and 6) in order to draw some preliminary conclusions on the potential effects of merging the various border procedures under the New Pact and its accompanying legislative proposals (section 7).

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5 European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’, COM(2016) 467 final, 13 July 2016.

6 Lyra Jakulevičienė’s chapter on pre-screening in this volume.

7 European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)’, COM(2018) 634 final, 12 September 2018, Article 8(6).

## 2. Closing the Gap: Management of Mixed Migration Flows

One of the overriding objectives of the New Pact on Migration and Asylum is to create operational instruments for tackling the migration challenges that result from the assumed tendency towards mixed migration flows. Thus, the Commission argues that the challenges have changed since the ‘refugee crisis’ of 2015-16 and that mixed flows of refugees and migrants have meant ‘increased complexity and an intensified need for co-ordination and solidarity mechanisms’.<sup>8</sup> This has been elaborated upon in the Explanatory Memorandum of the Proposal for a Screening Regulation where it is stated that the arrival of third-country nationals with clear international protection needs as observed in 2015-16 has been ‘partly replaced by mixed arrivals of persons’.<sup>9</sup> Therefore, according to the Commission, it is now important to develop a new effective process allowing for *better management of mixed migration flows* and, in particular, to create a tool allowing for the identification as early as possible of persons who are ‘unlikely to receive protection’ in the EU. Such a tool is to be built into the process of controls at external borders with a ‘swift outcome as well as clear and fair rules’. The result should be that third-country nationals will access the appropriate procedure on either asylum or return, arguably ‘enhancing the synergies between external border controls, asylum and return procedures’.<sup>10</sup>

The Commission’s reasoning seems to be based on the underlying assumption that the protection needs of third-country nationals can be adequately identified immediately upon their arrival at the EU external border so that asylum seekers can be ‘swiftly’ allocated to the appropriate procedure in order to have their protection needs examined unless they are allocated to the procedure for ‘effective returns’ because they are not in need of protection. Indeed, the representation in the New Pact of the pre-entry screening and its linkages to the substantive examination of applications may appear somewhat circular and perhaps even distant from the realities of examining applications for international protection. In order to decipher the apparent circularity, we shall focus on the role and intended functions of the asylum border procedure which is likely to become a kind of intermediary between pre-entry screening and the return border procedure.

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8 New Pact on Migration and Asylum (n 1), 3.

9 Proposal for a Screening Regulation (n 3), Explanatory Memorandum, 1.

10 Ibid, 1.

Depending on the organisational setup and the national administrative structures, the asylum border procedure and the return border procedure might even end up *de facto* gradually merging with the pre-entry screening procedure. If implemented in close connection with border procedures on asylum and return, as foreseen by the Commission,<sup>11</sup> the pre-entry screening may ultimately come to serve as a vehicle for summary decisions on the return of applicants whose cases are rejected on inadmissibility grounds, i.e. with no substantive examination of their need for protection, or for the cursory pre-examination and allocation of applications to either the normal asylum procedure or the accelerated and/or border asylum procedure.<sup>12</sup> This expectation seems to be supported by parts of the official reasoning behind the proposed border procedure, as shall be illustrated in the following.

### 3. *Novelties in the Amended Proposal for an Asylum Procedure Regulation*

The asylum border procedure under Article 41 of the Amended Proposal for an Asylum Procedure Regulation shall follow the pre-entry screening procedure provided that the asylum seeker has not yet been authorised to enter the Member States' territory and does not fulfil the entry conditions of the Schengen Borders Code.<sup>13</sup> According to Article 41(2) of the Amended Proposal, the proposed border procedure may be applied when taking decisions on (a) the *admissibility* of an application for international protection and (b) the *merits* of an application that is being examined in an accelerated examination procedure in the cases listed in Article 40(1). As discussed below, accelerated examination and inadmissibility decisions will be the main features of the proposed asylum border procedure under the New Pact.

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11 New Pact on Migration and Asylum (n 1), 4.

12 Cf Jens Vedsted-Hansen, 'Admissibility, Border Procedures and Safe Country Notions' in Sergio Carrera and Andrew Geddes (eds), *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* (EUI 2021), 171-73.

13 Regulation (EU) 2016/399 of 9 March 2016 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L77/1.

According to the 2016 Proposal for an Asylum Procedure Regulation, the accelerated examination procedure will be mandatory.<sup>14</sup> By contrast, allocation to the border procedure of such accelerated examinations would generally be optional under the 2016 Proposal,<sup>15</sup> whereas this is only supposed to be the point of departure under the corresponding provisions of the 2020 Amended Proposal.<sup>16</sup> Importantly, this will be modified by the Amended Proposal which stipulates that the asylum border procedure will be mandatory for the accelerated examination of three types of cases:

- Where the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to identity or nationality,
- Where the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member States, and
- Where the applicant holds a nationality or has a country of former habitual residence for which the proportion of decisions granting international protection is 20% or lower.<sup>17</sup>

The latter provision refers to the Amended Proposal for an Asylum Procedure Regulation which lays down a new acceleration ground in addition to those included in the 2016 Proposal.<sup>18</sup> Notably, this *additional acceleration ground* may in practice become subject to significant amplification, beyond the mandatory border procedure, by a derogation clause in the Proposal for a Crisis Regulation according to which Member States will have the option to apply the crisis border procedure to persons coming from third countries for which the EU-wide average recognition rate is above 20%, but lower than 75%.<sup>19</sup> While the special crisis management proposal shall not be examined here, the new ground for acceleration in the Amended Proposal for an Asylum Procedure Regulation, as well as the provision concerning an EU common list of ‘safe countries of origin’

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14 Proposal for an Asylum Procedure Regulation (n 5), Article 40(1).

15 Ibid, Article 41(1) and (5).

16 Amended Proposal for an Asylum Procedure Regulation (n 4), Article 41(1) and (2).

17 Ibid, Article 41(3), taken together with Article 40(1)(c), (f) and (i) of the Proposal for an Asylum Procedure Regulation, as amended (see n 18).

18 Article 40(1)(i), as proposed by Amended Proposal for an Asylum Procedure Regulation (n 4), no. 14.

19 European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum’, COM(2020) 613 final, 23 September 2020, recital 14 and Article 4(1)(a).

included in the 2016 Proposal as an acceleration ground, shall be further discussed below in section 4.

As another novelty in the Amended Proposal, the obligation to examine the three types of cases mentioned above in a border procedure may be dispensed with for nationals of or stateless persons habitually resident in third countries for which a Member State has submitted a notification to the Commission that it is confronted with substantial and persisting practical problems in the cooperation on the readmission of irregular migrants, in accordance with Article 25a(3) of the Visa Code.<sup>20</sup> Where the Commission upon examination considers that the third country is cooperating sufficiently, the Member State shall again apply the border procedure under the mandatory rule.<sup>21</sup> This clearly reflects the interlinkage between the asylum border procedure and the overall policies for the management of the EU's external borders.

#### 4. *Expanding the Criteria for Accelerated Examination of Asylum Applications*

The 2016 Proposal for an Asylum Procedure Regulation implied the introduction of accelerated examination of asylum applications on the basis of the designation of 'safe countries of origin' at EU level, as initially proposed by the Commission in a separate legislative initiative during the peak of the asylum crisis in 2015.<sup>22</sup> The proposed *EU common list of safe countries of origin* includes Albania, Bosnia and Herzegovina, Northern Macedonia, Kosovo, Montenegro, Serbia and Turkey.<sup>23</sup> Among these countries some may seem rather uncontroversial in terms of the general situation relating to human rights and the rule of law. On the other hand, considering Turkey as a 'safe country of origin' seems highly disputable given the Turkish government's overall record along these parameters, not least due to its reactions to the attempted military *coup d'état* two days after the proposal had been presented in July 2016.

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20 Regulation (EC) No 810/2009 of 13 July 2009 of the European Parliament and of the Council establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1.

21 Amended Proposal for an Asylum Procedure Regulation (n 4), Article 41(4).

22 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU', COM(2015) 452 final, 9 September 2015.

23 Proposal for an Asylum Procedure Regulation (n 5), Article 48 and Annex 1.



Against this background it is somewhat surprising that the Commission has not updated or qualified the reasoning of the 2016 Proposal as regards the human rights conditions in Turkey.<sup>24</sup> The Amended Proposal for an Asylum Procedure Regulation neither modifies the provision on designation of safe countries of origin at EU level nor explicitly addresses whether and how the unmodified EU common list can be considered compatible with fundamental rights. The very notion of a common list of ‘safe countries of origin’ may therefore be subject to debate in connection with the negotiations of the legislative package accompanying the EU Pact.

Importantly, the Amended Proposal introduces an *additional ground for accelerating the examination procedure*: the applicant’s nationality or, in the case of stateless persons, former habitual residence in a third country for which the proportion of decisions granting international protection is 20% or lower, according to the latest available yearly average Eurostat data. It is stipulated that exceptions are to be made (1) in situations where a ‘significant change’ has occurred in the third country concerned since the publication of the relevant data and (2) where the applicant belongs to a category of persons for whom the proportion of 20% or lower ‘cannot be considered as representative for their protection needs’.<sup>25</sup>

For one thing, the second exception may seem to constitute a contradiction insofar as it is difficult to reconcile with the rationale of accelerated procedures, apart from narrowly defined situations in which clear-cut categories of persons with a *prima facie* need for international protection are beyond dispute.<sup>26</sup> If taken at surface value and implemented accordingly, the proposed exceptions further call into question the very rationale of the new acceleration ground. More generally, the need for this provision does not appear evident in the light of the already existing grounds for accelerated examination and those previously proposed, among which several are based on similar considerations of presumed safety or otherwise undeserving cases.<sup>27</sup>

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24 Ibid, recital 62, cf the Proposal for a Common List Regulation (n 22), Explanatory Memorandum, 6.

25 Amended Proposal for an Asylum Procedure Regulation (n 4), Article 40(1)(i).

26 Cf ibid, recital 39a, indicating that the second exception in the proposed Article 40(1)(i) refers to specific categories of persons with a ‘specific persecution ground’. On the ambiguity of this criterion, see Evelien Brouwer and others, *The European Commission’s legislative proposals in the New Pact on Migration and Asylum*, Study requested by the LIBE Committee, European Parliament (PE 697.130, Policy Department for Citizens’ Rights and Constitutional Affairs, 2021), 77-78.

27 Cf Article 31(8)(a)-(j) of Directive 2013/32/EU of 26 June 2013 of the European Parliament and of the Council on common procedures for granting and with-

The Commission presents the proposed new acceleration ground as being based on ‘more objective and easy-to-use criteria’ and suggests that the percentage is justified by the ‘significant increase in the number of applications made by applicants coming from countries with a low recognition rate, lower than 20%’ and ‘hence the need to put in place efficient procedures to deal with those applications, which are likely to be unfounded’.<sup>28</sup> This may have to be seen in the light of the view that the border procedure is important as a *migration management tool*, held by Member States in favour of stipulating the mandatory application of the border procedure. In the view of those Member States, this procedure is particularly useful where a large share of the asylum seekers are coming from countries with a low recognition rate because the border procedure can increase the chances of successful returns directly from the external border within a short period of time after their arrival due to the stronger links between asylum and return.<sup>29</sup>

Accordingly, the purpose of the joint asylum and return border procedure is to quickly assess ‘abusive asylum requests or asylum requests made at the external border by applicants coming from third countries with a low recognition rate’ in order to swiftly return those without a right to stay in the EU.<sup>30</sup> This objective of the proposed legislation is well-explained and understandable as such, yet the question remains whether it really necessitates the new ground for acceleration of the examination procedure. Basing this on the average recognition rate, with vague and potentially complex exceptions as proposed, may well rather decelerate the examination of asylum cases if it should be compatible with the effective application of the rules defining third-country nationals in need of protection. The risk of damaging the effectiveness of these substantive rules due to the lowered quality of decisions is not likely to be minimal if the accelerated examination must take place as a mandatory part of the asylum border procedure.<sup>31</sup>

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drawing international protection, [2013] OJ L180/60, and Article 40(1)(a)-(h) of the Proposal for an Asylum Procedure Regulation (n 5).

28 Amended Proposal for an Asylum Procedure Regulation (n 4), Explanatory Memorandum, 13-14.

29 Ibid, 9.

30 Ibid, 4.

31 Cf Brouwer and others (n 26), 78; and Galina Cornelisse and Marcelle Reneman, ‘Border procedures in the Member States’ in EPRS Study, *Asylum procedures at the border. European Implementation Assessment* (PE 654.201, European Parliamentary Research Service, 2020), 98-107.

### *5. Inadmissibility Decisions in the Border Procedure*

As mentioned above, Article 41(2) of the Amended Proposal for an Asylum Procedure Regulation stipulates that the border procedure may be applied when taking decisions on the admissibility of applications for international protection, notably termed ‘inadmissibility’ in contrast to the more neutral heading of the provision of the 2016 Proposal which lays down the criteria for decisions on admissibility of applications. According to this provision, an asylum application shall be rejected as inadmissible on any of the following grounds:

- A non-Member State is considered to be a first country of asylum for the applicant
- A non-Member State is considered to be a safe third country for the applicant
- The application is a subsequent application where no new elements or findings relating to the examination have arisen or have been presented by the applicant
- A spouse or partner or accompanied minor lodges an application after he or she had consented to having an application lodged on his or her behalf and no facts justify a separate application.<sup>32</sup>

If an application is rejected as inadmissible in accordance with these criteria, it shall not be examined on its merits. The same applies in cases that are dealt with under the Dublin Regulation (or its successor instrument) and when another Member State has granted international protection to the applicant.<sup>33</sup>

Among these inadmissibility grounds we shall focus on the ‘safe third country’ rule proposed in Article 36(1)(b) of the Asylum Procedure Regulation since this is often considered the most controversial ground for inadmissibility, and possibly the most relevant in practice. This is so partly due to its vague definition, partly because of the serious consequences it is apt to have for the access to protection of those asylum seekers whose application will be rejected as inadmissible, and hence without examination by any Member State of their protection needs. According to Article 36, such rejection will be mandatory, and decisions to that effect may be taken in the asylum border procedure under the optional provision in Article 41(2) of the Amended Proposal for an Asylum Procedure Regulation.

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32 Proposal for an Asylum Procedure Regulation (n 5), Article 36(1)(a)-(d).

33 Ibid, Article 36(2).

The requirements for declaring an application inadmissible without any examination in substance are based on the presumption that the third country in question is generally 'safe' for asylum seekers and refugees. The existing admissibility rule in the Asylum Procedures Directive contains fairly modest criteria for applying the 'safe third country' notion, requiring that there is no risk of persecution or serious harm in the country, no risk of indirect *refoulement* from the country, and that the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention.<sup>34</sup> The inadmissibility criteria in the 2016 Proposal for an Asylum Procedure Regulation are even more vague as the latter requirement will be modified to the effect that the possibility must exist to receive protection in accordance with the 'substantive standards' of the Refugee Convention or 'sufficient protection' (Article 45(1)).<sup>35</sup>

The proposed modification of the criteria seems likely to expand the scope for defining third countries as 'safe' and thus rejecting applications as inadmissible and returning asylum seekers to such countries in order to request protection there. The amended reference to the Refugee Convention may seem to modify the currently existing requirement that the third country provides protection in full accordance with the Convention, even if not formally bound by the Convention under international law,<sup>36</sup> insofar as the additional criterion 'substantive standards' may be supposed to have the potential of softening the link to certain standards of protection under the Convention. Thus, in the light of recent experience it would not be surprising to see returns to 'safe third countries' where the legal or factual basis for assuming effective protection in accordance with the Refugee Convention would seem questionable.<sup>37</sup>

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34 Asylum Procedures Directive (n 27), Article 38(1)(a)-(e).

35 Proposal for an Asylum Procedure Regulation (n 5), Article 45(1)(e), referring to the proposed Article 44(2) on the concept of first country of asylum as regards the term 'sufficient protection'.

36 See Jens Vedsted-Hansen, 'Asylum Procedures Directive 2013/32/EU' in Daniel Thym and Kay Hailbronner (eds), *EU Immigration and Asylum Law. Article-by-Article Commentary* (3<sup>rd</sup> edn, C.H. Beck/Hart/Nomos 2022), Article 38 MN 3.

37 The EU arrangements with Turkey are probably the prime example. On legal aspects of the 'EU-Turkey statement' of 18 March 2016, see Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice' (2017) 31(2) *Journal of Refugee Studies* 216; and Koen Lenaerts, 'The Court of Justice of the European Union and the Refugee Crisis' in Koen Lenaerts and others (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart 2019), 3, 10.

Not least importantly, the impact of the ‘sufficient protection’ criterion is hard to predict. One could therefore imagine future scenarios in which the proposed more flexible standard for assessing the ‘sufficiency’ of protection in a third country could facilitate rejecting applications as inadmissible and returning asylum seekers to that country without examining them on their merits, based on the rather abstract presumption that they can receive protection there. The proposed rules on designation of safe third countries at EU level, in addition to the designation at national level for a transitional period of five years,<sup>38</sup> do not seem to mitigate that concern.

The effects of the amended inadmissibility criteria under the Proposal for an Asylum Procedure Regulation will depend entirely on the actual *possibility to rebut the presumption of safety* and the application in practice of the *requirement of an individual connection* to the ‘safe third country’ in question.<sup>39</sup> As to the latter, it is to be noted that the Proposal will lower the required connection threshold by including transit through a third country which is ‘geographically close’ to the applicant’s country of origin.<sup>40</sup> To the extent that admissibility decisions will be made in an asylum border procedure that is closely connected to, if not *de facto* merging with, the pre-entry screening as discussed above, such rebuttal and challenge against the application of the ‘safe third country’ concept may become difficult in practice.

## 6. Appeal and Suspensive Effect in the Asylum Border Procedure

An important procedural safeguard in order to enable applicants to effectively rebut the presumption of safety in a third country – whether it is considered a ‘safe third country’ for the purpose of inadmissibility or a ‘safe country of origin’ as a basis for accelerated examination on the merits – is the right to appeal and in particular the right to suspensive effect of such appeal. Although the details of the proposed rules on the right to an effective remedy and to suspensive effect fall beyond the scope of this

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38 Proposal for an Asylum Procedure Regulation (n 5), Articles 46 and 50, respectively.

39 Ibid, Article 45(3) and (4).

40 Ibid, Article 45(3)(a). Under Article 38(2)(a) of the Asylum Procedures Directive (n 27) mere transit cannot constitute a ‘connection’ for the purpose of inadmissibility of the application, cf CJEU, *FMS and Others*, Joined Cases C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, paras 156-60.

chapter, it should be highlighted that they may raise concern as regards certain cases that will be decided in the asylum border procedure.

According to Article 54 of the Amended Proposal for an Asylum Procedure Regulation, the applicant shall not have the right to remain, as will be the main rule for appellants, where the competent authority has rejected an application as unfounded or manifestly unfounded if any of the circumstances justifying the *accelerated examination* of the application apply, or in the cases subject to the *border procedure*.<sup>41</sup> There will indeed be the possibility for appellants to request the court or tribunal seized to issue a decision on interim measures, allowing for the right to remain pending the outcome of the appeal.<sup>42</sup> Nonetheless, due to the strict time limits and the totality of the circumstances and logistic constraints likely to prevail in the context of the border procedure, the possibility of obtaining suspensive effect under these rules may become rather illusory.

### 7. *Merging Border Procedures? Preliminary Conclusions*

As pointed out by Lyra Jakuleviciene, it is particularly striking that the Proposal for a Screening Regulation will eliminate the fine line that exists in international and EU law between persons seeking international protection and other migrants, following the legal rationale that persons seeking protection are subject to special treatment with regard to entry and stay in the host country during the examination of their application. In contrast to that legal distinction, the proposed pre-entry screening arguably builds on the premise that asylum seekers and migrants are the same category of unauthorised entrants and disregards the fact that asylum seekers' need for protection overrides the normal entry requirements.<sup>43</sup>

Indeed, both the Asylum Procedures Directive and the 2016 Proposal for an Asylum Procedure Regulation stipulate that asylum seekers shall have access to the examination procedure as well as the right to remain in the territory for the sole purpose of the procedure, regardless of compliance with the ordinary entry requirements under the Schengen Borders

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41 Amended Proposal for an Asylum Procedure Regulation (n 4), Article 54(3)(a), cf Article 40(1) and (5) and Article 41.

42 Ibid, Article 54(4) and (5).

43 Lyra Jakuleviciene's chapter on pre-screening in this volume.

Code.<sup>44</sup> While this right will in principle remain under the Amended Proposal for an Asylum Procedure Regulation, some of the procedural devices here introduced may jeopardise the effective exercise of the right of access and the right to remain during the examination of the request for protection.

This risk might seem particularly real to the extent that the asylum border procedure will in practice merge or overlap with, or have blurred boundaries toward, the pre-entry screening procedure and the return border procedure. If this happens, there may be a serious risk of deviating from crucial procedural safeguards for asylum seekers and further undermining the effective application of the substantive EU rules on qualification of refugees and other third-country nationals in need of protection. As experienced at the borders of certain Member States, and illustrated by a recent study,<sup>45</sup> the conduct of asylum procedures in the border context, including in transit zones, entails significant risks of subverting the EU asylum *acquis*. A further consequence of the proposed emphasis on pre-entry screening and asylum and return border procedure has been described as the multiplication of ‘anomalous zones’ for migration management that may ultimately become closed centres or ‘border camps’ amounting at least to *de facto* detention.<sup>46</sup> The ongoing revision of the EU rules on asylum procedures is bound to take proper account of the existing evidence on the realities of such procedures when conducted in the various border contexts.

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44 Cf Asylum Procedures Directive (n 27) recitals 25, 26, 28, 29 and Articles 6 and 9; and Proposal for an Asylum Procedure Regulation (n 5) recitals 12, 17, 22, 27 and Article 9.

45 Cf Cornelisse and Reneman (n 31).

46 Guisepe Campesi, ‘The EU Pact on Migration and Asylum and the Dangerous Multiplication of ‘Anomalous Zones’ for Migration Management’ in Sergio Carrera and Andrew Geddes (eds), *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* (EUI 2021), 195.





# The New Pact and EU Agencies: A Tale of Two Tracks of Administrative Integration and Unsatisfactory Embedding

*Evangelia (Lilian) Tsourdi\**

The ‘New Pact on Migration and Asylum’,<sup>1</sup> and the relevant legislative proposals that accompany it, adopt an ambivalent approach towards administrative integration. They partly recognise EU agencies’ increased involvement in the implementation of EU’s migration, asylum, and external border control policies. At the same time, they do not satisfactorily embed the novel functions of EU agencies, such as their increased executive powers. This means that, for example, new procedural steps introduced by the Pact such as the screening at the external borders<sup>2</sup> or the border procedure,<sup>3</sup> neither take to account the particularities of the potential involvement of EU agencies in these processes nor do they frame these executive powers. This could have a potential impact on migrants’ procedural rights and on the accountability of EU agencies. In addition, the Pact ingrains a two-track approach to administrative integration. Alongside institutionalised administrative cooperation through EU agencies, the Pact emphasizes bilateral and multilateral transnational cooperation between Member States, as portrayed by the new concept of return sponsorships.<sup>4</sup>

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1 Commission Communication on a New Pact on Migration and Asylum, COM(2020) 609 of 23 September 2020 (‘Pact Communication’).

2 Commission Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM(2020) 612 of 23 September 2020 (‘Screening Regulation Proposal’).

3 Amended Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 of 23 September 2020 (‘Amended Proposal for an Asylum Procedures Regulation’).

4 Proposal for a Regulation of the European Parliament and the Council on asylum and migration management and amending Council Directive concerning the sta-

This could potentially impact the effectiveness of administrative cooperation and migrants' fundamental rights protection.

This article, first, analyses in greater detail which are the two tracks of administrative integration, and briefly outlines the novel functions that two EU agencies, FRONTEX (used as a shorthand for the EU's European Border and Coast Guard Agency),<sup>5</sup> and EASO (used as a shorthand for the EU's European Asylum Support Office),<sup>6</sup> undertake in these fields. Next, I explain which legal instruments are to regulate their mandate according to the Pact, and whether the Commission Communication on the Pact contains novelties regarding their role. Finally, I draw examples from two Pact legal instruments, notably the Proposal for an Asylum and Migration Management Regulation and the Amended Proposal for an Asylum Procedures Regulation to illustrate the Pact's ambivalent approach to administrative integration.

### *1. The Two Tracks of Administrative Cooperation and EU Agencies' Novel Functions*

Administrative cooperation in the EU external border control, migration, and asylum policies has been pursued through two tracks. The first track is bilateral and multilateral transnational cooperation between Member States. The second track is institutionalised practical cooperation through EU agencies which has gradually evolved to joint implementation patterns and increased administrative integration. It is important to understand what each track entails to critically analyse a crucial development under the Pact, which is a renewed attention towards the first track of administrative cooperation.

In what concerns the first track, informal information-exchange among Member States, for example on asylum, started as early as 1992 through a consultation group chaired by the Council called CIREA (Centre for In-

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tus of third-country nationals who are long-term residents, COM(2020) 610 of 23 September 2020 ('Proposal for an Asylum and Migration Management Regulation').

5 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295/1 ('2019 EBCG Regulation').

6 Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office ('EASO Regulation').

formation, Discussion and Exchange on Asylum). While its aim was facilitating coordination of practice, results were limited and the Commission lamented its ineffectiveness.<sup>7</sup> Apart from information exchange through administrative networks, Member States sought transnational cooperation through *ad hoc* projects. For example, in 2004 the Dutch Presidency established of annual exchanges between General Directors of European Immigration Services (GDISC). Several projects supported by EU co-financing were developed under the auspices of GDISC. One such project was the European Asylum Curriculum (EAC), originally developed by a group of Member States led by Sweden with the financial support of the European Commission, and in cooperation with the Odysseus Academic Network. Its main aim was to ‘create a learning tool for the advancement of both knowledge and skills among officials working with asylum issues’.<sup>8</sup> Nonetheless, it soon became apparent that *ad hoc* projects, and loose networks of information exchange were not enough to effectively address the implementation gap in EU’s asylum, external border control and return policies. This led to the emergence of institutionalised administrative cooperation, and EU agencies.

The second track has been characterised by institutionalisation, and the creation of relevant EU agencies. This development came about later chronologically. The FRONTEX Regulation has undergone a series of legislative amendments since member states adopting the agency’s founding document in 2004.<sup>9</sup> Notably, the instrument was amended consecutively

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7 Commission Communication Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, COM(2020)755 of 22 November 2020.

8 European Asylum Curriculum, ‘A Vocational Training Program for the Asylum Process in Europe Objectives and Content’, 6 <[www.temaasyl.se/Documents/Program/ARGO/European%20Asylum%20Curriculum.pdf](http://www.temaasyl.se/Documents/Program/ARGO/European%20Asylum%20Curriculum.pdf)> accessed 1 December 2021.

9 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1.

in 2007,<sup>10</sup> 2011,<sup>11</sup> 2016,<sup>12</sup> and most recently in November 2019<sup>13</sup> - the legal document which is currently in force. EASO was set up in 2010,<sup>14</sup> and an agreement on an updated legal mandate was only reached in the course of 2021;<sup>15</sup> its role has shifted *de facto* though. I analyse these developments and the *status quo* on EASO's legal mandate in detail below. Overall, much has changed since these agencies were initially set up. Institutionalization of practical cooperation through EU agencies has begun to unsettle the initial implementation paradigm of 'the EU legislating' and 'Member States implementing'.

Focusing specifically on the *de jure* and *de facto* mandate expansion of EASO and FRONTEX two broad trends become apparent:

On the one hand, the operational expansion of EU agencies' mandates has led to patterns of joint implementation,<sup>16</sup> with their staff and experts deployed in fields such as border control, returns and the processing of asylum claims. This means that agency deployees increasingly have executive powers, implement policy alongside national authorities and administrations, and directly interact with refugees and migrants. On the other hand, these agencies' mandate has expanded to encompass functions that far exceed support, including operational support and administrative coop-

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- 10 Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ L 199/30 ('2007 FRONTEX Regulation').
  - 11 Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1.
  - 12 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251/1 ('2016 EBCG Regulation').
  - 13 2019 EBCG Regulation (n 5).
  - 14 EASO Regulation (n 6).
  - 15 Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, OJ L 468/1 ('EUAA Regulation').
  - 16 Evangelia (Lilian) Tsourdi, 'Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' (2016) 1 European Papers 997-1031.

eration. Reference is made to monitoring-like,<sup>17</sup> as well as to functions which have the potential to steer policy implementation.<sup>18</sup>

One example of a monitoring-like function is the ‘vulnerability assessment’ that FRONTEX undertakes.<sup>19</sup> This relates to issues such as state resources and state preparedness to undertake external border controls. It could lead to recommendations; a binding decision of measures set out by its Management Board; or, in cases where the external borders require urgent action, a Council implementing act prescribing measures which become binding for the Member States. An example of a function which has the potential to steer policy implementation is envisaged as part of a new European Union Agency on Asylum, the successor of EASO. This would be the adoption of a ‘common analysis’ on the situation in specific countries of origin and the production on this basis of guidance notes to assist Member States in the assessment of relevant asylum applications.<sup>20</sup>

One might have expected that these trends would have intensified, or at least would have been fully reflected in the New Pact and its different legal instruments. Nevertheless, the picture which emerges is far more nuanced. I examine, next, the legal mandate of these agencies according to the Pact.

## *2. EU Agencies’ Legal Mandates and the Pact: Nothing New under the Sun?*

The New Pact package does not alter the legal mandates of EASO and FRONTEX. This means that in what concerns FRONTEX the November 2019 instrument continues to regulate its functioning.<sup>21</sup> Consecutive amendments to this legal instrument mean that it is more attuned to the new administrative realities, clearly prescribes the newer functions of the agency, and sets out, at least on paper, improved fundamental rights guarantees. Things are more complicated in what concerns EASO. At the time of writing, a 2010 Regulation still underpinned its functioning,<sup>22</sup> while a

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17 Evangelia (Lilian) Tsoouri, ‘Beyond the migration crisis: the evolving role of EU agencies in the administrative governance of the asylum and external border control policies’ in Johannes Pollak and Peter Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (Palgrave Macmillan 2021) 175, 184-188.

18 Ibid, 188-191.

19 2019 EBCG Regulation (n 5), art 32.

20 EUAA Regulation (n 15), art 11.

21 2019 EBCG Regulation (n 5).

22 EASO Regulation (n 6).

final interinstitutional agreement on a new regulation had been struck and had received the endorsement of the EP LIBE Committee, the EP plenary, and the Council.<sup>23</sup> As I have analysed elsewhere,<sup>24</sup> this instrument has, since some time, no longer been fully attuned to the new administrative realities, such as joint implementation patterns, and this heightens EASO's accountability challenge.

The Commission issued a proposal for a revamped EUAA (used as a shorthand for the European Union Agency on Asylum) in 2016.<sup>25</sup> The two co-legislators, i.e. the Council and the European Parliament, reached a political agreement for several chapters of the EUAA proposal in late 2017, but some salient issues remained pending.<sup>26</sup> In the meantime, the Commission released in 2018 an amended proposal containing only targeted amendments reinforcing the operational tasks of the EUAA.<sup>27</sup> The Commission did not release a new, or consolidated, proposal on the EUAA as part of the Pact. Instead, it urged co-legislators to swiftly adopt, concluding negotiations by the end of 2020, the new Regulation on the EUAA based on the pre-existing proposals and interim political agreements I outlined above.<sup>28</sup>

This approach led to the following result: a relatively speedy conclusion of the negotiations in the summer of 2021 but with part of the new instrument remaining frozen through the inclusion of a 'sunrise clause'.<sup>29</sup> This relates to the new functions the co-legislators foresee for the EUAA in combination with its increasingly pivotal role in implementing intra-EU solidarity. Notably, the EUAA Regulation foresees a novel monitoring function of 'the operational and technical application of the CEAS in order to prevent or identify possible shortcomings in the asylum and reception systems of Member States and to assess their capacity and

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23 EUAA Regulation (n 15).

24 See analysis in Evangelia (Lilian) Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' (2020) 21 *German Law Journal*, 506.

25 Commission Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and Repealing Regulation (EU) 439/2010, COM (2016) 271 ('EUAA 2016 proposal').

26 The partial agreement was included as an Annex I to Council of the European Union, Doc. 10555/17, ('EUAA partial agreement').

27 Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2018)633 ('EUAA 2018 amended proposal').

28 Pact Communication (n 1), 3, 10.

29 See EUAA Regulation (n 15), art 73.

preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems'.<sup>30</sup> This exercise is linked with a gradation of measures ranging from recommendations of the Management Board, to the involvement of the European Commission, to the Council mandating agency deployments in the territory of a specific Member State through an implementing act.<sup>31</sup>

Despite the circumscribed language on the content of the monitoring exercise, the 'Med 5' group of countries in Council (Greece, Spain, Italy, Cyprus and Malta) would only endorse the final agreement with the addition of a 'sunrise clause'.<sup>32</sup> According to this clause, the monitoring exercise will only commence in 2024, and then only partly.<sup>33</sup> The 'enforcement part' of the mechanism, i.e. the gradation of measures I outlined before, will only commence as and when an agreement will be reached on the successor of the Dublin system that will include concrete responsibility-sharing arrangements. This final agreement attests both to the salience of solidarity for the functioning of the CEAS and of the importance that Member States place on the functions of EU agencies.

As for the operational functions of the EUAA, the final agreement reflects better, but not fully, the agency's enhanced role on the ground. Its role in asylum processing is recognised but the related wording is very careful, namely that the EUAA will 'facilitate the examination by the competent national authorities of applications for international protection or provide those authorities with the necessary *assistance* in the procedure for international protection'.<sup>34</sup> This formulation still does not encapsulate operational activities that EASO is currently undertaking in Greece and which I analyse below, for example independently conducting part of the asylum processing (admissibility or merits) and emitting an advisory opinion as to the outcome of individual applications. This careful formulation again illustrates the political sensitivities surrounding the expanded functions of EU agencies and, in essence, the resistance of Member States to legally frame them effectively. Analysis in the next section confirms these trends in the Pact's legal instruments.

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30 Ibid, art 14(1).

31 Ibid, art 15.

32 See Jacopo Barigazzi, 'EU at long last agrees on reform of asylum agency' (*Politico Europe*, 29 June 2021) <[www.politico.eu/article/after-5-years-eu-finds-deal-to-launch-asylum-agency/](http://www.politico.eu/article/after-5-years-eu-finds-deal-to-launch-asylum-agency/)> accessed 1 December 2021.

33 See EUAA Regulation (n 15), art 73.

34 Ibid, art 16(2)(c), emphasis added.

### *3. The New Pact and EU Agencies: What Way Forward for Administrative Cooperation?*

Having ascertained the Pact's position on the legal mandate of EU agencies, I now turn to analyse more broadly the way forward on administrative cooperation envisaged by the Pact. Namely, I fully substantiate arguments that I raised before: that the Pact instruments do not satisfactorily embed the novel functions of EU agencies, such as their increased executive powers; and that the Pact ingrains a two-track approach to administrative integration.

#### *a) The Commission Communication: Proclaiming the Importance of EU Agencies in Administrative Cooperation*

Some indications on the Pact's approach towards administrative cooperation can be drawn from the relevant Commission Communication, a non-legally binding document.<sup>35</sup> I already mentioned that the document called for the swift adoption of the amended EU agency proposal. However, it also contains further elements on the envisaged role of EU agencies.

Firstly, the Communication explicitly links mutual trust with 'consistency in implementation, requiring enhanced monitoring and operational support by EU agencies'.<sup>36</sup> This is quite a bold statement which seems to recognise EU agencies' increased role in implementation and, even, in monitoring. FRONTEX's 'vulnerability assessments' are lauded by the Commission as 'particularly important, assessing the readiness of Member States to face threats and challenges at the external borders and recommending specific remedial action to mitigate vulnerabilities'.<sup>37</sup> These assessments allow to 'target the Agency's operational support to the Member States to best effect'.<sup>38</sup> This means that structural shortcomings and capacity issues first identified through these supervision-like processes can then be (partially) overcome through the additional deployment of human and technical resources and enhancement of joint implementation actions.

Thereafter, the Communication outlines the importance of the envisaged monitoring mechanism as part of a new EUAA. This mechanism has

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35 Pact Communication (n 1).

36 Ibid, 6.

37 Ibid, 12.

38 Ibid.



been added to the EUAA mandate but will remain ‘frozen’ as analysed above; EASO does not currently hold such a function. Monitoring is explicitly linked with ‘bringing greater convergence’ and boosting mutual trust ‘through new monitoring of Member States’ asylum and reception systems and through the ability for the Commission to issue recommendations with assistance measures’.<sup>39</sup> A seminal future challenge will be the inherent underlying tension between the expanding operational and supervision mandates of EU agencies.<sup>40</sup> Namely, the agencies will be called on to play a double, and at times contradictory role: implementing jointly, while simultaneously supervising implementation.

Next, the Communication identifies a ‘leading role’ for FRONTEX in the EU common system on returns (p. 8). The Commission goes as far as to state that ‘[i]t should be a priority for Frontex to become the operational arm of EU return policy’.<sup>41</sup> This is linked with the deployment of the agency’s standing corps.<sup>42</sup> According to the November 2019 version of its Regulation, it is expected that by 2027 FRONTEX would have a total of 10.000 operational staff, comprised of both statutory staff, and staff made available through Member States for long and short term deployments.<sup>43</sup> Achieving this level of operational staff is recognised by the Commission as ‘essential for the necessary capability to react quickly and sufficiently’.<sup>44</sup> Return is a key area where operational staff will be involved.

A final area from the Communication concerns partnerships with third countries. The Commission envisages ‘a much deeper involvement of EU agencies’ to support the new partnerships.<sup>45</sup> It goes as far as to say that FRONTEX’s ‘enhanced scope of action should now be used to make cooperation with partners operational’.<sup>46</sup> In what concerns the Western Balkans FRONTEX is to ‘to work together with national border guards on the territory of a partner country’.<sup>47</sup> Reference is clearly made to joint implementation patterns in those countries. EASO is not left out either, however the Commission falls short of mentioning joint implementation patterns

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39 Ibid, 6.

40 Tsourdi, ‘Beyond the migration crisis: the evolving role of EU agencies in the administrative governance of the asylum and external border control policies’ (n 17), 193-194.

41 Pact Communication (n 1), 8.

42 Ibid.

43 2019 EBCG Regulation (n 5).

44 Pact Communication (n 1), 12.

45 Ibid, 20.

46 Ibid, 21.

47 Ibid.

in the assessment of asylum claims. Rather it refers to capacity building and operational support, as well as support on refugee resettlement from third countries to the EU.<sup>48</sup>

*b) The Pact Legal Instruments: No Adequate Reflection of Policy Ambition*

These programmatic statements are not fully reflected in the legal instruments that make up the Pact. It is impossible to examine all Pact instruments exhaustively in this contribution. Instead, I will draw characteristic examples to illustrate my points.

*aa) Border Procedure: Unsatisfactory Embedding of EU Agencies' Existing Roles and Current Administrative Realities*

The *border procedure* established by the Amended Proposal for an Asylum Procedures Regulation<sup>49</sup> is an illustrative example of unsatisfactory embedding EU agencies' existing roles and current administrative realities. The intricacies of the procedure itself are analysed in this publication by Jens Vedsted-Hansen.<sup>50</sup> Overall, through this procedure the Commission seeks to create 'a seamless link between all stages of the migration procedure, from a new pre-entry phase to the outcome of an asylum application'.<sup>51</sup> The pre-entry phase includes screening regulated by a different instrument,<sup>52</sup> analysed in this publication by Lyra Jakuleviciene.<sup>53</sup> For those channelled based on this initial screening to an asylum procedure, a decision will be made as to whether their application 'should be assessed without authorising the applicant's entry into the Member State's territory in an asylum border procedure or in a normal asylum procedure'.<sup>54</sup> If channelled to an asylum border procedure and found not to be in need

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48 Ibid.

49 Amended Proposal for an Asylum Procedures Regulation (n 3).

50 See Jens Vedsted-Hansen's chapter in this book.

51 Amended Proposal for an Asylum Procedures Regulation (n 3), Explanatory Memorandum, 3.

52 Screening Regulation Proposal (n 2).

53 See Lyra Jakuleviciene's contribution in this volume.

54 Amended Proposal for an Asylum Procedures Regulation (n 3), Explanatory Memorandum, 4.

of protection, failed applicants would then be directed to a return border procedure.

The border procedure is not unknown to national asylum systems. However, it is currently not obligatory, nor is it regulated by such detail in EU law. Rather, the possibility exists under EU law for Member States to introduce such a procedure to be framed by national law. This is a possibility that some Member States have taken up. EU agencies, and specifically EASO, have come to play pivotal roles in the application of current variants of border and accelerated procedures. The agency has been key in the operationalisation of the hotspot approach to migration management<sup>55</sup> in Greece. Greek national law in 2016 introduced an accelerated border asylum procedure, addressing also the situation at hotspots.<sup>56</sup> Consecutive amendments of Greek national law established increasing levels of EASO involvement in the processing of asylum applications in admissibility and, later, the merits of applications.<sup>57</sup> While the final decision rests with the Greek Asylum Service, EASO experts emit a non-binding advisory opinion, making these processes a peculiar type of mixed proceedings regulated only by national law, with the involvement of both the EU and national levels in asylum decision-making. EASO's implication in processing in Greece is numerically significant. For example, EASO conducted 8,958 interviews in the fast-track border procedure during 2018.<sup>58</sup> During the first half of 2019, EASO conducted 2,955 interviews in the fast-track border procedure,<sup>59</sup> mainly covering applicants from Afghanistan, Palestine, Iraq, Syria and Cameroon.

Given these factual realities and the pivotal role played by EASO in existing national variants of border procedures, the proposed amended Asylum Procedures Regulation is surprisingly silent on the role of EU agencies in general and, of EASO specifically. The Commission announces that through its proposal, 'consistency is ensured' with the provisional

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55 Katrien Luyten and Anita Orav, *Hotspots at EU external borders: State of play* (European Parliament, PE 652.090, September 2020).

56 See Law 4375/2016, art 60(4).

57 I am referring to Law 4540/2018 of May 22, 2018, Official Gazette of the Greek Government, Series A, Issue No. 91, 8005 et seq., art 28(7), and Law 4346/2019 of Nov. 1, 2019, Official Gazette of the Greek Government, Series A, Issue 169, 4827 ('Greek International Protection Act', art 76(1) - personal interviews on admissibility, art 76(2) - personal interviews on the merits of the case and art 90 - border procedures).

58 Minos Mouzourakis, *The Role of EASO Operations in National Asylum Systems* (ECRE 2019) 11.

59 Ibid, 12.

political agreements already reached on most elements of the EUAA.<sup>60</sup> Again, in the Explanatory Memorandum of the proposal in a paragraph titled ‘budgetary implications’ the Commission states that ‘within their respective mandates’, EASO and FRONTEX can support Member States with staff for operationalising the border procedure.<sup>61</sup> This of course could include involvement in processing applications through joint implementation patterns, an element that is partially included in the new enhanced mandate of the EUAA. Thereafter, the proposal refers to EASO’s material, as part of its quality initiatives, on operational standards and indicators for asylum procedures.<sup>62</sup> A recital also refers to EASO’s guidance notes, as part of the material to be taken into account in ascertaining which applicants fall under the border procedure.<sup>63</sup>

These passing references to the possibility of EASO staff supporting border procedures do not do justice to current administrative realities. EASO is in fact involved in the assessment of thousands of applications in Greece, mainly as part of the country’s border procedure. New, enhanced, obligations to conduct such type of processing will only increase the needs of border Member States for operational support. While the instrument does not negate the involvement of EASO within the remits of its mandate in asylum processing, it does not explicitly reflect or regulate the procedural implications of EU-coordinated involvement either. And yet, the EU Ombudsman has already been called twice to scrutinize potential violations of applicants’ procedural rights in Greece, due to EASO involvement.<sup>64</sup> These complaints reveal the procedural complexities and need for a broader rethink of EU procedural law and the establishment of the req-

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60 Amended Proposal for an Asylum Procedures Regulation (n 3), Explanatory Memorandum, 6.

61 *Ibid.*, 8.

62 *Ibid.*

63 *Ibid.*, recital 39(a).

64 See Decision of European Ombudsman in Case 735/2017/MDC on the European Asylum Support Office's (EASO) Involvement in the Decision-Making Process Concerning Admissibility of Applications for International Protection Submitted in the Greek Hotspots, in particular Shortcomings in Admissibility Interviews (5 July 2018) <[www.ombudsman.europa.eu/en/decision/en/98711](http://www.ombudsman.europa.eu/en/decision/en/98711)> accessed 1 December 2021; and Decision of the European Ombudsman in Case 1139/2018/MDC on the Conduct of Experts in Interviews with Asylum Seekers Organised by the European Asylum Support Office (30 September 2019) <[www.ombudsman.europa.eu/en/decision/en/119726](http://www.ombudsman.europa.eu/en/decision/en/119726)> accessed 1 December 2021.

uisite accountability arrangements.<sup>65</sup> Similar observations regarding lack of reflection on EU agencies' involvement can be made about the new screening procedure.<sup>66</sup>

*bb) Return Sponsorships: Embedding the Two-Track Approach to Administrative Cooperation*

Return sponsorships are an illustrative example of the Pact's embedding of the two-track approach to administrative cooperation. They are one of the solidarity tools envisaged by the Asylum and Migration Management Regulation.<sup>67</sup> Through a return sponsorship a Member State (say Hungary) commits to support another Member State which faces 'migratory pressure' (say Greece) in carrying out the necessary activities to return irregularly staying third-country nationals. While the individuals are present on the territory of Greece, it remains responsible for carrying out the return. However, if return has not taken place after 8 months (4 months in situations of crisis),<sup>68</sup> Hungary becomes responsible for transferring the migrants in an irregular situation and should relocate them to its territory.<sup>69</sup>

The instrument recognises that return sponsorship is part of the common EU system of returns, which also includes operational support through FRONTEX.<sup>70</sup> Measures to support return include providing counselling; using 'the national programme and resources for providing logistical, financial and other material or in-kind assistance' to those willing to depart voluntarily; leading or supporting the policy dialogue and exchanges with the authorities of third countries for the purpose of facilitating readmission; contacting the third country authorities to verify identity and obtain a valid travel document; and organising on behalf of the benefitting Member State the practical arrangements for the enforcement

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65 See Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible' (n 24).

66 See Screening Regulation Proposal (n 2), Explanatory Memorandum, 3, recital 21, and art 6(7).

67 See analysis in Olivia Sundberg Diez, Florian Trauner and Marie De Somer, 'Return Sponsorships in the EU's New Pact on Migration and Asylum: High Stakes, Low Gains' (2021) 23 *European Journal of Migration and Law* 219-244.

68 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 of 23 September 2020 ('Crisis Regulation Proposal'), recital 10.

69 Asylum and Migration Management Regulation (n 4), art 55(2).

70 *Ibid*, recital 27.

of return, such as charter or scheduled flights or other means of transport to the third country of return.<sup>71</sup>

The Commission affirms that these activities are ‘*additional*’ to the ones carried out by the European Border and Coast Guard Agency (EBCGA) by virtue of its mandate and notably include measures that the Agency cannot implement (e.g. offering diplomatic support to the benefitting Member State in relations with third countries).<sup>72</sup> Nonetheless, when one scrutinizes the measures that Member States are to undertake in the framework of a return sponsorship it becomes apparent that they are not all additional to the activities FRONTEX undertakes. For example, organising the practical arrangements for the enforcement of return is an action that also FRONTEX undertakes as part of its operational role on returns. Therefore, there will now officially be two tracks on administrative cooperation on returns: an institutionalised one, i.e. through FRONTEX, and a second track which, in essence, will consist of several bilateral co-operations between a ‘benefitting Member State’ and other Member States that will activate themselves in ‘sponsoring’ returns.

A policy choice was clearly made: instead of streamlining all operational support on return through FRONTEX, the Pact envisages a parallel track, that of bilateral transnational co-operation on implementing return. It seems that Member States were not yet fully prepared to make FRONTEX the ‘operational arm’ of the EU return policy after all. It will be one of the actors that will be active in this area. The other actors will be Member States through their administrations.

Institutionalised administrative integration through EU agencies is not inherently negative or positive. I already outlined the accountability and fundamental rights challenges that have emerged through the increased operational powers of EU agencies. However, bilateral administrative co-operation in this area is likely to present even more problems. It is unlikely to be efficient as it will not allow for the creation of economies of scale. It will create additional administrative burdens for the ‘benefitting’ Member state that instead of one interface will have to collaborate with several Member State authorities that will be acting, understandably, in an uncoordinated manner.

In addition, operational support under this framework will not be covered by the enhanced fundamental rights protection layer that has been developed by FRONTEX including, *inter alia*, a fundamental rights officer,

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71 Ibid, art 55(4)(a-d).

72 Ibid, Explanatory Memorandum, 2, emphasis added.

an individual complaints mechanism, and fundamental rights monitors.<sup>73</sup> This framework has been put in place specifically to address fundamental rights violations in the framework of operational activities of the agency. Put plainly, a migrant under a return obligation in the territory of Greece, whose return is sponsored by Hungary under a bilateral cooperation framework, cannot make use of the FRONTEX individual complaints mechanism regarding a potential violation by a Hungarian agent. It is certain that these mechanisms are not flawless as the most recent allegations on the role of FRONTEX in pushbacks in Greece once again highlight.<sup>74</sup> But the complete absence of these novel human rights mechanisms in an environment of transnational administrative cooperation which dilutes accountability and liability will be even worse. Monitoring foreseen by the Commission as part of the Asylum and Migration Management Regulation<sup>75</sup> might be able to reveal potential violations, especially where they are widespread, but will not be linked with an ‘access to justice’ component for individuals.

#### 4. Concluding Remarks

The New Pact was expected to breathe new life into EU’s asylum, migration, and external border control policies. There is little innovative thinking though in what concerns the role of EU agencies and opportunities presented by administrative integration. The programmatic declarations of the Pact Communication endorse the *status quo* in what concerns the role of EU agencies. When it comes to EASO’s mandate, the newly adopted agreement on an EUAA only partly reflects current operational realities. This means the agency’s mandate will continue to be out of tune with the administrative reality on the ground. For the rest, its monitoring-like functions have been locked into the negotiating impasse on solidarity.

Unlike the Pact Communication, the Pact legal instruments do not fully embed, or regulate, existing *de jure* and *de facto* developments, such as joint implementation patterns. The Pact’s ‘fresh’ approach is to provide renewed attention to the other track of administrative co-operation, which

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73 2019 EBCG Regulation, arts 108-111.

74 See, e.g. Giorgos Christides and others, ‘Frontex in illegale Pushbacks von Flüchtlingen verwickelt’ (*Der Spiegel*, 23 October 2020) <[www.spiegel.de/ausland/fluechtlinge-frontex-in-griechenland-in-illegale-pushbacks-verwickelt-a-000000-00-0002-0001-0000-000173654787](http://www.spiegel.de/ausland/fluechtlinge-frontex-in-griechenland-in-illegale-pushbacks-verwickelt-a-000000-00-0002-0001-0000-000173654787)> accessed 1 December 2021.

75 Asylum and Migration Management Regulation (n 4), art 6.

is bilateral and multilateral transnational administrative co-operation between Member States. This method is not inherently negative. However, it is unlikely to prove efficient in policies which essentially seek to provide regional public goods, such as asylum provision, or safeguarding EU's external borders in respect of fundamental rights. It also seems capable of jeopardizing migrants' fundamental rights even further.

Member State support for agency involvement to better respond to functional pressures and the unmet interstate solidarity imperative might have acted as the precursor of more radical shifts in the implementation modes of these policies.<sup>76</sup> At the current juncture though, it seems that Member States and the Commission had little appetite for such a policy direction. Not much is new under the sun then, other than the Pact's ambivalence towards administrative integration.

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76 Evangelia (Lilian) Tsourdi, 'EU Agencies' in Philippe De Bruycker, Marie De Somer and Jean-Luis De Brouwer (eds), *From Tampere 20 to Tampere 2.0. Towards a new European consensus on migration* (EPC 2019) 27-38.



## Secondary Movements: Improving Compliance and Building Trust among the Member States<sup>2</sup>

*Daniel Thym*<sup>\*</sup>

Trust is an essential prerequisite for a functioning area of freedom, security, and justice. In a foundational judgment, the Court of Justice stated paradigmatically: ‘At issue here is the *raison d’être* of the European Union and the creation of..., in particular, the Common European Asylum System, based on mutual confidence.’<sup>1</sup> Our theme is not the controversial case law on fundamental rights limits to Dublin transfers, judges dealt with when emphasising the relevance of mutual trust, but the more generic question about legal rules concerning asylum seekers taking advantage of the border-free Schengen area to relocate themselves autonomously. The phenomenon is usually referred to as ‘secondary movements’, even though the Commission evaded the term in the ‘Pact’. Nevertheless, it referred to the issue indirectly, in the title of the accompanying press release with its call for a ‘balance between responsibility and solidarity’<sup>2</sup>.

When it comes to policy debates among Member States, responsibility and solidarity are two sides of the same coin. The formula indicates the ambition to accommodate divergent preferences of countries at the external borders and elsewhere.<sup>3</sup> Search for ‘responsibility and solidarity’ has become a catchphrase for the relocation of asylum seekers and other measures in support of ‘frontline’ Member States (solidarity), as well as for the effective implementation of asylum laws throughout the European Union, including measures preventing or sanctioning secondary movements (responsibility). The formula takes up basic principles of primary law for mutual assistance (Article 80 TFEU) and loyal application of Union law

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1 ECJ, *N.S. and others*, C-411/10 & C-493/10, EU:C:2011:865, para 83.

2 Commission, ‘A Fresh Start on Migration’ (Press Release IP/20/1706, 23 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706)> accessed 15 December 2021.

3 See the introductory chapter by Daniel Thym, in section 2.

(Article 4(3) TEU).<sup>4</sup> It is attractive for signalling the desire for a political compromise, notwithstanding profound cleavages on the substance.

### 1. *EU Asylum Reform: Two Competing Narratives*

In the debate about EU asylum policy, we are confronted with two competing narratives which underlie the breakdown of mutual trust among ‘Southern’ and ‘Northern’ states: While countries at the external border regularly complain about having to shoulder the ‘burden’ without adequate solidarity, politicians further north often decry the alleged incapacity of peers in running functioning asylum systems and in preventing onward movements. The first narrative is fed by the well-known pictures of arrivals at the external borders. When it comes to the second narrative, German, Austrian, Swedish, or Dutch politicians, amongst others, will highlight the everyday experience of state authorities with asylum seekers and beneficiaries of international protection submitting another application, after having been registered in the Eurodac database, or after having received a protection status, previously in countries such as Italy, Greece, or Spain.

Statistics about secondary movements are notoriously unreliable, but the high number of take back requests under the Dublin system and discrepancies between the numbers of asylum applications and administrative first instance decisions in Italy or Greece are indicators of the lived experience of secondary movements.<sup>5</sup> During the first nine months of 2021, German authorities made more than 30 thousand take back requests to other Member States under the Dublin III Regulation, mostly following a ‘hit’ in the Eurodac database, even though there were comparatively few new arrivals in ‘frontline’ Member States at the time.<sup>6</sup> They estimate that more than 30,000 beneficiaries of international protection, which

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4 See further Editorial Comments, ‘From Eurocrisis to Asylum and Migration Crisis: Some Legal and Institutional Considerations about the EU’s Current Struggles’ (2015) 52 CML Rev. 1437, 1442-1444; and Iris Goldner Lang, ‘The EU Financial and Migration Crises: Two Crises – Many Facets of EU Solidarity’ in Andrea Biondi, Eglé Dagilyté and Esin Küçük (eds), *Solidarity in EU Law* (Elgar 2018) 133-160.

5 See Markus Wagner, Jimmy Perumadan and Paul Baumgartner, ‘Secondary Movements’ (CEASEVAL Research on the Common European Asylum System No 34, 2019) 5-7.

6 On constantly updated statistics, see for Germany ‘Aktuelle Zahlen’ <[www.bamf.de/DE/Themen/Statistik/Asylzahlen/asylzahlen-node.html](http://www.bamf.de/DE/Themen/Statistik/Asylzahlen/asylzahlen-node.html)>; and for Eurostat

are not covered by the take back procedure under the Dublin system at present, moved to Germany from Greece during the same period.<sup>7</sup> A substantial number of people who had arrived in previous years were moving northwards: some comparatively quickly, others after months or years of residence. While most onward movements had traditionally taken place before an administrative first instance decision in the country of first arrival, recent years have witnessed increasing number of beneficiaries of international protection moving northwards on the basis of their protection status.

Against this background, this contribution discusses those elements of the Commission proposals on asylum policy reform which address the phenomenon of secondary movements, including the recent - and surprising - initiative to facilitate refusal of entry at internal Schengen borders presented in December 2021. In doing so, it complements the discussion of solidarity measures in the contribution by Francesco Maiani. While both aspects cannot be disentangled politically, in line with the ‘solidarity *and* responsibility’ formula, it can be beneficial to address secondary movements separately from an analytical perspective. To do so sheds light on one aspect of the legislative negotiations which rarely receives much academic attention, although it is highly relevant for the policy debate. Special attention will be paid to interdisciplinary analyses about the driving forces behind secondary movements, which allow us to indicate the practical impact of different reform options that have been put forward.

## 2. *Driving Forces behind Secondary Movements*

A political compromise among the Member States, and among the EU institutions, is the main hurdle for any reform of asylum policy. Without it, no new legislation will be adopted. Nevertheless, the focus of much of the political negotiations on finding a common ground among the political actors should not detract us from another challenge: can the proposals function reasonably well in practice? Indeed, experiences with the notorious ineffectiveness of the take back procedure (most transfer decisions under the Dublin system are not realised in practice) and the lacklustre

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<[https://ec.europa.eu/eurostat/databrowser/view/migr\\_asyappctza](https://ec.europa.eu/eurostat/databrowser/view/migr_asyappctza)>, both accessed 15 December 2021.

7 See Manuel Bewarder and Carolina Drüten, ‘Freifahrtschein nach Deutschland’ (Die Welt, 15 December 2021) 6.

implementation of the Relocation Decisions adopted in 2015 indicate that changing the laws may not be enough.<sup>8</sup> Member States and individuals might simply not comply with statutory obligations promulgated in the EU's Official Journal. Major discrepancies between the law in the books and the law in practice are a major challenge of any reform of the Dublin system, for solidarity and responsibility alike.<sup>9</sup>

Social scientists teach us that it can be notoriously difficult to identify the reasons why people leave their home states, how they choose destination countries, and in what respect these preferences may change over time. Multiple 'push' and 'pull' factors overlap and their relative weight depends on the circumstances, with social and ethnic networks and the infrastructure (including 'smugglers') influencing the overall outcome.<sup>10</sup> Research specifically on onward movements of asylum seekers is rare and notoriously context-dependent, making it difficult to draw abstract conclusions about the relative weight of various driving forces.<sup>11</sup> When it comes to secondary movements, the choice of destination country may vary over time, for instance when individuals stay in a first state for several months or years before moving on to a second state, thus turning the initial destination into a 'transit country' (either because they had always intended to do so, or after changing their minds). An assessment is complicated by the comparatively low level of information on the part of many asylum seekers, which ethnographic research has unveiled, thus rendering symbols, stories, and perceptions as relevant as 'hard' facts.<sup>12</sup>

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8 On take back decisions, see Francesco Maiani and Vigdis Vevstad, 'Setting up a Common European Asylum System' (Study for the European Parliament PE 425.622, August 2010) 157-162; and on relocation, see Commission, 'Progress Report on the Implementation of the European Agenda on Migration' COM(2018) 250 of 14 March 2018, 16, Annex 4.

9 See generally Francesco Maiani, 'Responsibility Allocation and Solidarity' in Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer (eds), *From Tampere 20 to Tampere 2.0. Towards a new European consensus on migration* (EPC 2019) 103-118.

10 For an instructive overview, see Hein de Haas, Stephen Castles and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World* (6th edn, Palgrave 2020) ch 3.

11 See generally Valeria Ottonelli and Tiziana Torresi, 'When is Migration Voluntary?' (2013) 47 *IM Rev.* 783-813; Wagner, Perumadan and Baumgartner, 'Secondary Movements' (n 5) 11-16; and (Dutch) Advisory Committee on Migration Affairs (ACVZ), 'Secondary Movements of Asylum Seekers in the EU' (November 2019).

12 See Joris Schapendonk, 'Turbulent Trajectories. African Migrants on Their Way to the European Union' (2012) 2 *Societies* 27-41; and Jasper D. Tjaden and Tobias

Notwithstanding these uncertainties, common features define the social scientific analysis. Refugees and migrants generally have a low level of knowledge about the specificities of asylum laws, let alone the intricacies of supranational legislation. Statutory details of domestic or supranational asylum legislation, which define the policy debate, will influence decision-making to a limited extent only. Individuals will not always have heard about the Dublin system before reaching European soil, nor will they usually have an understanding of the procedural subtlety of the take back procedure or legal remedies.<sup>13</sup> Social benefits can be a factor amongst others, even though migrants will rarely distinguish between social benefits *sensu stricto* and the general quality of public services, including education or healthcare.<sup>14</sup> Few people leave home states with the intention to benefit from the welfare state, but inappropriate reception conditions in countries of first arrival can influence onward movements later.

Having said this, other elements than the contours of asylum legislation and the welfare state are, on the whole, probably more important. Fortunately, all Member States guarantee physical safety as a matter of principle (it is a crucial factor influencing forced migration otherwise). However, economic prospect and labour market success, real or perceived, can vary significantly between the Member States, as do living conditions. These elements are undoubtedly core factors.<sup>15</sup> Moreover, ethnic and family networks are generally a core factor determining where people want to

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Heldland, 'Does Welcoming Refugees Attract more Migrants? The Myth of the "Merkel Effect"' (Kiel Working Paper No 219, August 2021).

- 13 See Heaven Crawley and Jessica Hagen-Zanker, 'Deciding Where to Go: Policies, People and Perceptions Shaping Destination Preferences' (2019) 57 *International Migration* 20, 22-30; and Eiko R. Thielemann, 'How Effective are National and EU Policies in the Area of Forced Migration?' (2012) 31 *Refugee Survey Quarterly* 21, 25-28.
- 14 See Ole Agersnap, Amalie Sofie Jensen and Henrik Kleven, 'The Welfare Magnet Hypothesis: Evidence from an Immigrant Welfare Scheme in Denmark' (NBER Working Paper No 26454, November 2019) <[www.nber.org/papers/w26454](http://www.nber.org/papers/w26454)> accessed 15 December 2021; and generally Petra W. de Jong and Helga A.G. de Valk, 'Intra-European Migration Decisions and Welfare Systems: The Missing Life Course Link' (2020) 46 *Journal of Ethnic and Migration Studies* 1773, 171-176.
- 15 See Eric Neumayer, 'Asylum Destination Choice: What Makes some European Countries more Attractive than Others?' (2004) 5 *European Union Politics* 155-180; and Katie Kuschminder, 'Deciding which Road to Take' (2019) Migration Policy Institute Issue Brief No 10.

go.<sup>16</sup> The length of procedures can also influence decisions; the longer procedures last, the more likely individuals will have taken roots in a country and are less likely to comply with an obligation to leave the country, or to support or tolerate state measures in this respect.<sup>17</sup> Thus, the administrative inefficiency of the take back procedure is one element amongst others, even though the abovementioned factors are certainly more relevant in terms of influencing decisions whether to leave and where to go.

### 3. *Implications for the Reform Debate*

An essential lesson from the driving forces behind secondary movements is that EU institutions should strive for a smart legislative design in order to optimise compliance. Note that this is not a normative claim to respect the preferences of asylum seekers as a matter of justice (even though some may want to argue that), but a matter of regulatory self-interest. An asylum system which optimises compliance works better in practice, and the European Union desperately needs a better functioning regime given the dismal performance of the Dublin system.

Ideally, the policy debate will draw at least three inter-related conclusions from the inspection of the driving forces and practical experiences with the Dublin system. Firstly, the absence of systematic border controls within the Schengen area contrasts with the idea behind coercion-based transfers whose failure obliges host states to assume jurisdiction on behalf of the country that would normally be responsible. Secondly, there are administrative and practical limits to relocating, or transferring, tens of thousands of applicants among the Member States, which has been pejoratively dubbed an exercise in ‘technocratic overreach’<sup>18</sup>. Thirdly, labour market prospect and living conditions, as well as ethnic and family networks, are at least as important as the nitty-gritty of asylum legislation in terms of influencing secondary movements.

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16 See Thomas Faist, *The Volume and Dynamics of International Migration and Transnational Spaces* (Clarendon 2000); and Paul Collier, *Exodus: How Migration is Changing Our World* (OUP 2013) ch 2.

17 See Simone Bertoli, Herbert Brücker and Jesús Fernández-Huertas Moragac, ‘The European Crisis and Migration to Germany’ (2016) 60 *Regional Science and Urban Economics* 61-72; and the ethnographic study by Antje Ellermann, *States against Migrants: Deportation in Germany and the US* (CUP 2009).

18 Luuk van Middelaar, *Alarums and Excursions: Improvising Politics on the European Stage* (Agenda 2019) 100.

From the point of view of the interdisciplinary rational choice theory, decisions can be influenced by means of either positive incentives or negative sanctions: the proverbial ‘carrots and sticks’. Unfortunately, policy debates about secondary movements are often framed in a binary manner. While NGOs plead for positive incentives, states concentrate on sanctions. Such either/or-logic is a false dichotomy, as positive and negative incentives can be combined. Doing so will not only improve compliance (which is in the interest of everyone); it may even facilitate political agreement if different positions coalesce, also among the EU institutions. We shall come back to these considerations in our comments on family life.

Moreover, EU institutions should strive to improve statistics. Secondary movements are an excellent example to illustrate the deficits of contemporary asylum statistics. A core deficit concerns the focus on the number of asylum applications, not persons. That can inflate numbers as a result of double counting, whenever someone applies for asylum several times. Furthermore, there is no reasonably reliable information about how many individuals are residing in a country at any point in time. The number of asylum applications in Greece, for instance, usually includes those who have moved elsewhere. That is why the Commission put forward proposals to expand Eurodac. They consist of two lawyers, which have to be read jointly: the original Proposal of 2016; and an amendment introducing additional elements as an integral part of the Pact in 2020.<sup>19</sup> Eurodac is to become a genuine migration and asylum database, allowing Member States to track individuals (instead of counting applications) and facilitating the identification of the state responsible. Of course, migration statistics will never be perfect, since authorities will never track all people reliably, but better data can help to rationalise the debate nonetheless.

#### *4. Family Life: Recognising an Essential Motivation*

An essential bone of contention in political debates about Dublin reform is the definition of ‘family member’, which, at present, comprises spouses and minor children.<sup>20</sup> This somewhat narrow definition reflects social

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19 See Commission, Proposal for a Regulation on Eurodac, COM(2016) 272 of 4 May 2016; and the Amended Proposal for a Regulation on Eurodac, COM(2020) 614 of 23 September 2020.

20 See Article 2(g) Dublin III Regulation (EU) No 604/2013; in line with the original Article 4(2) Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Com-

practices in contemporary Europe and largely corresponds to human rights law.<sup>21</sup> Nevertheless, it constitutes a bottleneck for the practical relevance of the criteria supporting family unity in Articles 9-11 Dublin III Regulation (EU) No 604/2013. For decades, frontline states and NGOs have called for a broader definition embracing other relatives, in particular siblings, thus obliging countries further North to actively take charge of applicants arriving in Greece or Italy whose relatives are residing elsewhere. Such an amendment was proposed by the Commission in 2016 and, again, 2020; it was rejected in the Council on the first occasion, while discussions on the latest proposal are ongoing.<sup>22</sup> While the Rapporteur's Draft Report for the EP's LIBE Committee proposes to abandon the generous definition, the Council Presidency's compromise proposals of 2021 maintained the idea, which many governments reject nevertheless.<sup>23</sup>

The consequences of such a potential change are obvious: countries with a residual population of refugees would have to assume responsibility for the asylum applications of siblings and other family members covered by the extended definition. They would have to be flown to countries like Germany or Sweden, irrespective of whether their application has a realistic chance of being successful. As an intermediary jurisdictional test, the Dublin procedure does not pre-empt the outcome of the assessment of the admissibility or merits of the asylum application in the state responsible.<sup>24</sup> It would potentially cover those subject to asylum border procedures, since Member States may, on their own initiative, verify whether other countries hold jurisdiction during border procedures.<sup>25</sup> An extended definition of

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munities (adopted 15 June 1990, entered into force 1 September 1997) [1997] OJ C254/1; and ECJ, *État belge*, C-194/19, EU:C:2021:270, para 30.

- 21 See ECtHR, judgment of 9 October 2003 [GC], No. 48321/99, *Slivenko et al. v. Latvia*, para 94, including careful extension to other relatives in situations of dependency in line with Article 16(1) Dublin III Regulation (EU) No 604/2013, as interpreted by ECJ, *K*, C-245/11, EU:C:2012:685, paras 46-53.
- 22 See Article 2(g) Commission Proposal for an Asylum and Migration Management Regulation, COM(2020) 610 of 23 September 2020 (hereafter 'AMMR Regulation'); Article 2(g) Commission Proposal for a Dublin III Regulation, COM(2008) 820 of 3 December 2008; and the Presidency's compromise proposals in Council doc. 8895/18 of 17 May 2018, 26-27.
- 23 See EP Draft Report on the Proposal for an Asylum and Migration Management Regulation (Rapporteur: Tomas Tobé), PE698.950v01-00 of 11 October 2021, Amendment 32; as well as Council doc. 10450/21 of 10 June 2021; and Council doc. 11617/21 of 9 July 2021.
- 24 See Article 20(1) Dublin III Regulation (EU) No 604/2013; Article 33(1) Asylum Procedures Directive 2013/32/EU; and ECJ, *Mirza*, C-695/15 PPU, EU:C:2016:188.
- 25 See Article 41(7) Proposal for an AMMR Regulation (n 22).



family member would effectively legalise what social scientists call—some-what pejoratively—‘chain migration’<sup>26</sup> along family networks.

In sum, the scope of jurisdiction for family members is essential. Firstly, it concerns comparatively large numbers of people (unlike amendments concerning jurisdiction based on previous stays or studies<sup>27</sup>). Defining ‘family life’ is, in other words, a critical element of the policy debate. Secondly, an extended definition would recognise that family networks are one of the most relevant—and ethically most compelling—drivers of secondary movements. Instead of trying to counter movements that are most difficult to prevent or sanction in practice, those critical of secondary movements may recognise the inevitable and invest scarce resources in improving other elements of the Dublin system. Thirdly, opposition by the main asylum destination countries could possibly be mitigated in the negotiations. By way of example, responsibility for siblings could be counted towards the solidarity quota;<sup>28</sup> or it might be accepted politically in return for other changes, for instance stable asylum jurisdiction.

##### 5. ‘Other Carrots’: *Incentivising Compliance*

While an extended definition of ‘family member’ arguably constitutes the single most relevant incentive, the Commission adds further novelties. When relocating asylum seekers under the solidarity mechanism, discussed at length by Francesco Maiani in his contribution to this volume, Member States ‘shall’ take into account ‘meaningful links’ when determining which people to relocate.<sup>29</sup> The Commission refrains from defining the notion of ‘meaningful link’. However, it may be conceived in line with the EP’s position on the erstwhile Proposal for a Dublin IV Regulation, which had sponsored the relocation of asylum seekers on the basis ‘in particular [of] family, cultural or social ties, language skills or other meaningful

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26 John S. MacDonald and Leatrice D. MacDonald, ‘Chain Migration, Ethnic Neighborhood Formation and Social Networks’ (1964) 42 *Milbank Memorial Fund Quarterly* 82-97.

27 Cf Articles 19(4), 20 Proposal for an AMMR Regulation (n 22).

28 Similarly, with regard to the flexibility clause in today’s Article 17 Dublin III Regulation, the EP’s LIBE Committee Draft Report (n 23) Amendment 108.

29 See Articles 57(3)(1), 49(2) Proposal for an AMMR Regulation (n 22).

links which would facilitate his or her integration into that other Member State.<sup>30</sup>

We should recognise that the practical relevance of the ‘meaningful link’ criterion would depend on whether the legislature extended the definition of ‘family member’ and broadened jurisdiction on the basis of previous stays or studies. If that happened, siblings and former students would be transferred elsewhere on the basis of the hierarchy of substantive criteria for asylum jurisdiction, which take priority over solidarity-based relocation.<sup>31</sup> In this case, the ‘meaningful link’ criterion could be used, by way of example, for language skills or, controversially, religious affiliation. Note that neither the Commission’s Proposal of 2020 nor the EP’s Report of 2017 foresee an individual right to be transferred elsewhere on the basis of ‘meaningful links’; Member States are entrusted to take that aspect into account.<sup>32</sup> To recognise meaningful links would certainly not prevent secondary movements in itself, but it may be another element fostering compliance and improving the legitimacy of the overall system.

Legal onward movements after the completion of the asylum procedure may similarly be considered. NGOs had called for such ‘free choice’ for years, albeit to little avail.<sup>33</sup> The Commission does not support the idea,<sup>34</sup> although it makes a small but symbolically important move in its direction in the Pact presented in September 2020. Beneficiaries of international protection with long-term residence status are to benefit from intra-European mobility after 3 instead of the regular 5 years, which the Long-Term Residents Directive usually requires for status acquisition.<sup>35</sup> According to existing rules, the three-year period would be calculated from the date

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30 Article 24b read in conjunction with Article 19(2) EP LIBE Committee, Report on the Proposal for a Dublin IV Regulation, PE 599.751v03-00 of 6 November 2017.

31 See Article 57(3) Proposal for an AMMR Regulation (n 22).

32 See generally Francesco Maiani, ‘The Reform of the Dublin System and the Dystopia of “Sharing People”’ (2017) 24 Maastricht Journal of European and Comparative Law 622, 634-640.

33 By way of example, see the policy paper of various German associations, ‘Memorandum Flüchtlingsaufnahme in der Europäischen Union: Für ein gerechtes und solidarisches System der Verantwortlichkeit’ (March 2013) 20-22 <[www.proasyl.de/wp-content/uploads/2015/09/Memorandum\\_Dublin\\_deutsch.pdf](http://www.proasyl.de/wp-content/uploads/2015/09/Memorandum_Dublin_deutsch.pdf)> accessed 15 December 2021.

34 See also Commission, ‘Communication: Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe’ COM(2016) 197 of 6 April 2016, 7-9.

35 See Article 71 Proposal for an AMMR Regulation (n 22).

of the asylum application, even though half of the Member States use the statutory option of counting only half of that period.<sup>36</sup> Irrespective of the calculation of the period of previous residence, practical effects of the amendment would probably be limited. Long-term residence status presupposes economical self-sufficiency, thus excluding those who receive social benefits.<sup>37</sup> Moreover, destination countries retain the authority to refuse mobility on the basis of, amongst others, labour market tests.<sup>38</sup>

Theoretically, the Council and the European Parliament could broaden opportunities for legal onward movement for economic purposes during the legislative process. Thus, the legislature could follow the model of the revised Blue Card Directive (EU) 2021/1883 and extend other labour migration instruments to beneficiaries of international protection.<sup>39</sup> Hypothetically, the institutions could even introduce new rules on labour mobility specifically for refugees. Doing so would not result in unfettered 'free choice' and could be subject to predefined criteria, such as a work contract and economic self-sufficiency.<sup>40</sup> Free movement of Union citizens presents a far-reaching model, although institutions are free to agree on intermediate solutions with less rights for third country nationals.<sup>41</sup> Such an outcome appears unlikely politically, but the idea of enhancing legal mobility may serve as a point of reference in policy debates nonetheless.

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36 See Article 4(2), (3) Long-Term Residents Directive 2013/32/EU, as amended by Directive 2011/51/EU amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L32/1; and Commission, 'Report on the implementation of Directive 2003/109/EC' COM(2019) 161 of 29 March 2019, 3.

37 Ibid Article 5(1)(a).

38 Ibid Articles 14-17.

39 See Article 3(1), (2)(a), (b) Blue Card Directive (EU) 2021/1883; by contrast, asylum seekers and beneficiaries of international protection are excluded from Article 2(2)(a) Students and Researchers Directive (EU) 2016/801; as well as Article 2(1) ICT Directive 2014/66/EU and Article 2(3) Seasonal Workers Directive 2014/36/EU, which require residence abroad and do not, therefore, cover those living on the territory already.

40 For different options, see German Expert Council on Integration and Migration (Sachverständigenrat für Integration und Migration), *Chancen in der Krise: Zur Zukunft der Flüchtlingspolitik in Deutschland und Europa, Jahresgutachten 2017*, 41-45 <[www.svr-migration.de/wp-content/uploads/2017/10/SVR\\_Jahresgutachten\\_2017.pdf](http://www.svr-migration.de/wp-content/uploads/2017/10/SVR_Jahresgutachten_2017.pdf)> accessed 15 December 2021; the author of this chapter serves as the Council's vice chairperson.

41 Article 45 TFEU and Articles 45(1), 52(2) CFR do not cover third country nationals.

## 6. Streamlined Procedures

At present, the Dublin system often results in lengthy and ineffective take back procedures, which, moreover, often fail in practice. German statistics show that the initial designation of asylum jurisdiction by state authorities usually takes several months, followed by another two months during which domestic courts decide on whether to reinstall the suspensive effects of appeals. Thus, asylum seekers are legally obliged to return to the state responsible only after up to one year after having first entered.<sup>42</sup> Such long procedures are a problem in their own right, considering that extended periods of factual residence render it less likely that asylum seekers will voluntarily respect the take back decision, or tolerate enforcement measures. Procedural inefficiency turns secondary movements into a self-fulfilling prophecy, culminating in the transfer of jurisdiction.

Against this background, it is apparent why the Commission proposes to streamline procedures: the take back procedure shall be turned into a simple notification subject to shorter time limits; the scope *ratione personae* is extended to beneficiaries of international protection and those who had been relocated; and legal remedies are to be considerably curtailed, requiring domestic courts to decide on the suspensive effect within one month.<sup>43</sup> In future, only those challenging the transfer decision on grounds of family links or the real risk of inhumane or degrading treatment are to be given a legal remedy, thus going even beyond the Proposal of 2016.<sup>44</sup>

Restricting legal remedies returns to the *status quo ante* under the former Dublin II Regulation, which had similarly provided for legal remedies with suspensive effects under restrictive conditions only.<sup>45</sup> It seems to me that the Court of Justice would probably accept the amendment, given that the case law extending legal remedies was based on the wording and general scheme of the Dublin III Regulation.<sup>46</sup> If the latter is reversed, the

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42 See the latest data on the year before the COVID-19 pandemic, which resulted in considerable additional delays, in Federal Government (*Bundesregierung*), 'Antwort auf die Kleine Anfrage der Fraktion Die Linke: Ergänzende Informationen zur Asylstatistik für das Jahr 2019' (Bundestag-Drucksachen 19/18498, 2 April 2020) 48 <<https://dserver.bundestag.de/btd/19/184/1918498.pdf>> accessed 15 December 2021.

43 See Articles 26(1)(c), (d), 31, 33(1) Proposal for an AMMR Regulation (n 22).

44 Ibid Article 33(3)(1); in line with Article 28(4), (5) Commission Proposal for a Dublin IV Regulation COM(2016) 270 of 4 May 2016.

45 See Article 19(2) former Dublin II Regulation (EC) No 343/2003 [2003] OJ L50/1.

46 See ECJ, *Ghezalbash*, C-63/15, EU:C:2016:409, para 35; ECJ, *A.S.*, C-490/16, EU:C:2017:585, paras 24-25; and ECJ, *Mengesteab*, C-670/16, EU:C:2017:587, paras

case law can be expected to accept that choice. Article 13 ECHR does not prevent such restriction, since it applies only to those with an arguable claim that another human right was violated<sup>47</sup>—a condition the Commission carefully respects; it foresees a remedy for family links and regarding inhumane or degrading treatment. Article 47 CFR does not arguably require further protection either, since it should be read to presuppose, in cases not involving human rights, individual statutory rights, whose scope is determined by the legislature.<sup>48</sup> Alternatively, interference may possibly be justified on proportionate public policy grounds.<sup>49</sup>

An Achilles heel of the reform proposal may be an exception for situations ‘force majeure’, which the Commission defines in rather general language in a non-binding recital: ‘Member States may be faced with abnormal and unforeseeable circumstances outside their control, the consequences of which could not have been avoided in spite of the exercise of all due care.’<sup>50</sup> That is relevant for our topic, since invocation of *force majeure* would effectively suspend take back procedures.<sup>51</sup> To be sure, take back procedures rarely result in the actual transfer anyway, but their official suspension might be a signal, in light of previous comments on the scant knowledge base, individuals might possibly read as an invitation to move elsewhere. Member States can activate the suspension clause unilaterally, without having asked the Commission or the Council for authorisation. In case the situation endures for more than one year, countries where asylum seekers are factually residing would officially have to assume responsibility and perform the asylum procedure.<sup>52</sup>

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41-62; as well as Maarten den Heijer, ‘Remedies in the Dublin Regulation: *Ghezelbash* and *Karim*’ (2017) 54 CML Rev. 859, 862-869; contra ECJ, *Abdullahi*, C-394/12, EU:C:2013:813, para 60; and ECJ, *Puid*, C-4/11, EU:C:2013:740, paras 25-31 on the former Dublin II Regulation.

47 See ECtHR, judgment of 21 January 2011 [GC], No. 30696/09, *M.S.S. v. Belgium & Greece*, para 288.

48 See Advocate General Michal Bobek, *El Hassani*, C-403/16, EU:C:2017:659, paras 74-84.

49 See Article 52(1) CFR; and the critical position of Siliva Morgades-Gil, ‘The Right to Benefit from an Effective Remedy against Decisions Implying the Return of Asylum Seekers to European Safe Countries’ (2017) 19 EJML 255, 274-277.

50 Recital 7 Proposal for a Crisis and Force Majeure Regulation, COM(2020) 613 of 23 September 2020.

51 *Ibid*, Article 8(3).

52 *Ibid*, Article 8(3) third sentence.

## 7. 'Sticks': Sanctioning Disrespect for EU Rules

In line with the earlier observation that positive and negative sanctions can be combined, the Commission reiterates some of the sanctions which had featured in the 2016 Proposal for a Dublin IV Regulation. Those moving elsewhere will be subject to an accelerated asylum procedure;<sup>53</sup> a preclusion period for submitting relevant information shall be introduced, whose practical effects would depend on how domestic courts handle the provision;<sup>54</sup> an additional, express obligation not to engage in secondary movements and to comply with transfer decisions cannot be expected to change much in practice.<sup>55</sup> Secondary movements of asylum seekers are illegal already. The absence of border controls in the Schengen area should not be misunderstood as legal authority to cross internal borders. Doing so presupposes the possession of a residence permit, which asylum seekers do not have.<sup>56</sup> Beneficiaries of international protection have a residence permit, but they may often lack sufficient resources, or cannot justify the purpose of a short-stay of no more than 90 days, followed by return to the country responsible. As a result, they are not covered by the provisions authorising intra-European mobility for short stays within the Schengen area.<sup>57</sup> It may be appropriate to render these somewhat obscure provisions better known, but reaffirming that secondary movements are illegal will not change much in practice.

The most significant sanction is the reduction of social benefits in line with the ongoing negotiations on the reform of the Reception Conditions

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53 See Article 40(1)(g) Proposal for an Asylum Procedures Regulation, COM(2016) 467 of 13 July 2016, read in conjunction with Article 9(1) Proposal for an AMMR Regulation (n 22).

54 Ibid Article 10(2); in Germany, for instance, administrative Courts are obliged to verify the fact *ex officio*; preclusion clauses for arguments put forward by the parties may not have much practical effects as a result.

55 Article 9(4)(a), (5) Proposal for an AMMR Regulation (n 22).

56 See Article 21(3) Convention Implementing the Schengen Agreement (adopted 19 June 1990, entered into force 1 September 1993) [2000] OJ L239/19, as amended by Regulation (EU) No 265/2010 as regards movement of persons with a long-stay visa [2010] OJ L85/1; and Article 9(1) Asylum Procedures Directive 2013/32/EU.

57 Ibid Article 21(3) read in conjunction with Article 6(1) Schengen Borders Code Regulation (EU) 2016/399; see also, on previous disputes between France and Italy on movement of those with domestic temporary protection, Sara Casella Colombau, 'Crisis of Schengen? The Effect of Two "Migrant Crises" (2011 and 2015) on the Free Movement of People at an Internal Schengen Border' (2020) 46 Journal of Ethnic and Migration Studies 2258, 2264-2266.

Directive.<sup>58</sup> However, the Commission proposes to introduce a double caveat limiting the scope of the reduction *ratione materiae*. Note that the reduction remains subject to a threefold caveat. Firstly, it shall apply once a transfer decision has been notified to the individual; it would not take effect automatically whenever someone files a second asylum application. Secondly, the general scheme of the draft legislation indicates that the reduction will come to an end with the transfer of jurisdiction. It would not, therefore, result in permanent exclusion from social benefits. Thirdly, the Council's compromise text states that the reduction shall be 'without prejudice to the need to ensure a standard of living in accordance with [the Charter]', whose exact requirements remain uncertain at this juncture.

Notwithstanding these caveats, the effects of the reduction in social assistance should not be overestimated. While the level of benefits can influence secondary movements in line with previous comments, other factors are more relevant, notably the prospect of labour market success. These broader pull factors, in particular different degrees of economic attractiveness, cannot be influenced by secondary legislation. Social and economic discrepancies between different Member States will persist; CEAS legislation cannot establish a comprehensive level playing field.

Closer inspection shows that the degree of harmonisation remains limited, even in those subject areas where the legislature has regulatory leverage. The future Qualification Regulation aims to establish a 'uniform status' throughout the Union, but does so by obliging Member States to treat beneficiaries of international protection akin to nationals, thereby reiterating discrepancies between the level of domestic welfare payments. A refugee will receive less support in Bulgaria than in Belgium.<sup>59</sup> During the asylum procedure, the situation is similar, since the Proposal for a Recast of the Reception Conditions Directive continues to guarantee an 'adequate standard of living', mirroring rules for nationals.<sup>60</sup> Crucially, I do not claim that the Commission should instruct Member States to

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58 See Article 17a Commission Proposal for a Recast of the Reception Conditions Directive, COM(2016) 465 of 13 July 2016; and the provisional political compromise among the Member States enshrined in Council doc. 10009/18 of 18 June 2018.

59 Article 34 Commission Proposal for a Qualification Regulation, COM(2016) 466 of 13 July 2016 establishes benefits for nationals as a point of reference, although lower standards are permissible; similarly at present, Article 29 Qualification Directive 2011/95/EU.

60 Article 16(2), (6) Proposal for a Recast of the Reception Conditions Directive (n 58) are by and large identical with Article 17(2), (5) Reception Conditions Directive 2013/33/EU.

give higher level of benefits to beneficiaries of international protection than to nationals. All I intend to say is that the Commission is in a regulatory dilemma when harmonising reception conditions during the asylum procedure and after recognition. Domestic asylum systems are bound to mirror the discrepancies in welfare levels between the 27 Member States of the European Union.

Somewhat surprisingly, the Commission presented another idea how to respond to irregular movements in December 2021, in the overall context of an amendment of the Schengen Borders Code. Doing so recognises that Schengen and Dublin have always been linked, politically at least.<sup>61</sup> In order 'to counter irregular movements between Member States'<sup>62</sup> the Commission suggests introducing a novel mechanism for refusal of entry and the direct transfer to neighbouring countries. By way of example, Austria could cooperate with Slovenia to return people apprehended 'as part of cross-border police operational cooperation, in particular, during joint police patrols'<sup>63</sup>. This limitation effectively excludes unilateral returns without the consent of neighbouring states. Individuals would be returned there on the basis of a standard form within a short period of no more than one day; legal remedies are available but are foreseen not to have suspensive effect.<sup>64</sup> Even though the instrument has apparently been designed to apply to refugees and asylum seekers, the proposal remains silent on how it relates to the asylum *acquis*. It remains unclear, in particular, whether the transfer could take place if the person applied for asylum. In that respect much will depend on the reform of the Dublin system. Beneficiaries of international protection, in particular, might be covered by the new instrument on rejection at internal borders, provided that EU institutions agree not to transfer asylum jurisdiction for those holding a protection status already.

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61 Remember that on asylum jurisdiction in today's Dublin III Regulation reiterates the original compromise enshrined in Articles 28-38 Convention Implementing the Schengen Agreement (n 56); see Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 35.

62 Recital 25 Commission Proposal for an Amendment of the Schengen Borders Code Regulation (EU) 2016/399, COM(2021) 891 of 14 December 2021.

63 Ibid Article 23a(1)(c).

64 Ibid Article 23(a), read in conjunction with Annex XII.



### 8. Continuation of the Status Quo: Transfer of Jurisdiction

A surprising novelty of the Pact on Migration and Asylum was the absence of ‘stable’, or even ‘permanent’, asylum jurisdiction. Instead, the Commission retains the individual right to a second asylum procedure, which effectively obliges Member States to officially assume jurisdiction and to assess the merits of an application once the transfer to the state responsible has failed in practice.<sup>65</sup> In particular, the Commission proposes to maintain the six-month rule during which the transfer must take place, while abolishing the three-month time limit for the initiation of the take back notification, which is less relevant in practice.<sup>66</sup> Moreover, the Commission considerably broadens the current extension of the time limit of six months for the actual transfer whenever asylum seekers ‘abscond’: in cases of absconding, the take back option endures indefinitely, instead of the current 18-month deadline.<sup>67</sup> In practice, however, the practical impact of the extension would be limited, since the Court of Justice interprets the meaning of ‘absconding’ narrowly, excluding ‘simple’ scenarios of individuals obstructing transfers, for as long as authorities know where they reside.<sup>68</sup>

The transfer of jurisdiction effectively reiterates the legislative status quo under the Dublin III Regulation that allows for double (and threefold<sup>69</sup>) asylum applications in cases of secondary movements. That move is a departure from the Proposal of 2016, which had suggested perpetuating asylum jurisdiction: the failure of the take back procedure was no longer supposed to entail a transfer of responsibility. Asylum seekers were expected to return to the state responsible instead of receiving a second, albeit accelerated procedure elsewhere. This political about-turn is even more surprising if we remember that the European Parliament had supported the discontinuation of the transfer of jurisdiction, while the Council had called it a ‘stable responsibility’ for a period of five or eight years.<sup>70</sup>

65 See Articles 27(1), 35(1), (2) Proposal for an AMMR Regulation (n 22).

66 Article 21(1)(3) Dublin III Regulation (EU) No 604/2013 shall be discontinued.

67 Contrast Article 35(2)(2) Proposal for an AMMR Regulation (n 22) with Article 29(2) Dublin III Regulation (EU) No 604/2013.

68 See ECJ, *Jawo*, C-163/17, EU:C:2019:218, paras 52-65.

69 See ECJ, *Hasan*, C-360/16, EU:C:2018:35, paras 21-45, 71-88.

70 The EP LIBE Committee’s Report (n 30) had sponsored far-reaching solidarity measures, including mandatory relocation, while supporting permanent jurisdiction; on deliberations within the Council, see Article 9a Presidency’s compromise proposals (n 22).

There is, however, one scenario in relation to which the Commission wants to introduce permanent jurisdiction: beneficiaries of international protection. To start with, beneficiaries of international protection will be covered by the take back obligation under the new Asylum and Migration Management Regulation, in contrast to the Dublin III Regulation.<sup>71</sup> What is more, the Commission generally excluded beneficiaries of international protection from the transfer of jurisdiction enshrined in Article 27(1)(2) of the Proposal for an Asylum and Migration Management Regulation. The end result leaves us with a mixed overall message: transfer of jurisdiction would be abandoned for beneficiaries of international protection, not however for asylum seekers, as well as for those whose application was rejected or who have been granted complementary humanitarian protection under domestic laws. If these people moved on, they might still receive a second full asylum procedure in the country of their choice.

The question of permanence will undoubtedly feature prominently in the political negotiations. Several Member States have called for the abrogation of the transfer of jurisdiction, which the EP's Draft Report leaves intact.<sup>72</sup> It seems to me that the continued availability of double asylum applications can be read as an implicit recognition, on the part of the Commission, that—notwithstanding the insistence on a 'fresh start' through a 'new' pact<sup>73</sup>—the practical effects of the proposals would not differ decisively from the status quo. The solidarity mechanism remains feeble and the novel emphasis on return might not work in practice. Secondary movements would be here to stay, together with the first entry criterion.

### 9. Conclusion: Overcoming the Vicious Circle

For many years, the Commission had pursued a negotiation strategy based on alleged win-win scenarios: its proposals were presented to satisfy the needs and desires of (almost) everyone. The 'pact' follows the reverse scenario. Commissioner Johansson predicted: 'I will have zero Member States

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71 Compare Article 26(1)(c) Proposal for an AMMR Regulation (n 22) with Article 18(1) Dublin III Regulation (EU) No 604/2013.

72 See Council docs 5755/21 of 29 January 2021; and 11617/21 of 9 July 2021; the EP's LIBE Committee Draft Report (n 23) does not propose to amend Articles 27(1), 35(2).

73 See Daniel Thym's introductory chapter to this volume.

saying it's a perfect proposal.<sup>74</sup> She was certainly correct, as indicated by the reaction of Southern states to the solidarity mechanism and of Northern countries to secondary movements. If the proposals were adopted as they stand, we might be confronted with more of the same, albeit under changed circumstances: a bit more solidarity and slightly less secondary movements, which, nonetheless, would result in a transfer of jurisdiction in many cases. That may not be the reset button some had hoped for, but it could be a realistic assessment of what might reasonably be achieved at this juncture. We shall see whether this lack of ambition is enough for Member States and the European Parliament to find common ground.

Would the situation be satisfactory in the medium run if the Commission proposals found their way into the Official Journal? I doubt that the cleavages between Member States would be overcome. 'Frontline' Member States would continue complaining about the absence of meaningful solidarity, while countries further North would decry the persistence of irregular movements. The two competing narratives that have haunted European asylum policy in recent years would be here to stay. We might even see a vicious circle of continued reciprocal accusations about the lack of solidarity and responsibility at the same time. Instead of mutual trust, reticence among Member States would be enhanced.

The end result might be convergence on the lowest common denominator: prevent refugees from entering Europe in the first place, by means of externalisation, to avoid poisonous debates about solidarity and secondary movements. For those who do not want such an outcome, the overall lesson stands out: overcome the false dichotomy between either more solidarity or less secondary movements, as well as between either positive incentives or negative sanctions. Try to optimise compliance by designing rules that might work reasonably well in practice. Such a reform would certainly not bring about a brave new world of European asylum law, but it may be a pragmatic move to prevent the Common European Asylum System from becoming dysfunctional by means of external closure in response to protracted compliance deficits and intergovernmental cleavages.

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74 See Alexandra Brzozowski, 'EU's New Migration Pact to Request "Mandatory Solidarity" from Member States' (EurActiv.com, 23 September 2020) <[www.euractiv.com/section/justice-home-affairs/news/eus-new-migration-pact-to-request-mandatory-solidarity-from-member-states/](http://www.euractiv.com/section/justice-home-affairs/news/eus-new-migration-pact-to-request-mandatory-solidarity-from-member-states/)> accessed 15 December 2021.



# Immediate Protection in the New Pact on Migration and Asylum: A Viable Substitute for Temporary Protection?

Meltem Ineli-Ciger\*

## 1. Introduction

The European Commission concluded in 2020 that “The EU is still lacking a toolbox to address situations of crisis, which could result from a mass influx of third-country nationals arriving irregularly capable of rendering a Member State’s asylum or reception system non-functional, and have serious consequences on the functioning of the overall CEAS.”<sup>1</sup> and concluded that Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection (hereinafter *Temporary Protection Directive 2001/55/EC*)<sup>2</sup> no longer responds to the current reality of Member States and needs to be repealed. By referencing the conclusions of the Study on Temporary Protection Directive 2001/55/EC<sup>3</sup> published in 2016 the Commission offered the following reasons for this conclusion: a) the absence of definitions of different types of mass influx set out in the Temporary Protection Directive 2001/55/EC and indicators on how

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- 1 European Commission, Commission Staff Working Document Accompanying the Document Proposal For A Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, SWD(2020) 207 final of 23 September 2020, 63.
- 2 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof, OJ L 212/12 of 7 August 2001 (Temporary Protection Directive).
- 3 Hanne Beirens, Sheila Maas, Salvatore Petronella, Maurice van der Velden, ‘Study on the temporary protection directive: Final report’ European Commission (2016) <[https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-europe-an-asylum-system/temporary-protection\\_en](https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-europe-an-asylum-system/temporary-protection_en)> accessed 19 October 2021.

to measure these; b) impossibility to attain Member State agreement on the possible activation of the Directive and c) procedural weaknesses to activate and implement the temporary protection mechanism namely, cumbersome activation mechanism foreseen in the Directive.<sup>4</sup> To remedy the outlined shortcomings, the Commission presented the Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum<sup>5</sup> (hereinafter *Proposal for a Migration and Asylum Crisis Regulation*) as part of the new European Pact on Asylum and Migration<sup>6</sup> on 23 September 2020 which sought to repeal the Temporary Protection Directive 2001/55/EC and aims at introducing immediate protection instead.<sup>7</sup>

A closer look at the new immediate protection status reveals that immediate protection resembles a lot to temporary protection in some respects though there are a number of differences.<sup>8</sup> Motivation behind the introduction of the immediate protection status can be identified as to establish a group protection status that would be applied in situations of crisis as opposed to the Temporary Protection Directive 2001/55/EC which remains, to this date, unimplemented.<sup>9</sup> To increase the protection framework's chances of implementation, the Commission has changed the name of the protection status from temporary to immediate protection, simplified its activation/triggering mechanism, narrowed down its scope and limited its duration. This chapter examines whether these changes will

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4 European Commission Staff Working Document (n 1).

5 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum COM (2020) 613 final, 2020/0277(COD) of 23 September 2020.

6 European Commission, 'A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity' (Press Release, IP/20/1706 of 23 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706)> accessed 19 October 2021.

7 Galina Cornelisse and Giuseppe Campesi, 'The European Commission's New Pact on Migration and Asylum Horizontal Substitute Impact Assessment' (European Parliamentary Research Service 2021), 79 and 80.

8 This chapter builds on Meltem Ineli-Ciger, 'What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration' (*EU Immigration and Asylum Law and Policy*, 11 November 2020) <<https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/>> accessed 19 October 2021.

9 Meltem Ineli-Ciger, 'Time to activate the Temporary Protection Directive: Why the Directive can play a key role in solving the migration crisis in Europe' (2016) 18(1) *EJML* 1.

increase the likelihood of implementation of the immediate protection status and make a difference in practice by reviewing the newly proposed immediate protection framework and comparing it with the temporary protection status.

## *2. Activation Mechanism*

The Temporary Protection Directive 2001/55/EC was adopted and entered into force in 2001 following the refugee crisis in Kosovo.<sup>10</sup> The Directive established an emergency mechanism to provide immediate and temporary protection to displaced persons from third countries who are unable to return to their country of origin in mass influx situations.<sup>11</sup> The Directive refers to temporary protection as a measure that can be introduced in the event of a mass influx or imminent mass influx. Mass influx is defined as: “arrival in the community of a large number of displaced persons, who came from a specific country or geographical area, whether the arrival in the Community was spontaneous or aided, for example through an evacuation programme”.<sup>12</sup> For the Directive to be implemented, the Council, upon the proposal of the Commission, should adopt a decision by a qualified majority.<sup>13</sup>

In its new Proposal for a Migration and Asylum Crisis Regulation, the Commission maintains the need for a trigger mechanism, which the Commission proposes to entrust on the Commission itself.<sup>14</sup> The Commission should adopt an implementing act triggering the granting of immediate protection status with the assistance of the committees of representatives from EU countries.<sup>15</sup> However, if there are duly justified imperative

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10 Cf Nuria Arenas, ‘The Concept of Mass Influx of Displaced Persons in the European Directive Establishing the Temporary’ (2005) 7 EJML 435, 435.

11 Cf Achilles Skordas, ‘Temporary Protection Directive 2001/55/EC’ in Kai Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law* (Nomos 2016) 1055; Karoline Kerber, ‘The Temporary Protection Directive’ (2002) 4(2) EJML 193.

12 Art. 2(d) of the Temporary Protection Directive 2001/55/EC.

13 Art. 5 of the Temporary Protection Directive 2001/55/EC.

14 Art. 10(3) of the Proposal for a Migration and Asylum Crisis Regulation.

15 Art. 11(2) of the Proposal for a Migration and Asylum Crisis Regulation; Art. 8 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers OJ L 55 of 28 February 2011.

grounds of urgency the Commission can adopt an implementing act without submitting it to the committee first.<sup>16</sup> This means, if the situation of crisis is so dire that it makes the granting of immediate protection status absolutely urgent and necessary, then the Commission does not have to follow the examination procedure<sup>17</sup> and can adopt a decision which will be in force immediately.

While these institutional rules might appear quite complex, the experience of the Temporary Protection Directive 2001/55/EC shows how relevant they are in practice. Under which circumstances can the Commission trigger these mechanisms? Article 1(2)(a) and (b) of the Proposal for a Migration and Asylum Crisis Regulation defines ‘a situation of crisis’ as:

*“(a) an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State’s asylum, reception or return system non-functional and can have serious consequences for the functioning of the Common European Asylum System or the Common Framework as set out in Regulation (EU) XXX/XXX [Asylum and Migration Management], or  
(b) an imminent risk of such a situation.”*

As I interpret this definition four conditions need to be fulfilled for a situation of crisis to exist: to begin with, an imminent or actual mass influx situation should exist. It should be noted that unlike the Temporary Protection Directive 2001/55/EC, the Proposed Regulation does not define the term ‘mass influx’. Secondly, the mass influx should consist of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations. Thirdly, the number of persons arriving irregularly to a member state or disembarked after a search and rescue operation should be disproportionate to the population and GDP of the Member State concerned. Finally, the nature and scale of the arrivals should make the Member State’s asylum, reception or return system non-functional. Mass influx may also adversely affect the Common European Asylum System or the Common Framework as set out in the Asylum and Migration Management Regulation Propos-

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16 Art. 11(2) of the Proposal for a Migration and Asylum Crisis Regulation.

17 European Commission, Comitology (2021) <[https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts/comitology\\_en](https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts/comitology_en)> accessed 19 October 2021.



al<sup>18</sup> though this is not cited as a condition but rather a likely result of a situation of crisis.

The novelty in immediate protection is the fact that the Commission, instead of the Council, has the authority to decide when immediate protection would be granted, who will receive the status and for how long. The proposal leaves this wide discretion, which was left to the Council in the Temporary Protection Directive 2001/55/EC mostly to the Commission.

Another difference between immediate and temporary protection lies within the indicators of a mass influx/crisis situation. While implementation of temporary protection is tied to the existence of a mass influx situation and inability of the asylum system to process this influx without adverse effects for its efficient operation, implementation of immediate protection is linked to the existence of a crisis situation and the Member State's asylum, reception or return system becoming non-functional. A situation of crisis which is key to triggering the granting of immediate protection status includes clearer and more precise indicators compared to the vague definition of 'mass influx' in the Temporary Protection Directive 2001/55/EC. For instance, the inclusion of the number of arrivals being disproportionate to the population and GDP of the Member State can, to a certain extent, make it easier to determine the existence of a crisis. Yet, it is not clear, when exactly a Member State's asylum, reception or return system becomes non-functional; what does this return system include and why a dysfunction in the return system must be accepted as a relevant factor for granting persons in need of protection a group protection status.

A stark difference between two frameworks relates to whether protection status can be given to those persons evacuated directly from their country of origin or neighbouring countries to the country of origin hosting large number of displaced persons. Whilst Article 2 (d) of the Temporary Protection Directive 2001/55/EC makes clear that temporary protection can be granted to "third-country nationals or stateless persons who have been evacuated from their country or region of origin in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country", the Proposal mentions that immediate protection is to be

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18 Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM (2020) 610 final, 2020/0279(COD) of 23 September 2020.

implemented for only “exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State”. Since coming to the Union territories through evacuation programmes cannot be categorised as ‘irregular arrivals’, the immediate protection status is not to be granted to those evacuated from the country of origin or neighbouring states to the country of origin.

The Proposal for a Migration and Asylum Crisis Regulation while defining the term ‘situation of crisis’ makes a reference to irregular arrivals and the number of persons disembarked to Member States following search and rescue operations though no such reference exists in the Temporary Protection Directive 2001/55/EC. This change reflects today’s reality that arrival of mixed flows by sea is a common concern for the EU. In view of the outlined differences, whilst the activation mechanism of the Temporary Protection Directive 2001/55/EC is complex and requires lengthy procedures. Compared to this, immediate protection can be activated arguably through a simpler process without a decision by the Council.

I previously argued<sup>19</sup> that the absence of clear objective indicators of a mass influx, complex and lengthy activation mechanism of the Temporary Protection Directive 2001/55/EC and difficulty in securing a qualified majority vote in the Council in the face of an influx situation that only seriously affects a limited number of Member States can be accounted for the non-implementation of the Directive to this date.<sup>20</sup> Similar reasons are cited in the Study on the Temporary Protection Directive by Beirens et al.<sup>21</sup> which concluded that it seems impossible to achieve Member State agreement on the possible activation of the Directive. This is cited as one of the reasons why the Temporary Protection Directive 2001/55/EC no longer responds to Member States’ current reality and needs to be repealed in the Explanatory Memorandum of the Proposal for a Migra-

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19 Meltem Ineli-Ciger, ‘Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and its Lack of Implementation in view of the Recent Asylum Crisis in the Mediterranean’ in Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common Asylum System* (Brill 2015) 225, 232-236; Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill 2018), 157-162.

20 See for a 2019 MA thesis confirming some of these arguments Pia Micallef, *Six Reasons Why: Europe’s Temporary Protection Mechanism – Case studies from Malta and Italy during the 2010 Arab Spring and motivations behind an unused solution to Europe’s 2015 Migration Crisis* (MA Refugee Protection and Forced Migration Management Thesis, University of London, 2019).

21 Study on the Temporary Protection Directive Final Report (n 3).

tion and Asylum Crisis Regulation. Although it is true that the Proposal for a Migration and Asylum Crisis Regulation increased the number of indicators for determining ‘a mass influx’ or a ‘crisis situation’, some of the proposed indicators such as a large scale irregular arrival of third country nationals and stateless persons rendering Member State’s asylum, reception or return system becomes non-functional, is still vague and open to interpretation.<sup>22</sup> Carrera and Cortinovis agree with this view and add that “the absence of precise and objective qualitative criteria and data to differentiate between situations of ‘migratory pressure’ and ‘crisis’ creates uncertainty as to which circumstances would fall under the scope of each of these two situations.”<sup>23</sup>

The Proposal for a Migration and Asylum Crisis Regulation by adding additional indicators for activation of/triggering the protection scheme, by simplifying the activation/trigger mechanism and by leaving the decision to initiate the protection mechanism not to the Council but to the Commission seeks to overcome the reasons for the non-implementation of the Temporary Protection Directive. However, considering the Commission has not proposed activating the Temporary Protection Directive in the past two decades it is doubtful whether it will adopt a decision to implement the immediate protection status in the near future.

### *3. Eligibility Criteria for Receiving Protection*

Who can be granted immediate protection? Article 10 of the Proposal for a Migration and Asylum Crisis Regulation provides for the granting of immediate protection status to displaced persons who, in their country of origin, are facing an exceptionally high risk of being subject to indiscriminate violence in a situation of armed conflict and who are unable to return to that third country. Indiscriminate violence means violence in situations of international or internal armed conflict which presents a serious and individual threat to a civilian’s life. Simply put, persons who face a high risk

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22 See also EPRS Study on the Temporary Protection Directive Final Report (n 7) 137.

23 Sergio Carrera and Roberto Cortinovis, ‘Proposal for A Crisis And Force Majeure Regulation’ in *The European Commission’s legislative proposals in the New Pact on Migration and Asylum* (Study of the European Parliament, July 2021) <[www.asilep.roject.eu/wp-content/uploads/2021/09/IPOL\\_STU2021697130\\_EN-1.pdf](http://www.asilep.roject.eu/wp-content/uploads/2021/09/IPOL_STU2021697130_EN-1.pdf)> accessed 19 October 2021, 137.

of being subject to bombings, attacks and armed confrontations in areas that are inhabited or frequented by civilians could be granted immediate protection. The Commission has the authority to designate a specific country of origin, or a part of a specific country of origin for persons who have fled or fleeing there to receive immediate protection. Persons representing a danger to the national security or public order of the Member State are excluded from the scope of immediate protection. The Proposal does not provide any guidance on how this exclusion determination will be made and whether an appeal against the decision to exclude a person will be possible. This is unlike the Temporary Protection Directive 2001/55/EC which clearly notes an exclusion decision should follow an individual assessment in line with the principle of proportionality.<sup>24</sup>

The Commission has the authority to designate groups who are to be given the immediate protection status whereas the Council has the power to decide on persons who are to be granted temporary protection. A broad category of persons i.e. refugees, persons fleeing non-international and international armed conflict and endemic violence as well as victims of systematic or generalised human rights violations can be protected within the Temporary Protection Directive's scope.<sup>25</sup> Compared to temporary protection, groups that can be granted the immediate protection status have been defined quite narrowly.

From the outset, the term 'displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict' reminds one immediately of article 15(c) of the Qualification Directive 2011/95/EU<sup>26</sup> and CJEU's El-gafaji judgment.<sup>27</sup> So, it seems, immediate protection is to be granted to a group of persons who, if the international protection procedures had not been suspended, would be eligible for subsidiary protection on the basis of Article 15(c) of the Qualification Directive 2011/95/EU. This limits the potential use of immediate protection since the status can only be granted to those fleeing indiscriminate effects of an armed conflict but not

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24 Art. 28 of the Temporary Protection Directive 2001/55/EC.

25 See Art. 2(c) of the Temporary Protection Directive 2001/55/EC; Skordas, 'Temporary Protection Directive 2001/55/EC' (n 11), 1066.

26 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337 of 20 December 2011.

27 CJEU, C-465/07 ECLI:EU:C:2009:94.

persons fleeing political persecution, systematic violations of their human rights, oppressive regimes etc. For example, in theory while persons fleeing Aleppo and Idlib where the degree of indiscriminate violence reaches such a high level would satisfy the eligibility criteria, a person fleeing Homs or Damascus would not qualify for the immediate protection status despite his/her genuine need for international protection.<sup>28</sup> In line with this, it is advocated by a number of authors that personal scope of immediate protection should be enlarged as to include refugees and other displaced persons such as persons fleeing violence and systematic human rights violations.<sup>29</sup>

#### 4. *Rights of the Protected Persons*

Persons holding immediate protection status would be eligible for the rights of subsidiary protection beneficiaries as laid down in the Qualification Regulation Proposal.<sup>30</sup> The Commission envisages the persons with immediate protection status to receive protection from *refoulement*, information on the rights and obligations relating to their status, maintaining family unity, the right to be issued a residence permit, freedom of movement within the Member State, access to employment, access to education, access to procedures for recognition of qualifications and validation of skills, social security and social assistance, healthcare, rights related to unaccompanied minors, access to accommodation, access to integration measures and repatriation assistance. On the other hand, since the right

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28 Cf EASO, Country Guidance Syria (September 2020), <<https://easo.europa.eu/country-guidance-syria/3342-overview>> accessed 19 October 2021.

29 See Carrera and Cortinovia, 'Proposal For A Crisis And Force Majeure Regulation' (n 23) 178; ECRE, 'Comments on the Commission Proposal For a Regulation Addressing Situations of Crisis and force Majeure in the Field of Migration and Asylum COM (2020) 613' (March 2021) <<https://ecre.org/ecre-comments-on-the-commission-proposal-for-a-regulation-addressing-situations-of-crisis-and-force-majeure-in-the-field-of-migration-and-asylum-com-2020-613/>> accessed 19 October 2021, 23.

30 Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents COM/2016/0466 final, 2016/0223 (COD) of 13 July 2016.

to family unification is secured under the Family Unification Directive 2003/86/EC not under the Qualification Regulation Proposal or the Qualification Directive, immediate protection status holders do not have a right to family unification.

Rights of immediate protection status holders are drafted differently compared to those of temporary protection beneficiaries. The Temporary Protection Directive obliges Member States to protect temporary protection beneficiaries from *refoulement* and provide them with residence permits. The Directive also allows such persons to engage in employed or self-employed activities though states can invoke labour market policies to give priority to EU citizens, citizens of the European Economic Area, and documented migrants from third countries. Member States are further required to provide temporary protection beneficiaries with access to suitable accommodation, necessary assistance in terms of social welfare and means of subsistence and access to medical care, if they do not have sufficient resources. Those under 18 years of age can also enjoy education under the same conditions as nationals.

Unlike immediate protection, temporary protection beneficiaries do not have a right to enjoy equal treatment with nationals of the Member State granting protection with regard to social security, working conditions, freedom of association and affiliation, education, social assistance and healthcare. Moreover, while the Temporary Protection Directive neither provides the status holders with an absolute right to family reunification nor with a right to free movement within the host Member State, immediate protection status holders are to enjoy the mentioned rights. If the Proposed Regulation is adopted, compared to temporary protection immediate protection would offer more rights and entitlements to the status holders in terms of both quality and quantity.

##### *5. Access to International Protection Procedures and Time Limits*

Both immediate and temporary protection do not prejudice the right of its beneficiaries to apply for international protection although these statuses give Member States an opportunity to postpone processing of international protection applications for a certain period of time. The duration of temporary protection is one year and can be further extended by the Council for a maximum of three years.<sup>31</sup> Whereas, immediate protection

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31 Art. 4 of the Temporary Protection Directive 2001/55/EC.

can be granted for a maximum of one year although the Commission has the authority to decide how long immediate protection will continue.<sup>32</sup> This means the Commission can designate a certain period of less than a year during which processing of international protection applications can be suspended and immediate protection will be granted to persons instead.

## 6. Conclusion

Implementation of immediate protection introduced by the Proposal for a Migration and Asylum Crisis Regulation and temporary protection are tied to an activation or a trigger mechanism yet, the trigger mechanism in the Proposed Regulation is much simpler and mainly involves the Commission instead of the Council. Arguably, indicators for triggering immediate protection are clearer and more precise compared to those which apply to temporary protection. Simplifying the activation/trigger mechanism, introducing clearer indicators for identifying a crisis situation and making the Commission the main decision-maker, aim at ensuring that immediate protection is implemented in practice when the need arises – unlike in the case of the Temporary Protection Directive 2001/55/EC, which to date, remains obsolete.

Persons who can be granted immediate protection are defined narrower compared to persons who can be granted temporary protection. This limits the potential use of immediate protection. In a situation where persons who have arrived to a Member State irregularly or those rescued from sea do not flee from an armed conflict but systematic human rights violations, political persecution or oppressive regimes, immediate protection becomes obsolete. This is one of the shortcomings of the newly proposed protection framework. Broadening the personal scope of immediate protection can enable the proposed framework to deal more effectively with mass influx or crisis situations. The rights of immediate protection status holders are more generous compared to the rights of temporary protection beneficiaries and this is certainly a positive aspect of the proposal. Nevertheless, immediate protection can only continue for a year and there is no procedure foreseen to prolong this duration.

In sum, immediate protection with its narrow scope shifts the focus from providing effective protection to a large number of displaced persons

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32 Art. 10 of the Proposal for a Migration and Asylum Crisis Regulation.

in mass influx situations to offer breathing space to Member States until their asylum, reception or return system becomes functional again. One crucial question remains: if the Proposal for a Migration and Asylum Crisis Regulation is adopted, will immediate protection be used in practice? One of the reasons for the non-implementation of the Temporary Protection Directive 2001/55/EC to date was the belief shared by many Member States that an activation of the Directive may create a pull factor for migrants seeking entry to the EU.<sup>33</sup> Thus, it is to be seen whether the outlined shift from temporary to immediate protection in the EU asylum *acquis* and the changes proposed in 2020 will be enough to render immediate protection a more applicable framework. Granting group protection to certain groups fleeing indiscriminate violence in an armed conflict may still create a pull factor for those who wish to flee to Europe and this is certainly not something that the EU or the Member States want. Hence, only time will tell whether the reduced scope of immediate protection would be enough to address this particular concern. In light of the fact that the Commission has not proposed activating the Temporary Protection Directive 2001/55/EC in the past two decades, similar to temporary protection, immediate protection is likely to remain as a measure of last resort to respond to future mass influx situations.

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33 Ineli-Ciger, 'Has the Temporary Protection Directive Become Obsolete?' (n 19) 233.



# Towards a Thousand Little Morias: The EU (Non-)Rescue Scheme - Criminalising Solidarity, Structuralising Defection

Violeta Moreno-Lax\*

## 1. Introduction: Saving Lives by Pre-empting Arrivals<sup>1</sup>

The ambition of the New Pact on Migration and Asylum is to ‘build a system that manages and normalises migration for the long term and which is fully grounded in European values and international law’,<sup>2</sup> avoiding the kind of piecemeal *ad hoc*-ism that may degenerate in Moria-like fiascos.<sup>3</sup> This requires a ‘comprehensive approach’ that recognises ‘collective responsibilities ... and tackles the implementation gap’ of the relevant standards,<sup>4</sup> while ensuring solidarity, including in the maritime domain.<sup>5</sup> Search and rescue (SAR) is acknowledged by the European Commission not only as ‘a moral duty and a ... [binding legal] obligation under international law’, but also as ‘a key element of the European integrated

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1 This chapter draws from Moreno-Lax, ‘A New Common European Approach to Search and Rescue? Entrenching Proactive Containment’ (EU Migration Law Blog, 3 February 2021) <<https://eumigrationlawblog.eu/a-new-common-european-approach-to-search-and-rescue-entrenching-proactive-containment/>>; and from Violeta Moreno-Lax and others, ‘The EU Approach on Migration in the Mediterranean’, PE 694.413 (European Parliament 2021), 70-117 <[www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL\\_STU\(2021\)694413\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU(2021)694413_EN.pdf)>. All websites last accessed 17 November 2021.

2 ‘New Pact on Migration and Asylum’, COM(2020) 609 final, 23 September 2020, 1.

3 Ibid, 3 and 13. See also ‘Moria Migrants: Fire Destroys Greek Camp Leaving 13,000 without Shelter’ (BBC, 9 September 2020) <[www.bbc.com/news/world-europe-54082201](http://www.bbc.com/news/world-europe-54082201)>.

4 ‘New Pact on Migration and Asylum’ (n 2), 3. For an alternative understanding of the ‘comprehensive approach’ required, see Violeta Moreno-Lax and Efthymios Papastavridis (eds), *‘Boat Refugees’ and Migrants at Sea: A Comprehensive Approach* (Brill 2016).

5 ‘New Pact on Migration and Asylum’ (n 2), 5-6.

border management' and 'a shared responsibility' of both the Union and its Member States.<sup>6</sup>

However, the focus—as with much of the New Pact—is neither on the protection of seaborne migrants and refugees nor on the elimination of the structural factors that push them to take the sea to reach safety in the first place. The main concern is with managing mixed flows and countering irregular arrivals on consideration that '[d]angerous attempts to cross the Mediterranean continue to bring great risk and fuelling criminal networks'.<sup>7</sup> Accordingly, the measures proposed to develop a 'common European approach to search and rescue' centre on 'ensuring effective migration management',<sup>8</sup> rather than enhancing the SAR response, providing safe passage opportunities, or establishing legal pathways to protection.

Five elements are expected to achieve this objective: (1) a more predictable relocation mechanism for disembarkations; (2) enhanced cooperation and coordination among Member States; (3) the deeper involvement of Frontex through increased operational and technical support; (4) the fight against the facilitation of irregular entry; and (5) strengthened cooperation with countries of origin and transit to prevent unauthorised crossings.<sup>9</sup> These measures may, as an add-on, 'contribute to saving lives at sea',<sup>10</sup> but this is not the priority. The priority is to curb 'dangerous journeys and irregular crossings' in partnership with third countries and the prevention of the facilitation of unauthorised arrivals.<sup>11</sup>

This entrenches a two-pronged model of proactive containment,<sup>12</sup> which prioritises the fight against irregular migration above all else.<sup>13</sup> On the one hand, it relies on countries of origin and transit as deputised (extraterritorial) enforcers of Schengen controls and, on the other hand, it targets irregular movement through the criminalisation of smugglers, traffickers, and anybody who facilitates unauthorised arrivals,<sup>14</sup> except in

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6 Ibid, 13.

7 Ibid.

8 Ibid, heading of section 4.3 and p. 14.

9 Ibid, 13-14.

10 Ibid, 13 (emphasis added).

11 Ibid, 14 and sections 5 and 6.

12 Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 81 <[www.unhcr.org/5a056ca07.pdf](http://www.unhcr.org/5a056ca07.pdf)>.

13 See chapters by Elspeth Guild and Paula García Andrade in this collection.

14 See, e.g., FRA, 'June 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them' (19 June 2020) <<https://fra>

limited circumstances discussed below. In my view, what the *common European approach to search and rescue* thereby amounts to is the official endorsement and formal entrenchment of the rescue-through-interdiction/rescue-without-protection paradigm that has developed in practice over the past years,<sup>15</sup> since Frontex launched its first maritime (border surveillance) operation back in 2006.<sup>16</sup>

In its latest stages of formation, this model has been characterised by an ‘interdiction by omission’ strategy,<sup>17</sup> based on the negation of rescue,<sup>18</sup> including through outright abandonment of survivors at sea,<sup>19</sup> the withdrawal of naval assets from Frontex and EUNAVFORMED operations,<sup>20</sup> or the reduction of operational areas covered by maritime missions to avoid contact with potential ‘boat migrants’,<sup>21</sup> as well as by the use of drones,<sup>22</sup> and information-sharing capabilities to allow third-country inter-

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- .europa.eu/en/publication/2020/2020-update-ngos-sar-activities#TabPubOverview0>.
- 15 Violeta Moreno-Lax, ‘The EU Humanitarian Border and the Securitization of Human Rights: The “Rescue-through-Interdiction / Rescue-without-Protection” Paradigm’ (2018) 56 *Journal of Common Market Studies* 119.
  - 16 Frontex, ‘Longest FRONTEX coordinated operation – HERA, the Canary Islands’ (Press Release, 19 December 2006) <<https://frontex.europa.eu/media-centre/news/news-release/longest-frontex-coordinated-operation-hera-the-canary-islands-WpQJs>>.
  - 17 Violeta Moreno-Lax, ‘Protection at Sea and the Denial of Asylum’ in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021), 483 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3623029](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623029)>.
  - 18 Charles Heller and Lorenzo Pezzani, ‘Death by Rescue: The Lethal Effects of Non-Assistance at Sea’ (Forensic Oceanography, April 2016) <<https://forensic-architecture.org/investigation/death-by-rescue-the-lethal-effects-of-non-assistance-at-sea>>.
  - 19 PACE, ‘The “Left-to-die Boat”: Actions and Reactions’, Resolution 1999 (2014) <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21024&lang=en>>.
  - 20 Council of the EU, ‘EUNAVFORMED Operation Sophia: Mandate Extended until 30 September 2019’ (Press Release, 29 March 2019) <[www.consilium.europa.eu/en/press/press-releases/2019/03/29/eunavfor-med-operation-sophia-mandate-extended-until-30-september-2019/](http://www.consilium.europa.eu/en/press/press-releases/2019/03/29/eunavfor-med-operation-sophia-mandate-extended-until-30-september-2019/)>.
  - 21 Eugenio Cusumano, ‘Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya between Humanitarianism and Border Control’ (2019) 54 *Cooperation and Conflict* 3, 10-12.
  - 22 ‘Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over’ (*The Guardian*, 4 August 2019) <[www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu](http://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu)>.

ceptions of potential shipwrecks.<sup>23</sup> Port closures and the criminalization of ‘solidarity rescues’ undertaken by civil society organizations are also representative of this trend.<sup>24</sup> The overarching goal, in the words of the European External Action Service (EEAS), is to ‘save lives by reducing crossings’,<sup>25</sup> so as ‘to better *contain* the growing flows of illegal migration’ across the Mediterranean.<sup>26</sup> And this remains the underpinning rationale of the new common European approach to SAR.

This contribution will show that, in the New Pact, the emphasis is on minimizing opportunities for rescue to translate into arrival and entry into EU ports by investing in building third countries’ interdiction capacity, while divesting from Member States’ and EU rescue missions, and keeping SAR NGOs under close scrutiny, treating them as suspicious and potentially criminally liable for their contribution to facilitating unauthorised crossings. With this in mind, the Commission has proposed two soft-law instruments to deliver its vision: a Recommendation on how to deal with vessels owned or operated by private entities undertaking rescue activities (‘SAR Recommendation’)<sup>27</sup> and Guidance on the implementation of EU rules on the facilitation of irregular migration (‘Criminalisation Guidance’),<sup>28</sup> which concentrate on the NGOs providing rescue at sea since the outbreak of the ‘refugee crisis’ in 2015. The other aspects of the common European

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23 On the information sharing strategy of EUNAVFORMED with Libyan actors, see Letter by Paraskevi Michou, European Commission Director General for Migration and Home Affairs, to Fabrice Leggeri, Frontex Executive Director, 18 March 2019, Ref. Ares(2019)1755075 of 18 March 2019 <[www.statewatch.org/media/documents/news/2019/jun/eu-letter-from-frontex-director-ares-2019\)1362751%20Rev.pdf](http://www.statewatch.org/media/documents/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf)>.

24 For an overview, see Moreno-Lax and others, ‘The EU Approach on Migration in the Mediterranean’ (n 1), 92-117.

25 EEAS, ‘European Union Naval Force – Mediterranean Operation Sophia’ (Mission Update, 15 September 2016) <[https://eas.europa.eu/sites/default/files/factsheet\\_eunavfor\\_med\\_en\\_0.pdf](https://eas.europa.eu/sites/default/files/factsheet_eunavfor_med_en_0.pdf)>.

26 EU Presidency Conclusions, EUCO 22/15, 26 June 2015, para 3 (emphasis added).

27 Commission Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, C(2020) 6468 final, 23 September 2020 (‘SAR Recommendation’) <[https://ec.europa.eu/info/sites/default/files/commission-recommendation\\_cooperation-operations-vessels-private-entities\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/commission-recommendation_cooperation-operations-vessels-private-entities_en_0.pdf)>.

28 Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, C(2020) 6470 final, 23 September 2020 (‘Criminalisation Guidance’) <[https://ec.europa.eu/info/sites/default/files/commission-guidance-implementation-facilitation-unauthorised-entry\\_en.pdf](https://ec.europa.eu/info/sites/default/files/commission-guidance-implementation-facilitation-unauthorised-entry_en.pdf)>.

approach to SAR have been left inchoate in Section 4.3 of the Pact—which constitutes further evidence of where EU priorities lie.

Before delving into the details of the proposed instruments, it is worth discussing the background of the crisis environment within which the proactive containment approach has crystallized. That will provide the basis to analyse the main aspects of the common European approach to SAR in terms of rescue, disembarkation, and relocation envisaged by the Commission and allow for conclusions on the implications that ensue.

## 2. Background: A ‘Crisis’ of our Own Making

The origins of the boat migration ‘crisis’, within which the proactive containment approach has consolidated and to which the common European approach to SAR intends to respond, lie in a number of factors, starting with the drastic reduction of SAR capacity by EU coastal Member States in the Mediterranean from the 2010s, resulting in mass drownings,<sup>29</sup> which led to the launch of the Italian *Mare Nostrum* Operation in 2014,<sup>30</sup> withdrawn one year after and replaced with Frontex-coordinated border control (rather than rescue) missions *Triton*,<sup>31</sup> *Triton+*,<sup>32</sup> and *Themis*.<sup>33</sup> Gaps in SAR capacity were met with increased deaths at sea, earning the Mediterranean the title of ‘world’s deadliest’ frontier by the UN.<sup>34</sup> SAR NGOs emerged as a result to try to fill those gaps in SAR provision. Although their presence was initially welcomed and their cooperation with Italian,

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29 See, e.g., ‘Italy Boat Sinking: Hundreds Feared Dead off Lampedusa’ (*BBC News*, 3 October 2013) <[www.bbc.com/news/world-europe-24380247](http://www.bbc.com/news/world-europe-24380247)>.

30 Marina Militare Italiana, *Mare Nostrum Operation* <[www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx](http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx)>.

31 European Commission, ‘Frontex Joint Operation “Triton” – Concerted Efforts for managing migrator flows in the Central Mediterranean’, (MEMO, 31 October 2014) <[www.europa-nu.nl/id/vjohgqgsbzzn/nieuws/frontex\\_joint\\_operation\\_triton\\_concerted](http://www.europa-nu.nl/id/vjohgqgsbzzn/nieuws/frontex_joint_operation_triton_concerted)>.

32 Frontex, ‘Joint Operation Triton (Italy)’ (Press Release, 10 October 2016) <<https://frontex.europa.eu/media-centre/news/focus/joint-operation-triton-italy-ekKaes>>.

33 Frontex, ‘Operation Themis (Italy)’, Main Operations (Feature) <<https://frontex.europa.eu/we-support/main-operations/operation-themis-italy/>>.

34 ‘Mediterranean crossing still world’s deadliest for migrants – UN report’ (*UN News*, 24 November 2017) <<https://news.un.org/en/story/2017/11/637162-mediterranean-crossing-still-worlds-deadliest-migrants-un-report>>. The Commission refers to IOM data counting over 20,000 fatalities since 2014 in Recital 3, SAR Recommendation (n 27). See also IOM, Missing Migrants <<https://missingmigrants.iom.int/region/mediterranean>>.

Maltese, and Greek coastguards run smoothly for a period of time, this changed in 2017, when the Italian government signed its MoU with Libya in February 2017,<sup>35</sup> to jointly fight irregular migration across the Central Mediterranean route, followed by the controversial Code of Conduct for SAR NGOs in July 2017,<sup>36</sup> which among other things required them ‘not to obstruct Search and Rescue operations by official Coast Guard vessels, including the Libyan Coast Guard’.<sup>37</sup> This led to the criminalisation of the IUVENTA crew and the impoundment of their vessel in August 2017,<sup>38</sup> after *Jugend Rettet* refused to sign the Code, due to several clauses being considered in breach of international law.<sup>39</sup> Indeed, both the MoU with Libya and the Code of Conduct disregard the grave and widespread human rights abuses committed against migrants both in Libya and at sea – including by the Libyan Coastguard, which may amount to atrocity crimes, as indicated by the ICC Prosecutor in her investigation.<sup>40</sup>

The wave of criminalisation of SAR organisations and the de-legitimation of maritime arrivals was reinforced once Salvini became Italy’s Interior Minister in 2018,<sup>41</sup> when he adopted a special security decree implementing a ‘closed ports’ policy, banning SAR NGOs from entering

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35 ‘Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic’ (2 February 2017, unofficial translation) <[https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM\\_translation\\_finalversion.doc.pdf](https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf)>.

36 (Italian) Code of Conduct for NGOs Involved in Migrants’ Rescue Operations at Sea (July 2017) <[www.humanrightsatsea.org/wp-content/uploads/2017/07/2017070516-EU-Code-of-Conduct.pdf](http://www.humanrightsatsea.org/wp-content/uploads/2017/07/2017070516-EU-Code-of-Conduct.pdf)>.

37 Ibid, para 9.

38 See the official website of the IUVENTA crew campaign <<https://iuventa-crew.org/>>.

39 ‘Italy stops, inspects, NGO ship refusing to sign migrant rescue code of conduct’ (*EFE Italy*, 2 August 2017) <[www.efc.com/efe/english/life/italy-stops-inspects-ngo-ship-refusing-to-sign-migrant-rescue-code-of-conduct/50000263-3342682](http://www.efc.com/efe/english/life/italy-stops-inspects-ngo-ship-refusing-to-sign-migrant-rescue-code-of-conduct/50000263-3342682)>.

40 ICC Prosecutor, ‘Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)’ (5 May 2020) <[www.icc-cpi.int/Pages/item.aspx?name=200505-statement-prosecutor-unscl-libya](http://www.icc-cpi.int/Pages/item.aspx?name=200505-statement-prosecutor-unscl-libya)>. See also ‘Final report of the Panel of Experts on Libya established pursuant to Security Council resolution 1973 (2011)’, UN doc. S/2021/229, 8 March 2021, paras 40–46.

41 Lina Vosyliūtė and Carmine Conte, ‘Crackdown on NGOs and Volunteers Helping Refugees and Other Migrants’ (ReSOMA Final Synthetic Report, June 2019) <[www.resoma.eu/sites/resoma/resoma/files/policy\\_brief/pdf/Final%20Synthetic%20Report%20-%20Crackdown%20on%20NGOs%20and%20volunteers%20helpin%20refugees%20and%20other%20migrants\\_1.pdf](http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/Final%20Synthetic%20Report%20-%20Crackdown%20on%20NGOs%20and%20volunteers%20helpin%20refugees%20and%20other%20migrants_1.pdf)>.

Italian ports and disembarking survivors—regardless of Italy’s obligations under EU and international law.<sup>42</sup> This triggered a series of ‘crises’ whereby rescues were left incomplete, with rescue vessels left wandering for weeks or even months until voluntary, *ad hoc* solutions, including rerouting and relocation to other EU Member States,<sup>43</sup> would be agreed in intergovernmental and typically secret negotiations brokered by the Commission (sometimes with Council input). The unsubstantiated belief that rescue creates a ‘pull factor’ that is exploited by smugglers and traffickers has fed into this dynamic, despite wide-ranging research dispelling the claim, based on data generated, not least, by Frontex and the EUNAVFORMED.<sup>44</sup> An important detail to bear in mind is that these ‘crises’ have on average concerned 600 individuals at a time, which can hardly be said to overwhelm the overall asylum and return capacities of any given Member State.<sup>45</sup>

Against this background, a first attempt to put an end to the ‘ship-by-ship’ arrangements to solve recurrent standoffs over disembarkation, particularly between Italy and Malta, was made with the Malta Declaration in September 2019,<sup>46</sup> aiming for a structural, Europeanised solution that would make the system more stable and predictable.<sup>47</sup> The outcome, however, was meagre and failed to bring the scheme within the EU

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42 Thibault Larger, ‘Matteo Salvini: Italian ports closed to migrants’ (*Politico*, 23 December 2018) <[www.politico.eu/article/matteo-salvini-italian-ports-closed-to-migrants/](http://www.politico.eu/article/matteo-salvini-italian-ports-closed-to-migrants/)>.

43 See, e.g., SOS Méditerranée, ‘Aquarius instructed to sail to Spain to reach a port of safety: 629 people rescued in the Mediterranean to be disembarked in Valencia’ (12 June 2018) <<https://sosmediterranee.com/aquarius-instructed-to-sail-to-spain-to-reach-a-port-of-safety-629-people-rescued-in-the-mediterranean-to-be-disembarked-in-valencia/>>.

44 Eugenio Cusumano and Matteo Villa, ‘Sea Rescue NGOs: A Pull Factor of Irregular Migration?’ (MPC Policy Brief Issue 2019/22, November 2019) <[https://cadmus.eui.eu/bitstream/handle/1814/65024/PB\\_2019\\_22\\_MPC.pdf](https://cadmus.eui.eu/bitstream/handle/1814/65024/PB_2019_22_MPC.pdf)>. See also analysis and further references in Moreno-Lax and others, ‘The EU Approach on Migration in the Mediterranean’ (n 1), 80-81.

45 Matteo Villa and Elena Corradi, ‘Migranti e EU: Cosa Serve Sapere sul Vertice di Malta’ (ISPI, 20 September 2019) <[www.ispionline.it/it/pubblicazione/migranti-e-ue-cosa-serve-sapere-sul-vertice-di-malta-23970](http://www.ispionline.it/it/pubblicazione/migranti-e-ue-cosa-serve-sapere-sul-vertice-di-malta-23970)>.

46 Joint Declaration of Intent on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism (‘Malta Declaration’) (23 September 2019) <[www.dropbox.com/s/glnukwn4h5hw2ns/Temporary%20Arrangements%2023%20September%202019.pdf?dl=0](http://www.dropbox.com/s/glnukwn4h5hw2ns/Temporary%20Arrangements%2023%20September%202019.pdf?dl=0)>.

47 For an analysis, see Eleonora Frasca and Francesco Luigi Gatta, ‘The Malta Declaration on Search & Rescue, Disembarkation and Relocation: Much Ado about Nothing’ (EU Migration Law Blog, 3 March 2020) <<https://eumigrationlawblog.e>



legal framework, making no provision for safeguards and remedies to guarantee compliance with fundamental rights and the rule of law, instead reinforcing the trend of informal solutions and legitimising the actions by the Italian government: endorsing both the MoU with Libya and the Code of Conduct for NGOs, despite harsh criticism including by the Council of Europe Commissioner for human rights and other organisations,<sup>48</sup> while UNHCR continued to consider Libya an unsafe place for disembarkation.<sup>49</sup> EU support and persistent Member States' engagement with the Libyan Coastguard have been normalised as a result.<sup>50</sup> The EU Trust Fund for Africa is a direct consequence of this approach,<sup>51</sup> which buttresses the externalisation of SAR and the containment of maritime arrivals of seaborne migrants (the misuse of which has been denounced at the European Court of Auditors and the European Parliament).<sup>52</sup>

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- u/the-malta-declaration-on-search-rescue-disembarkation-and-relocation-much-ad-o-about-nothing/>.
- 48 Council of Europe Commissioner for Human Rights, 'Lives saved. Rights protected: Bridging the protection gap for refugees and migrants in the Mediterranean' (June 2019) <<https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87>>. See also, e.g., Amnesty International, 'EU Governments Face Crucial Decision on Shared Sea Rescue Responsibility' (3 October 2019) <[www.amnesty.org/en/latest/press-release/2019/10/eu-governments-face-crucial-decision-on-shared-sea-rescue-responsibility/](http://www.amnesty.org/en/latest/press-release/2019/10/eu-governments-face-crucial-decision-on-shared-sea-rescue-responsibility/)>.
- 49 UNHCR, 'Position on the Designation of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation following Rescue at Sea' (September 2020) <[www.refworld.org/pdfid/5f1edee24.pdf](http://www.refworld.org/pdfid/5f1edee24.pdf)>.
- 50 OHCHR, "'Lethal Disregard" Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea' (May 2021) <[www.ohchr.org/Documents/Issue\\_s/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf](http://www.ohchr.org/Documents/Issue_s/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf)>.
- 51 Commission Decision on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, C(2015) 7293, 20 October 2015.
- 52 See further Global Legal Action Network ('GLAN'), 'EU Financial Complicity in Libyan Migrant Abuses' <[www.glanlaw.org/eu-complicity-in-libyan-abuses](http://www.glanlaw.org/eu-complicity-in-libyan-abuses)>. For a critique, see Thomas Spijkerboer, 'Migration Management Clientelism: Europe's Migration Funds as a Global Political Project' (2021) *Journal of Ethnic and Migration Studies* DOI: 10.1080/1369183X.2021.1972567 <[www.tandfonline.com/doi/full/10.1080/1369183X.2021.1972567](http://www.tandfonline.com/doi/full/10.1080/1369183X.2021.1972567)>.



### 3. The 'New' Common European Approach to Search and Rescue

Building on the Malta Declaration and to avoid a repeat of the 'closed ports' incidents,<sup>53</sup> the Commission has proposed, as part of the New Pact package, a common European approach to SAR, failing, however, to provide any details on rescue and disembarkation arrangements, which, by contrast, were considered the key 'pillars' of the Malta Declaration initiative.<sup>54</sup> The novelty lies in the solidarity relocations proposed in the draft Migration Management Regulation ('MMR').<sup>55</sup> But there is very little on the essentials of SAR as such. The focus, as already stated, has rather been on 'migration management' through the prevention of arrivals.<sup>56</sup>

#### a) Normalising Disengagement

The SAR Recommendation adds nothing to the current (underwhelming) EU rescue response in the Mediterranean, limiting itself to acknowledging that rescue is 'an obligation under international law' and highlighting that '[t]he European Union is a contracting party to UNCLOS',<sup>57</sup> but without elaborating on the concrete repercussions of this statement. This tallies with the general remark in the New Pact, mentioned above, that SAR is 'a key element of the EU integrated border management' system to be 'implemented as a shared responsibility by Frontex and national authorities'.<sup>58</sup> The only further specification is that Frontex 'should provide increased operational and technical support *within EU competence*' and 'deploy[] maritime assets to Member States to improve their capabilities',<sup>59</sup> omitting the

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53 See, e.g., Amnesty International's Letter to Ylva Johansson, Commissioner for Home Affairs, Reference: B1996, 21 May 2020 <[www.amnesty.eu/wp-content/uploads/2020/05/B1996-Letter-to-Commission-on-pushbacks-and-port-closures.pdf](http://www.amnesty.eu/wp-content/uploads/2020/05/B1996-Letter-to-Commission-on-pushbacks-and-port-closures.pdf)>.

54 Actually, Italy has called for a return to the Malta Declaration mechanism. See 'Italy Hopeful of Reviving EU's "Malta Agreement" on Migrant Burden Sharing' (*Times of Malta*, 13 May 2021) <<https://timesofmalta.com/articles/view/italy-hopeful-of-reviving-eus-malta-agreement-on-migrant-burden.871453>>.

55 Proposal for a Regulation on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23 September 2020 ('Migration Management Regulation' or 'MMR').

56 SAR Recommendation (n 27), paras 1 and 2(b).

57 Ibid, Recital 1.

58 'New Pact on Migration and Asylum' (n 2), 13.

59 Ibid (emphasis added).

fact that Frontex has no explicit mandate to proactively engage in SAR. In fact, the agency has been confronted with repeated accusations for failure to respond to distress calls,<sup>60</sup> if not directly contributing to push-backs,<sup>61</sup> and ignoring ‘instructions to move ... outside [the relevant mission’s] operational area’ for the purpose of rendering assistance to migrant boats, in a bid to avoid coming into contact with them and triggering rescue obligations in their regard.<sup>62</sup> This has triggered several investigations by its own Management Board,<sup>63</sup> OLAF,<sup>64</sup> the EU Ombudsman,<sup>65</sup> and a special Working Group of the European Parliament,<sup>66</sup> while several legal actions are pending against the agency.<sup>67</sup>

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- 60 Alarm Phone, ‘Coordinating a Maritime Disaster: Up to 130 People Drown off Libya’ (22 April 2021) <[https://alarmphone.org/en/2021/04/22/coordinating-a-maritime-disaster-up-to-130-people-drown-off-libya/?post\\_type\\_release\\_type=post&fbclid=IwAR1rzZq6YGGZTvsjTfGgMMn7QxuKkDQCU-L3X8biOblwCNo3-l5ToWiB7uWk](https://alarmphone.org/en/2021/04/22/coordinating-a-maritime-disaster-up-to-130-people-drown-off-libya/?post_type_release_type=post&fbclid=IwAR1rzZq6YGGZTvsjTfGgMMn7QxuKkDQCU-L3X8biOblwCNo3-l5ToWiB7uWk)>.
- 61 ECRE, ‘Med: Investigations Reveal Frontex’ Complicity in Interceptions and Returns to Horrors in Libya’ (Weekly Bulletin, 30 April 2021) <<https://mailchi.mp/ecre/ecre-weekly-bulletin-30042021?e=2bf31e028b#med>>. Regarding the Aegean, see ‘EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign’ (*Der Spiegel*, 23 October 2020) <[www.spiegel.de/international/europe/eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7](http://www.spiegel.de/international/europe/eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7)>; and Matina Stevis-Gridneff, ‘E.U. Border Agency Accused of Covering Up Migrant Pushback in Greece’ (*New York Times*, 26 November 2020) <[www.nytimes.com/2020/11/26/world/europe/frontex-migrants-pushback-greece.html](http://www.nytimes.com/2020/11/26/world/europe/frontex-migrants-pushback-greece.html)>.
- 62 Letter by Klaus Rösler, Frontex Director of Operations, to Giovanni Pinto, Italian Director of the Border Police, Ref. 19846/25.11.2014 <<https://s3.documentcloud.org/documents/3531242/Rosler-Pinto-Frontex-Letter-2014.pdf>>.
- 63 ‘Conclusions of the Management Board’s meeting on 5 March 2021 on the report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea’ (Frontex Management Board Updates, 5 March 2021) <<https://frontex.europa.eu/media-centre/management-board-updates/conclusions-of-the-management-board-s-meeting-on-5-march-2021-on-the-report-of-its-working-group-on-fundamental-rights-and-legal-operational-aspects-of-operations-in-the-aegean-sea-aFewSI>>.
- 64 Nikolaj Nielsen, ‘EU Anti-fraud Office Launches Probe into Frontex’ (*EU Observer*, 11 January 2021) <<https://euobserver.com/migration/150574>>.
- 65 EU Ombudsman, ‘Ombudsman Opens Inquiry to Assess European Border and Coast Guard Agency (Frontex) “Complaints Mechanism”’ (12 November 2020) <[www.ombudsman.europa.eu/en/news-document/en/134739](http://www.ombudsman.europa.eu/en/news-document/en/134739)>.
- 66 European Parliament, ‘Report on the Fact-finding Investigation on Frontex Concerning Alleged Fundamental Rights Violations’ (14 July 2021) <[www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG\\_en.pdf](http://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf)>.
- 67 Front-Lex and Legal Centre Lesvos, ‘Preliminary Action Pursuant to Article 265 TFEU’ (15 February 2021) <[www.statewatch.org/news/2021/april/pushbacks-from](http://www.statewatch.org/news/2021/april/pushbacks-from)>.

Instead of clarifying SAR obligations or increasing rescue assets in the Mediterranean, the SAR Recommendation relies on the rescue capacity stemming from ‘the ... involvement of private and commercial vessels’, including those operated by NGOs, praising the ‘significant contributions from coastal States’ and Frontex,<sup>68</sup> but without calling on them for additional efforts, despite a reference to the explicit request by the European Parliament to that effect, and a direct allusion to the maritime conventions ‘obligat[ing] contracting parties to participate in the development of SAR services and to take urgent steps to ensure that the necessary assistance is provided to any person ... in distress at sea’.<sup>69</sup> No additional assets or resources are pledged or organised. The only provision made is for an Interdisciplinary Contact Group of relevant stakeholders, including Frontex, SAR NGOs, academics, and international organisations, to develop best practices, exchange information and reinforce cooperation between flag and coastal Member States<sup>70</sup>— which, however, since inception in March 2021, has been accused of failing to meet its own transparency requirements and discharge its mandate as originally intended.<sup>71</sup>

#### *b) Policing Humanitarianism*

At the same time, the SAR Recommendation contains a veiled critique of NGO rescues. First, the SAR Recommendation embraces the ‘pull factor’ rhetoric when stating that ‘it is essential to avoid a situation in which migrant smuggling or human trafficking networks ... take advantage of the rescue operations conducted by private vessels’.<sup>72</sup> It is unclear whether the necessary implication is that rescue should not be performed, if it risks jeopardising ‘effective migration management’ as defined by the

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greece-to-turkey-ombudsman-s-report-highlights-obstruction-of-investigations/>. See also Statewatch, ‘EU: Legal Actions Pile up against Frontex for Involvement in Rights Violations’ (23 February 2021) <[www.statewatch.org/news/2021/february/eu-legal-actions-pile-up-against-frontex-for-involvement-in-rights-violations/](http://www.statewatch.org/news/2021/february/eu-legal-actions-pile-up-against-frontex-for-involvement-in-rights-violations/)>.

68 SAR Recommendation (n 27), Recitals 4-5.

69 Ibid, Recitals 6 and 10.

70 Ibid, Recitals 15-16 and paras 1-2.

71 Statewatch, ‘Mediterranean: European Contact Group on Search and Rescue Failing to Meet Transparency Requirements’ (23 April 2021) <[www.statewatch.org/news/2021/april/mediterranean-european-contact-group-on-search-and-rescue-failing-to-meet-transparency-requirements/](http://www.statewatch.org/news/2021/april/mediterranean-european-contact-group-on-search-and-rescue-failing-to-meet-transparency-requirements/)>.

72 SAR Recommendation (n 27), Recital 9.

Commission,<sup>73</sup> which laments that ‘continued disembarkations ... have direct consequences on [Member States’] migration management systems and place increased and immediate pressure on [them]’.<sup>74</sup>

Be it as it may, the foreseeable impact of the SAR Recommendation, rather than increasing SAR capacity in the Mediterranean, may well be the opposite by subjecting SAR NGO vessels to strict scrutiny, using ‘safety of navigation’ as an excuse to police their activity.<sup>75</sup> Several measures, which in themselves constitute forms of criminalisation of humanitarianism in the broad sense,<sup>76</sup> are proposed in the SAR Recommendation for this purpose. On the premise that SAR NGOs may conduct ‘consecutive rescue operations before disembarking [survivors]’ and act on their own motion,<sup>77</sup> rather than at the behest of a Maritime Rescue Coordination Centre, with that ‘trigger[ing] specific operational needs of enhanced coordination’ with the authorities concerned,<sup>78</sup> the Commission feels this requires special rules of control, even though this behaviour is in conformity with international law.<sup>79</sup>

Because SAR NGOs may conduct large and complex rescues, there appears to be an assumption that this may give rise—*per se* and without further substantiation—to ‘public policy, including safety’ concerns, justifying a need to closely police that SAR NGO vessels are ‘suitably registered and properly equipped to meet the relevant safety and health requirements associated with [their] activity’.<sup>80</sup> There are, however, no instances of any SAR NGO vessel having failed to comply with registration and safety of navigation rules in the past—all prosecutions on these grounds have ended in acquittal.<sup>81</sup> It is also telling that the same level of scrutiny does not apply to the Libyan Coastguard and similar actors with which the

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73 Ibid, para 1; and ‘New Pact on Migration and Asylum’ (n 2), 14.

74 SAR Recommendation (n 27), Recital 13.

75 ‘New Pact on Migration and Asylum’ (n 2), 14. As an indication, see questions referred in CJEU, Case C-15/21 *Sea-Watch* (pending).

76 Sergio Carrera, Valsamis Mitsilegas and Jennifer Allsopp, *Policing Humanitarianism* (Hart Publishing 2019).

77 SAR Recommendation (n 27), Recital 8.

78 Ibid, Recital 11.

79 For a detailed discussion, see Violeta Moreno-Lax, Daniel Ghezalbash and Natalie Klein, ‘Between Life, Security and Rights: Framing the Interdiction of “Boat Migrants” in the Central Mediterranean and Australia’ (2019) 32 *Leiden Journal of International Law* 715.

80 SAR Recommendation (n 27), Recital 12.

81 Moreno-Lax and others, ‘The EU Approach on Migration in the Mediterranean’ (n 1), Annex Table I.

coastal Member States and the EU routinely cooperate, including private merchant vessels.<sup>82</sup> And no attention is paid to the fact that oftentimes the complexity of rescues is compounded by the refusal to allow disembarkation at safe ports on the EU side.<sup>83</sup>

In addition, the rules in the maritime Conventions on safety of navigation and rescue capacity for the performance of SAR duties are primarily addressed to the State parties' fleets.<sup>84</sup> They primarily concern State-run rescue services rather than private vessels, which are supposed to only sporadically engage in SAR actions—on the assumption that coastal States fulfil their duties and run effective SAR services within their rescue zones. The proposal by the Commission to turn the scheme upside-down and enforce the rules on NGO vessels, while official SAR services are withheld,<sup>85</sup> is inadequate. It amounts to a reversed stoppel argument used to obstruct NGO interventions. Not only are States not being called upon to observe their SAR obligations, but they are seemingly encouraged to 'transfer' them to the NGO sector and then police them, as a way to impede their action and foreclose unwanted migration flows.

In the same vein, the Recommendation mentions the Italian Code of Conduct, and appears to imply that it may provide a model for the cooperation and coordination framework to be established by the Interdisciplinary Contact Group, for the purposes of 'increase[ing] safety at sea' and 'monitor[ing] and verify[ing] compliance with standards for safety at sea as well as the relevant rules on migration management'.<sup>86</sup> To that end, the framework should specifically aim to provide 'appropriate information as regards the operations and the administrative structure' of SAR NGOs,<sup>87</sup>

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82 Jean-Pierre Gauci, 'When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations' (British Institute of International and Comparative Law, November 2020) <[www.biicl.org/documents/124\\_private\\_vessels\\_research.pdf](http://www.biicl.org/documents/124_private_vessels_research.pdf)>.

83 Izzy Ellis, 'In the News: COVID-19 Port Closures Leave Migrants Stranded at Sea' (*The New Humanitarian*, 13 April 2020) <[www.thenewhumanitarian.org/news/2020/04/13/mediterranean-italy-malta-migrants-coronavirus](http://www.thenewhumanitarian.org/news/2020/04/13/mediterranean-italy-malta-migrants-coronavirus)>.

84 Convention on the Law of the Sea 1833 UNTS 3 ('UNCLOS'), Art 98; International Convention for the Safety of Life at Sea 1184 UNTS 278 ('SOLAS Convention'); International Convention on Maritime Search and Rescue 1405 UNTS 119 ('SAR Convention').

85 E.g. Chantal Da Silva, 'Italy, Malta and Libya Slow to React to Deadly Shipwreck, Analysis Finds' (*Euronews*, 4 May 2021) <[www.euronews.com/2021/05/04/italy-malta-libya-slow-to-react-to-deadly-shipwreck-analysis-finds](http://www.euronews.com/2021/05/04/italy-malta-libya-slow-to-react-to-deadly-shipwreck-analysis-finds)>.

86 SAR Recommendation (n 27), Recitals 14-16 and para 2.

87 Ibid, Recital 15.

hence Europeanising policing practices that *de facto* restrict, rather than facilitate, rescue activities.

The proposed common European approach to search and rescue, therefore, encloses a paradox: it relies on the enhanced SAR capacity represented by private vessels operated by NGOs, while raising suspicion of their undertakings, which it attempts to control, police, and may ultimately suppress. This is particularly evident from the manner in which the Guidance on the criminalisation of humanitarian assistance has been framed.

*c) (Not Entirely De-)Criminalising Humanitarian Assistance*

Despite criticism by the UN Office on Drugs and Crime (UNODC), i.e. the body in charge of overseeing the correct application of the UN Protocol against Migrant Smuggling (which the EU ratified in 2006),<sup>88</sup> making clear that the behaviour that may be criminalised is the facilitation of irregular entry *mediating financial benefit* and alerting that ‘even if the Protocol does not prevent States from creating [other] criminal offences outside its scope ... it does not seek and cannot be used as the legal basis for the prosecution of humanitarian actors’,<sup>89</sup> the response by the Commission has been equivocal. While it has expressed the view that Article 1 of the Facilitation Directive must be interpreted so that ‘humanitarian assistance that is mandated by law [presumably including rescue at sea] cannot and must not be criminalised’,<sup>90</sup> the Guidance fails to provide examples of what should be understood as ‘humanitarian assistance’ or when should it be considered as ‘mandated by law’. Then, the Commission states that ‘the criminalisation of NGOs ... that carry out [SAR] operations at sea ... amounts to a breach of international law and therefore is not permitted by EU law’, but it caveats the provision to cover only rescue operations conducted ‘while complying with the relevant legal framework’,<sup>91</sup> which allows for speculation.

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88 UN Protocol against the Smuggling of Migrants, 2241 UNTS 507; Council Decision 2006/616/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, [2006] OJ L 262/24.

89 Criminalisation Guidance (n 28), 3.

90 Ibid, para 4(i), referring to Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (‘Facilitation Directive’), [2002] OJ L 328/17.

91 Criminalisation Guidance (n 28), para 4(ii).

Quite controversially, the Commission claims that '[e]veryone involved in search and rescue activities *must* observe the instructions received from the coordinating authority when intervening in search and rescue events',<sup>92</sup> disregarding recent incidents of orders provided to stand-by or to collaborate with the Libyan Coastguard in contravention of international obligations flowing from the right to life or the prohibition of *refoulement*.<sup>93</sup> Conversely, due to the prohibition on any State to claim sovereignty over the high seas, no jurisdictional powers, different from those explicitly recognized by the UN Convention on the Law of the Sea (UNCLOS) or other relevant treaties, can validly be established to deliver orders with legal effect to foreign ships.<sup>94</sup> Freedom of navigation and the rule of exclusive flag-state jurisdiction support this interpretation.<sup>95</sup> What is more, in the specific context of SAR interventions, the Safety of Life at Sea Convention (SOLAS) makes clear that no 'other person ... shall ... prevent or restrict the master of the ship from taking or executing any decision which, *in the master's professional judgement*, is necessary for safety of life at sea'.<sup>96</sup> Such level of discretion is essential to respond promptly and adequately to rapidly changing circumstances. And, as regards the content of SAR instructions by rescue coordination authorities, these cannot be such as to contravene the purpose of the SAR regime—which is to preserve human life at sea. Neither can they violate human rights.<sup>97</sup> In such situations, shipmasters have what has been called a 'right to obey international law'.<sup>98</sup>

The Guidance fails to clarify the specific conduct to be punished and the conditions under which it should be prosecuted—something that cannot be authoritatively defined in a non-binding Commission Recommendation, but which is required for compliance with the principle of legality of offences under Article 49 of the Charter of Fundamental Rights. The final assessment rests with the judicial authorities of the Member States. They are the ones who will (*ex post facto*) 'have to strike the right balance

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92 Ibid, 7 (emphasis added).

93 Charles Heller and Lorenzo Pezzani, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration across the Mediterranean' (Forensic Oceanography, May 2018) <<https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>>.

94 UNCLOS, Art 89.

95 UNCLOS, Arts 90 and 92(1).

96 SOLAS, Annex c V reg 34-1 (emphasis added).

97 UNCLOS, Arts 2(3) and 87(1).

98 Massimo Starita, 'The Duty to Rescue at Sea and the Shipmaster's "Right to Obey" (International) "Law"' (2019) 7 *Diritti umani e diritto internazionale* 5.



between the different interests and values at play<sup>99</sup>—as if the (customary international legal) duty to rescue or the absolute principle of *non-refoulement* admitted such a balancing against the migration management interests of the Union and the Member States.

The Guidance also explains the discrepancy in the ‘for profit’ motive between EU law and the UN Protocol by the dual purpose of the Facilitation Directive and related instruments, which is not just to combat organised crime—the primary object of the UN instrument—but also to combat irregular migration *as such*. By this logic, ‘the non-inclusion of the purpose of gain in the basic definition of the offence of facilitation of entry and transit would not be in contrast with the definition of the UN Protocol, but rather [constitute] an expression of the additional (and broader) objective of fighting against irregular migration’ in the EU context.<sup>100</sup> The resulting risk of over-criminalisation is, however, left unaddressed.

The only policy recommendation made by the Commission is simply to ‘invite’ Member States ‘to use the possibility provided for in Article 1(2) of the Facilitation Directive’ of exonerating humanitarian assistance from criminalisation.<sup>101</sup> This means that a matter of EU legality (and its compatibility with international law) is left unresolved and relegated to an issue of domestic implementation and policy preference that may ultimately have to be settled by Member State Courts ‘on a case-by-case basis’.<sup>102</sup> In consequence, the practices of policing and criminalisation of SAR NGOs witnessed since 2017 may endure.<sup>103</sup> It will only be in the Courts that their activities, as humanitarian actors and human rights defenders, may eventually be de-criminalised. But the strategy of ‘persecution by prosecution’, used in Italy and Greece against Sea-Watch, Proemaid, or Team Humanity,<sup>104</sup> can and will foreseeably continue under the terms

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99 Criminalisation Guidance (n 28), 6.

100 Angelo Marletta, ‘The Commission ‘Guidance’ on Facilitation and Humanitarian Assistance to Migrants’ (EU Law Analysis Blog, 29 September 2020) <<http://eulawanalysis.blogspot.com/2020/09/the-commission-guidance-on-facilitation.html>>.

101 Criminalisation Guidance (n 28), 8 (emphasis added).

102 Ibid, para 4(iii).

103 OMCT, ‘Europe: New Report Highlights Increased Criminalisation against Migrants’ Rights Defenders’ (15 November 2021) <[www.omct.org/en/resources/news-releases/europa-nuevo-informe-alerta-sobre-el-incremento-de-la-criminalizaci%C3%B3n-contra-defensor-s-de-personas-migrantes](http://www.omct.org/en/resources/news-releases/europa-nuevo-informe-alerta-sobre-el-incremento-de-la-criminalizaci%C3%B3n-contra-defensor-s-de-personas-migrantes)>.

104 ‘Sea-Watch Captain Rackete Faces Italian Prosecutor over Migrant Rescue’ (*France24*, 18 July 2019) <[www.france24.com/en/20190718-germany-italy-libya-sea-watch-captain-prosecutor-migrant-rescue-carla-rackete](http://www.france24.com/en/20190718-germany-italy-libya-sea-watch-captain-prosecutor-migrant-rescue-carla-rackete)>; Niki Kitsantonis,



of the Criminalisation Guidance.<sup>105</sup> Only legislative action would ensure alignment with the requirements of legal certainty, legitimacy, and proportionality, guaranteeing compliance with the principle of legality and the rule of law.

#### 4. Disembarkation and Relocation

Regarding disembarkation, there is no proposal as part of the common European approach to SAR to clarify where survivors should be taken when rescued within operations not coordinated by Frontex (which is the only scenario regulated by the EU Maritime Surveillance Regulation,<sup>106</sup> to which the Commission proposals make no reference). Rather than attempting a clarification, the Commission alludes to ‘strengthen[ed] cooperation with countries of origin and transit to prevent ... irregular crossings, including through tailor-made Counter Migrant Smuggling Partnerships with third countries’.<sup>107</sup> Although no direct mention is made of Libya, Turkey or Morocco, these are the main countries of provenance of rescued persons disembarked in the EU.<sup>108</sup> It is striking that there is no discussion of the human rights implications of collaboration with these countries and that the proposal completely disregards the EU’s and the Member

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‘Volunteers Who Rescued Migrants Are Cleared of Criminal Charges in Greece’ (*New York Times*, 7 May 2018) <[www.nytimes.com/2018/05/07/world/europe/greece-migrants-volunteers.html](http://www.nytimes.com/2018/05/07/world/europe/greece-migrants-volunteers.html)>; GLAN, ‘Greece’s Crackdown on Humanitarian Organisations’ (April 2019) <[www.glanlaw.org/salamaldeen](http://www.glanlaw.org/salamaldeen)>.

105 See FRA, ‘June 2021 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights’ (18 June 2021) <<https://fra.europa.eu/en/publication/2021/june-2021-update-ngo-ships-sar-activities>>. For an ongoing case, see Helena Smith, ‘On Trial for Saving Lives: The Young Refugee Activist Facing a Greek Court’ (*The Guardian*, 14 November 2021) <[www.theguardian.com/world/2021/nov/14/on-trial-for-saving-lives-the-young-refugee-activist-facing-a-greek-court](http://www.theguardian.com/world/2021/nov/14/on-trial-for-saving-lives-the-young-refugee-activist-facing-a-greek-court)>.

106 Regulation (EU) No 656/2014 of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2014] OJ L 189/93.

107 ‘New Pact on Migration and Asylum’ (n 2), 14.

108 UNHCR, Operational Data Portal: Mediterranean (November 2021) <<https://data2.unhcr.org/en/situations/mediterranean>>.

States' own extraterritorial obligations vis-à-vis third-country nationals,<sup>109</sup> including concerning the right to leave any country including one's own, the right to seek asylum, and the right to protection from ill-treatment as well as the prohibitions of collective expulsion and *refoulement* that remain relevant at sea.<sup>110</sup>

a) *Compulsory Solidarity?*

It is only if (and once) disembarkation takes place in an EU Member State that there is a specific system of solidarity relocations, which may be activated as part of the new provisions contained in the proposed Migration Management Regulation ('MMR'). As explained by Maiani,<sup>111</sup> the system can work in 'basic' mode, 'pressure' mode, or 'crisis' mode. In its basic variant, designed to replace the current *ad hoc* solutions,<sup>112</sup> the Commission assesses, in its yearly Migration Management Report,<sup>113</sup> whether a Member State is faced with 'recurring [maritime] arrivals' following rescue operations and determines its solidarity needs,<sup>114</sup> in terms of relocations and other contributions potentially taking the form of 'return sponsorships' or capacity-building measures.<sup>115</sup> The other Member States are then 'invited' to notify the 'contributions they intend to make'.<sup>116</sup> If offers are sufficient, the Commission adopts a 'solidarity pool'.<sup>117</sup> If not, it will convene a 'Solidarity Forum' and ask Member States to adjust their pledges.<sup>118</sup> If the offer still falls 'significantly short' of the needs,

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109 European Parliament, Resolution of 19 May 2021 on Human Rights Protection and the EU External Migration Policy (2020/2116(INI)) <[www.europarl.europa.eu/doceo/document/TA-9-2021-0242\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-9-2021-0242_EN.html)>, relying on Violeta Moreno-Lax, 'EU External Migration Policy and the Protection of Human Rights', PE 603.512 (European Parliament 2020) <[www.europarl.europa.eu/RegData/etudes/IDAN/2020/603512/EXPO\\_IDA\(2020\)603512\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2020/603512/EXPO_IDA(2020)603512_EN.pdf)>.

110 ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. 27765/09, 23 February 2012. See also HRC, *A.S. and Others v. Italy*, Comm. 3042/2017, CCPR/C/130/D/3042/2017, 27 January 2021; and *A.S. and Others v. Malta*, Comm. 3043/2017, CCPR/C/128/D/3043/2017, 27 January 2021.

111 See Francesco Maiani's chapter in this volume.

112 MMR (n 55), Arts 47-49.

113 Ibid, Art 6(4).

114 Ibid, Art 47(1).

115 Ibid, Art 45.

116 Ibid, Art 47(3)-(4).

117 Ibid, Art 48(1) and 49.

118 Ibid, Art 46 and 47(5).

the Commission will adopt an implementing act,<sup>119</sup> identifying relocation targets for each Member State according to a distribution key, weighing total population and total GDP.<sup>120</sup> Member States may react by offering other contributions instead, provided that this is considered ‘proportional’. If the relocations offered still fall 30% short of the identified needs, each Member State will be obliged to meet at least 50% of their quota via relocations or return sponsorships.<sup>121</sup> If the solidarity pool risks being exhausted, the Commission can revise it and set out additional relocations, which, however, may be ‘capped to 50%’ of the amount initially foreseen.<sup>122</sup> If these, too, become insufficient, then the ‘pressure’ or ‘crisis’ mode may be activated.<sup>123</sup>

The relocation scheme can also be triggered by a ‘request for solidarity support’ from the Member State faced with repeated maritime arrivals.<sup>124</sup> In such cases, the Commission will draw on the solidarity pool and coordinate implementation of the solidarity measures ‘for each disembarkation or group of disembarkations’<sup>125</sup>—which may replicate the current ‘ship-by-ship’ formulas. It is then for the Commission, alongside Frontex and EA-SO, ‘to draw up a list of eligible persons to be relocated’, indicating their distribution amongst the contributing Member States, taking account of their nationalities and any ‘meaningful links’ with the country of relocation, but giving priority to vulnerable persons.<sup>126</sup>

From this brief overview the overly complex nature of the system proposed becomes visible and a number of shortcomings readily detected. First of all, it is unclear what happens if Member States fail to engage with the SAR Solidarity Response Plan,<sup>127</sup> if they persist in their defection or do not comply with the Commission indications. What if there are conflicts between Member States or if they contest the way in which their quotas have been calculated? There are no conciliation procedures or sanctions envisaged in such cases. It is also unclear how long the Solidarity Forum may deliberate for and under which rules; this may defeat the objective of ‘rapid’ relocations, which may, in turn, translate into situations where

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119 Ibid, Art 48.

120 Ibid, Art 54.

121 MMR Memorandum (n 55), 19.

122 Ibid.

123 MMR (n 55), Arts 49(3) and 50-53.

124 Ibid, Art 49(1).

125 Ibid (emphasis added).

126 MMR (n 55), Art 49(2).

127 Ibid, Art 47(4) and Annex I.

disembarkations are withheld indefinitely. The system depends on constant negotiation and relies on an amount of good faith and mutual trust unseen between the Member States so far.<sup>128</sup> We also do not know how concurrent situations of ‘recurring arrivals’, ‘migratory pressure’ or ‘crisis’ sparking simultaneously in different Member States will be reconciled. The Commission promises ‘reductions’ of up to 10% of the quotas of contributing Member States in certain situations,<sup>129</sup> but it remains silent on the coordination of concurrent emergencies.

Overall, it seems unrealistic to expect Member States to cede the required power to the Commission to force their hand into accepting relocations of disembarked migrants. A repeat of the legal proceedings against the Visegrad countries regarding the 2015 relocation scheme cannot be discarded.<sup>130</sup> The proposal in fact concentrates the power to make all the key decisions in the hands of the Commission, to decide what the solidarity needs are and how these should be distributed; whether Member States are confronted with ‘recurring arrivals’, ‘pressure’ or a ‘crisis’; how solidarity contributions should be calculated and which shape they need to take. Yet, it is unclear how much more predictable, swift or foreseeable this system will be compared to the current *ad hoc* arrangements.

### b) *Limitless Defection Possibilities*

The situation is exacerbated by the new rules on *force majeure*, contained in the draft crisis and *forced majeure* Regulation (‘CFMR’),<sup>131</sup> which the Com-

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128 Violeta Moreno-Lax, ‘Mutual (Dis-)Trust in EU Migration and Asylum Law: The Exceptionalisation of Fundamental Rights’ in Maribel González Pascual and Sara Iglesias Sánchez (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press 2021), 77.

129 MMR (n 55), Art 52(5).

130 CJEU, Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631; and Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v. Poland* [2020] ECLI:EU:C:2020:257. For analysis and full references on the Relocation scheme, see Elspeth Guild, Cathryn Costello and Violeta Moreno-Lax, ‘Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece’, PE 583.132 (European Parliament 2017) <[www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL\\_STU\(2017\)583132\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf)>.

131 Proposal for a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum, COM(2020) 613 final, 23 September 2020 (‘CFMR’).

mission proposal fails to define. While crisis scenarios are characterised by a ‘mass influx of third-country nationals ... arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale ... and nature that it renders the Member State’s asylum, reception or return system non-functional’,<sup>132</sup> *force majeure* has not been specified. The Preamble of the proposed instrument relates generally to ‘abnormal and unforeseeable circumstances outside [Member States’] control the consequences of which could not have been avoided in spite of all due care’ and it alludes to the COVID-19 pandemic and lessons to be learnt from it.<sup>133</sup> But rather than condemning the violations witnessed throughout this period<sup>134</sup>—vaguely referring to the unlawful suspension of the right to asylum by the Greek authorities in March 2020 as a ‘political crisis’,<sup>135</sup> the Commission proposes to entrench them as valid derogations from the applicable rules—ignoring the impact that these will have on absolute human rights, like the prohibition of ill-treatment (including *refoulement*), which do not allow for proportionality reasoning or any limitations or derogations whatsoever.

An extra complication stems from the new *force majeure* framework, which can be triggered on a simple notification.<sup>136</sup> What will happen if a majority of Member States unilaterally declared themselves to be faced with a *force majeure* situation, such as an additional wave of COVID-19 infections? The current proposal allows them to do so without any democratic or legal oversight by the European Parliament or the Commission. This will put on hold solidarity mechanisms for months and exempt Member States from Dublin transfers for an unspecified period of time, since there is no deadline applicable to the length of the *force majeure* situation.<sup>137</sup> This can paralyse the system and lead to a legalised form of fragmentation, which could lead to *de facto* de-harmonization of the existing legal and pol-

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132 Ibid, Art 1(2).

133 Ibid, Recital 7 and CFMR Memorandum (n 131), 4 and 9-11.

134 E.g., UNHCR, ‘UNHCR issues recommendations for EU to ensure refugee protection during the pandemic and beyond’ (Press Release, 1 July 2020) <[www.unhcr.org/news/press/2020/7/5efb7e544/unhcr-issues-%20recommendations-eu-ensure-refugee-protection-during-pandemic.html](http://www.unhcr.org/news/press/2020/7/5efb7e544/unhcr-issues-%20recommendations-eu-ensure-refugee-protection-during-pandemic.html)>.

135 CFMR Memorandum (n 131), 9. Cf. UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’ (2 March 2020) <[www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html](http://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html)>.

136 CFMR (n 131), Art 7(1).

137 Ibid, Arts 3(4) and 7(2).

icy framework, unwalking the steps towards a *common* European system in this field.<sup>138</sup>

c) *From Win-Win to Lose-Lose Outcomes*

While it is open to discussion who the winners of this scheme will be, there are some clear losers. The implications for applicants and the beneficiary Member States need to be considered in some detail. Although one may think that relocations will be a ‘good thing’ for the individuals concerned, it is striking that their agency, voice, and preferences will not be taken into account. Although they will be able to oppose a relocation decision (on the same limited grounds they could challenge a Dublin transfer<sup>139</sup>), it is unclear the degree to which extended family links, support networks, and other relevant connections will be taken into consideration, in light of the ‘swiftness’ with which the pre-entry screening and relocation procedures are supposed to take place. The ‘meaningful links’ that need to be factored into relocation decisions have not been defined in the proposed Regulation,<sup>140</sup> beyond the allusion to ‘diploma[s] or qualification[s] issued by an educational institution established by a Member State’ and some ‘*targeted* extensions of the family definition’.<sup>141</sup> The fact that some relocations (or ‘return sponsorships’) will, therefore, be arranged against their will entrench, rather than reduce, possibilities for supposed abuses and boost the much-despised ‘secondary movements’ within the Schengen area.<sup>142</sup> Another issue the Commission fails to address is the potential incompatibility of these arrangements with Article 3 of the Refugee Convention,<sup>143</sup> which forbids discrimination amongst refugees. This system, however, singles out maritime rescuees on the basis of their mode of arrival to the prospective country of refuge, putting them at a potential disadvantage on grounds unrelated to their protection needs.

There are also significant hidden costs for beneficiary Member States, who will need to undertake substantial processing of SAR arrivals *before* relocation can be pursued, including for pre-entry screening purposes,

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138 See further Philippe De Bruycker’s contribution to this collection.

139 CJEU, Case C-163/17 *Jawo* [2019] ECLI:EU:C:2019:218.

140 MMR (n 55), Art 49(2). Cf MMR, Art 2.

141 *Ibid*, Recital 50 and MMR Memorandum (n 55), 24 (emphasis added).

142 See Daniel Thym’s chapter in this volume.

143 Convention relating to the Status of Refugees, 189 UNTS 150.

entailing health and security checks,<sup>144</sup> which may exclude applicants from relocation<sup>145</sup>; for the registration of asylum applications<sup>146</sup>; to carry out some form of abbreviated Dublin processing, at least, to establish whether family criteria may render the Member State of disembarkation responsible for the potential candidate<sup>147</sup>; and regarding the border procedure, if persons fall within its remit,<sup>148</sup> since this also disqualifies them from relocation.<sup>149</sup>

Against this background, the extent to which relocations can be made swift remains doubtful and whether Member States in ‘pressure’ or ‘crisis’ situations will be able to adequately cope, even on account of the extended deadlines for registration and transfers under the applicable modes of operation is uncertain.<sup>150</sup> Also, and most importantly, there are no guarantees against defection on the part of fellow Member States. In cases of non-compliance, the beneficiary Member State will, in fact, be ‘stuck’ with the persons concerned.

##### *5. Concluding Remarks: Towards a Thousand Little Morias*

All in all, the Commission’s plan for a new common European approach to search and rescue leaves much to be desired. It structuralises the current (mal)practices, including those whose legitimacy and legality have been challenged in national and European Courts.<sup>151</sup> This, I fear, will create more problems than will solve.

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144 Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM(2020) 612, 23 September 2020 (‘pre-entry screening proposal’), Arts 6(6), 9 and 11. For analysis, see Lyra Jakulevičienė’s contribution to this collection.

145 MMR (n 55), Art 57(2) and MMR Memorandum (n 55), 12.

146 Pre-entry screening proposal (n 144), Arts 10 and 14(6).

147 MMR (n 55), Art 57(3).

148 Amended Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611, 23 September 2020, Art 41. See further Jens Vedsted-Hansen’s chapter in this volume.

149 MMR (n 55), Art 45(1)(a).

150 CFMR (n 131), Arts 4-6 and 7-9.

151 See, e.g., GLAN, ‘Migration and Border Violence Stream, containing a summary of the legal actions undertaken by the organisation’ <[www.glanlaw.org/migratio nandborders](http://www.glanlaw.org/migratio nandborders)>.

Rescue in the New Pact has been designed as an *exception* to the general rule of containment of unwanted arrivals, and unauthorised crossings as a *risk* to be avoided as much as possible. Within this framework, the EU will ‘support capacity building ... help[ing] partner countries manage irregular [flows],<sup>152</sup> framing maritime intervention as a function of border management. When assisting third countries, the EU will indeed focus on ‘strengthening capacities for border management, *including* by reinforcing their search and rescue capacities at sea’.<sup>153</sup> Rescue will thereby be further securitised,<sup>154</sup> configured as a form of ‘sovereign capture’ that becomes undistinguishable from interdiction,<sup>155</sup> used to spare the dangers of deadly crossings, to be performed pre-emptively to avoid loss of life, but, at the same time, in a way that impedes access to protection in Europe.<sup>156</sup> Pull-backs, detention and repression by partner States will thus become further normalised,<sup>157</sup> if not legitimised as a means within the ‘targeted migrant smuggling partnerships’ the EU is to conclude with third countries,<sup>158</sup> regardless of their human rights implications—which are nowhere mentioned in the New Pact.

Even upon disembarkation the possibility of a thousand little Morias proliferating cannot be excluded.<sup>159</sup> The combination of pre-entry screening arrangements, border procedures, and complex solidarity relocations

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152 ‘New Pact on Migration and Asylum’ (n 2), 20.

153 *Ibid* (emphasis added).

154 Daniel Ghezlbash and others, ‘Securitization of Search and Rescue at Sea: The Response to “Boat Migration” in the Mediterranean and Offshore Australia’ (2018) 67 *International and Comparative Law Quarterly* 315.

155 Polly Pallister-Wilkins, ‘Humanitarian Rescue/Sovereign Capture and the Policing of Possible Responses to Violent Borders’ (2017) 8 *Global Policy* 19. See also Moreno-Lax, ‘The EU Humanitarian Border and the Securitization of Human Rights’ (n 15).

156 A prime example of this practice is offered by ECtHR, *S.S. and Others v. Italy*, Appl. 21660/18 (pending), on which the author acts as lead counsel, as a member of GLAN, on behalf of the applicants. For further details, see Violeta Moreno-Lax, ‘The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v. Italy*, and the “Operational Model”’ (2020) 21 *German Law Journal* 385.

157 Violeta Moreno-Lax and Martin Lemberg-Pedersen, ‘Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalization’ (2019) 56 *Questions of International Law* 5 <[www.qil-qdi.org/border-induced-displacement-the-ethical-and-legal-implications-of-distance-creation-through-externalization/](http://www.qil-qdi.org/border-induced-displacement-the-ethical-and-legal-implications-of-distance-creation-through-externalization/)>.

158 ‘New Pact on Migration and Asylum’ (n 2), 16.

159 The term is inspired by Matthew J. Gibney, ‘A Thousand Little Guantánamos: Western States and Measures to Prevent the Arrival of Refugees’ in Kate E.



embeds rather than overhauls the failed hotspot approach.<sup>160</sup> Inevitably, the international SAR regime and the customary international legal obligation to render assistance and rescue at sea on which it is based (including disembarkation in a ‘place of safety’ in line with *non-refoulement* guarantees<sup>161</sup>) will be disfigured and betrayed. The supposedly new common European approach to SAR will thus prolong non-rescue practices, embed the criminalisation of solidarity, and sanction defection from international standards and the EU acquis. So, in the final assessment, I need to concur with Commissioner Johansson and conclude that ‘no one will be satisfied’ with the New Pact proposals—at least, no one should.<sup>162</sup>

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Tunstall (ed), *Displacement, Asylum, Migration: The Oxford Amnesty Lectures 2004* (Oxford University Press 2006), 139.

- 160 FRA, ‘Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the “hotspots” set up in Greece and Italy’ (February 2019) <[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2019-opinion-hotspots-update-03-2019\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-hotspots-update-03-2019_en.pdf)>.
- 161 UNHCR, IMO and ICS, ‘Rescue at Sea: A Guide to Principles and Practices as Applied to Refugees and Migrants’ (January 2015) <[www.unhcr.org/450037d34.pdf](http://www.unhcr.org/450037d34.pdf)>. See also ECtHR, *Hirsi Jamaa and Others v. Italy* (n 110).
- 162 Eszter Zalan, ‘Commissioner: No One will Like New EU Migration Pact’ (*EU Observer*, 18 September 2020) <<https://euobserver.com/migration/149475>>.



# The Future Architecture of the EU's Return System Following the Pact on Asylum and Migration: Added Value and Shortcomings

Madalina Moraru\*

## 1. Introduction – The Evolution of the EU's Return System Reform

This chapter analyses the implications of the Pact on Asylum and Migration<sup>1</sup> and the proposal for recasting the Return Directive<sup>2</sup> on the future of the EU's return system and the right to asylum. Returns do not feature in the Pact's title, nevertheless they are a redline running across all of the Pact's five legislative acts, and two non-binding proposals. These proposals are said to increase effective returns of irregularly staying third-country nationals from the EU by way of: introducing a mandatory, expedited return border procedure that could become the new regular return procedure; creating an EU Return Coordinator position to increase coordination among domestic return practices; increasing the links between asylum and return policies into a single integrated migration procedure; and introducing return sponsorship as a form of solidarity cooperation among the Member States. This chapter argues that while the Pact has remedied some of the shortcomings in the 2018 Commission proposal for the Recast of the Return Directive ('2018 Proposal'), in particular a more humane return border procedure, the improvements are not sufficient given the low bar set by the 2018 Proposal. Moreover, the diminished judicial control, weakened right to asylum, policy fragmentation and questionable efficiency of

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1 European Commission, New Pact on Migration and Asylum, COM(2020) 609, 23 September 2020.

2 European Commission, Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast), COM(2018) 634, 12 September 2018; and Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast): Partial General Approach, 10, 144/19, 13 June 2019.

the return system, as envisaged by the Pact, are challenges that need to be addressed.

The implications of the Pact on Asylum and Migration on the future architecture of the EU's return system need to be assessed jointly with the Return Directive,<sup>3</sup> as currently in force, as well as in light of the proposal for recasting the Return Directive. The Commission has started the process of reforming the EU's return system in 2015, first by way of soft law acts. Up until March 2017, the Commission's solution for reforming the EU's return system was to adopt bi-annual, non-binding acts putting forward concrete recommendations for how the Member States could improve domestic implementation of the Return Directive (see the Return Action Plans from 2015<sup>4</sup> and 2017,<sup>5</sup> and the 2017 Return Handbook<sup>6</sup>). This Directive was already widely considered a normative example of returns for legal orders around the globe.<sup>7</sup> It was thus thought that, unlike the Common European Asylum System (CEAS) instruments, there was no need for reforming it via legislative means. The advantage of this soft law approach was flexibility in providing guidelines for effective implementation and time efficiency in delivering potential policy solutions to the Member States. However, this soft law reform also came with less transparency and accountability safeguards.<sup>8</sup> The Commission's approach changed in 2018, when it tabled with urgency a proposal amending the Return Directive.<sup>9</sup>

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3 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, OJ 2008 L 348/98, 24 December 2008.

4 European Commission, Communication from the Commission to the European Parliament and the Council: EU Action Plan on Return, COM(2015) 453, 9 September 2015, 2.

5 European Commission, Communication from the Commission to the European Parliament and the Council on a More Effective Return Policy in the European Union: A Renewed Action Plan, COM(2017) 200, 2 March 2017, 2.

6 European Commission, Commission Recommendation (EU) 2017/2338 of 16 November 2017, Establishing a Common "Return Handbook" to Be Used by Member States' Competent Authorities When Carrying out Return-Related Tasks, OJ 2017 L 339/83, 19 December 2017.

7 European Commission, Communication from the Commission to the Council and the European Parliament on EU Return Policy, COM(2014) 199, 28 March 2014.

8 Peter Slominski and Florian Trauner, 'Reforming Me Softly – How Soft Law Has Changed EU Return Policy since the Migration Crisis' [2020] *West European Politics* 1.

9 See (n 2).

The Commission did not conduct an impact assessment, nor an updated evaluation of the Directive implementation, although this was required by both Article 19 of the Return Directive, as well as by the Better Regulation Guidelines.<sup>10</sup> Nevertheless, both a substitute impact assessment<sup>11</sup> and an evaluation of domestic implementation<sup>12</sup> were done by the European Parliament.<sup>13</sup> These assessments, so important for ensuring the reliability of proposed amendments, came only after the Council had already delivered its partial agreement on the Commission's proposal<sup>14</sup> (see the timeline in Figure 1 below). Currently, the negotiations on the recast of the Return Directive are stuck in the Parliament, where the amendments tabled by the Rapporteur, Tienieke Strik, are under discussion. Although the Draft Report was finalised in February 2020,<sup>15</sup> it has not yet been adopted in the plenary, at least at the moment of writing this chapter.<sup>16</sup>

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10 European Commission, 'Better Regulation Guidelines', 2017, c III, 15.

11 'Substitute Impact Assessment on the Proposed Return Directive (Recast)', European Parliamentary Research Service PE 631.727, February 2019, 9–14.

12 European Parliament, European Parliament Resolution on the Implementation of the Return Directive (2019/2208(INI)), P9\_TA(2020)0362, 17 December 2020.

13 Izabella Majcher and Tienieke Strik, 'Legislating without Evidence: The Recast of the EU Return Directive' (2021) 23 *European Journal of Migration and Law* 103.

14 Council of the European Union, partial agreement (n 2).

15 Draft Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) (COM(2018)0634 – C8-0407/2018 – 2018/0329(COD)), 21 February 2020.

16 Maria Diaz Crego, 'Recasting the Return Directive', European Parliamentary Research Service PE 637.901, March 2021.

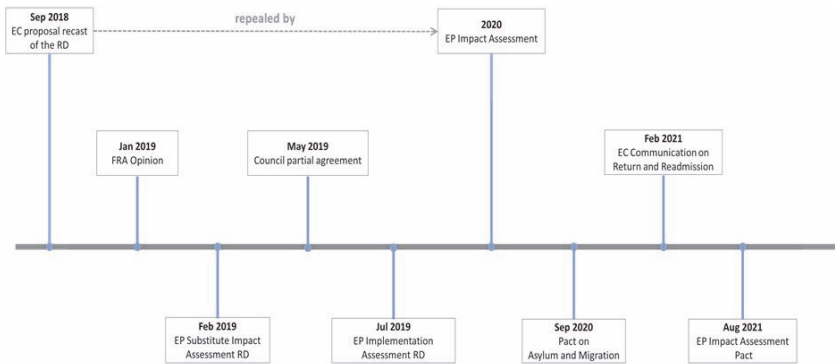


Figure 1: Timeline of the EU's return system reform (up until September 2021)

The 2018 Proposal on recasting the Return Directive put forward a new mandatory return border procedure, and linked return policies to asylum by requiring the issuing of a common administrative decision for both the rejection of an asylum claim and return decision. These two proposals are taken up by the Pact and substantially amended. The Pact enlarges the scope of application of return border procedure, increases the links between asylum and return policies so much so that return related provisions are inserted in all the new or amended legislative acts proposals on asylum: Asylum and Migration Management Regulation;<sup>17</sup> Screening Regulation;<sup>18</sup> amended Asylum Procedures Regulation;<sup>19</sup> amended Eurodac;<sup>20</sup> and the

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- 17 European Commission, Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) [Asylum and Migration Fund], COM(2020) 610, 23 September 2020 ('Asylum and Migration Management Regulation').
  - 18 European Commission, Proposal for a Regulation of the European Parliament and of the Council Introducing a 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, COM(2020) 612, 23 September 2020.
  - 19 European Commission, Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, COM(2020) 611, 23 September 2020 ('Asylum Procedure Regulation').
  - 20 European Commission, Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of "Eurodac" for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU)

Regulation addressing situations of crisis and force majeure.<sup>21</sup> While the Pact ensures an accurate cross-referencing between the proposed acts, nevertheless, the return legal framework will be made up of numerous new provisions that are scattered across six different legislative acts (those of the Pact and the Recast Return Directive), and additional cooperation agreements with third countries.<sup>22</sup> This fragmented legal framework will further complicate an already dense return regulatory framework made up of norms pertaining to the global, regional (both Council of Europe and EU), and domestic legal orders.<sup>23</sup>

In the following sections, the chapter will focus on: why returns feature so centrally in the Pact; how the Pact proposes to reform the EU policy design on returns, compared to the 2018 Proposal to Recast the Return Directive and the currently in force Return Directive; and what could be the future challenges for the EU system of returns as envisaged by the Pact.

## 2. 'Effective' Returns as the Main Driving Force for the Reform of the Common European Asylum System (CEAS)

The reform of the CEAS has been stalled for more than four years mainly due to a lack of consensus among the Member States on the implementation of the principle of solidarity (Article 80 TFEU). During this period, reform discussions have taken a turn towards returns as the preferred solution to deal with (future) migration crises.<sup>24</sup> The 'fight against irregu-

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XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM(2020) 614 final ('2020 Eurodac Proposal').

21 European Commission, Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum, COM(2020) 613, 23 September 2020.

22 See Paula García Andrade's chapter in this collection.

23 Evangelia (Lilian) Tsourdi, 'Alternatives to Immigration Detention in International and EU Law: Control Standards and Judicial Interaction in a Heterarchy' in Madalina Moraru, Galina Cornelisse and Philippe de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart 2020) ch 7.

24 See, Jessica Schulz, 'The end of protection? Cessation and the "return turn" in refugee law' (EU Migration Law Blog, 31 January 2020) <<https://eumigrationlawblog.eu/the-end-of-protection-cessation-and-the-return-turn-in-refugee-law/>> accessed 17 November 2021.

lar migration' has become a key objective of the CEAS, overshadowing the international obligation of the Member States to protect refugees.<sup>25</sup> Prioritising returns appears to gather more consensus among Member States than the implementation of the international obligation to protect refugees.<sup>26</sup> Building on this consensus, the Commission has made effective returns a core aim of the asylum reform as envisaged in the Pact on Asylum and Migration.

As justification for making returns an integrated part of the CEAS reform, the Pact refers to: the persistently low return rates, which seem to not match the Commission's unrealistically high return rates (70% for 2020);<sup>27</sup> changes in the migration flows, 'as the arrival of third-country nationals with clear international protection needs in 2015-2016 has been partly replaced by mixed arrivals of persons of nationalities with more divergent recognition rates'; the high proportion of rejected asylum seekers in the percentage of returnees (namely 80%).<sup>28</sup>

The Pact identifies various challenges to effectiveness of returns: procedural loopholes and guarantees in the EU asylum and return systems, which are 'abused' by third-country nationals to prolong their stay in the EU; inefficiencies in the national return system, and lack of harmonisation at EU level; and insufficient cooperation of third countries on readmission.<sup>29</sup> These causes overlap to a certain extent with the shortcomings identified by scholars and practitioners. The recent jurisprudence of the Court of Justice of the European Union (CJEU) confirms the still persistent deficient transposition of the Return Directive, ten years

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25 Council Conclusions, 'Migration policy: Council agrees partial negotiating position on return directive', 7 June 2019.

26 Remarks by Commissioner Dimitris Avramopoulos following the Home Affairs Council meeting of December 2018 <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_18\\_6706](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_18_6706)> accessed 17 November 2021.

27 Sergo Mananashvili, 'EU Return Rates, COVID-19, and the Future of Return Policies and Partnerships' (ICMPD Policy Brief, May 2020).

28 See European Commission, Proposal for a Regulation of the European Parliament and of the Council on a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM/2020/611 final, 23 September 2020, 2.

29 Commission Staff Working Document Accompanying the document Proposal for a regulation of the European Parliament and the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund] SWD/2020/207 final, 41 and 88.



since the entry into force of this instrument.<sup>30</sup> Member States' practices still diverge on: who should be returned;<sup>31</sup> how the return should take place;<sup>32</sup> and where to return safely.<sup>33</sup> However the Commission's narrow understanding of 'effectiveness' of returns as increasing the number of returns has attracted harsh criticism given, *inter alia*, the unreliability of return date at the EU level.<sup>34</sup> Notably, Member States legal definition and methods of calculation of returns and reporting style vary significantly, to the point of impairing the reliability of return data on the basis of which the Commission relies on.<sup>35</sup> Furthermore, it is difficult to evaluate if the Commission proposals for increasing effectiveness actually ensure both effectiveness and human rights protection, when none of them was preceded by an implementation and impact assessment reports.<sup>36</sup> In fact one of the Commission's assumptions that increased formal and informal readmission agreements will increase effectiveness of returns, in its narrow understanding, has been demonstrated to be false.<sup>37</sup>

It remains to be seen whether the Parliament's draft tabled amendments, which understand effectiveness as referring also to sustainability of returns and implementation of fundamental rights safeguards and procedural guarantees, will pass the vote in the plenary and be taken on board by the Council and the Commission

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30 ECJ 8 October 2020, Case C-568/19, *MO (Zaizoune II)*, ECLI:EU:C:2020:807; ECJ 17 September 2020, Case C-806/18, *JZ*, ECLI:EU:C:2020:724.

31 Galina Cornelisse, 'The Scope of the Return Directive: How Much Space is Left for National Procedural Law on Irregular Migration' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 1.

32 See the chapters in Part III of Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23).

33 Olivia Sundberg Diez, 'Diminishing safeguards, increasing returns: Non-refoulement gaps in the EU return and readmission system' (EPC Discussion Paper 2019).

34 Philipp Stutz and Florian Trauner, 'The EU's "Return Rate" with Third Countries: Why EU Readmission Agreements Do Not Make Much Difference' [2021] *International Migration*; Sergio Carrera and Jennifer Allsopp, 'The Irregular Immigration Policy Conundrum: Problematizing "Effectiveness" as a Frame for EU Criminalization and Expulsion Policies' in Ariadna Ripoll Servent and Florian Trauner, *The Routledge Handbook of Justice and Home Affairs Research* (Routledge 2017) ch 7.

35 Stutz and Trauner (n 34).

36 Izabella Majcher, 'The EU Return System under the Pact on Migration and Asylum: A Case of Tipped Interinstitutional Balance?' (2020) 26 *European Law Journal* 199.

37 Stutz and Trauner (n 34).

### 3. *The Pact's New Architecture of the EU's Return System*

The main changes proposed by the Pact aim to reform the EU's current return system by including: a reinforced EU's returns coordination; extended links between asylum and returns policies; accelerated mandatory border return procedure; the introduction of return sponsorship as a new form of solidarity; and the promotion of assisted voluntary return programmes.

#### *a) Reinforcing the EU's Role on Returns Coordination*

The amended Asylum Procedure Regulation proposal mentions that 'effective return of those who are not in need of protection, should not have to be dealt with by individual Member States alone, but by the EU as a whole'.<sup>38</sup> The Pact thus proposes a more EU-coordinated approach to returns by introducing a new position, that of an EU Return Coordinator, inside the European Commission, supported by a Deputy Executive Director for Return within Frontex and a network of high-level representatives. This should contribute to a 'common strategic and coordinated approach on return and readmission among the Member States, the Commission and Union agencies'.<sup>39</sup> While enhanced coordination, cooperation and consistent return processes are paramount, the legal act appointing the EU Return Coordinator in 2021 should also provide for clear monitoring tasks. The Coordinator should thus ensure that Member States provide an accessible appeals mechanism, free legal advice, special protection for vulnerable groups and independent monitoring mechanism in both border and ordinary return procedures, as well as monitoring Frontex extended operational powers on returns. Although we are approaching the end of 2021, the EU Return Coordinator has not been nominated. His powers are also limited as they depend on the willingness of Member States to cooperate. The push back situation at the border between Poland and Belarus has shown the limits of Frontex intervention, which in the absence of Poland request for assistance, it has its hands tight.<sup>40</sup>

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38 European Commission, Proposal for [an Asylum Procedures Regulation], COM(2016) 467, 13 July 2016 and Amended proposal, COM(2020) 611, 23 September 2020, 1.

39 Ibid.

40 Anne Applebaum, 'A Dictator Is Exploiting These Human Beings' (*The Atlantic*, 13 November 2021) <[www.theatlantic.com/ideas/archive/2021/11/belarus-eu-poland-migrants-refugees-border/620700/](http://www.theatlantic.com/ideas/archive/2021/11/belarus-eu-poland-migrants-refugees-border/620700/)> accessed 17 November 2021.

b) *Extending the Links between Asylum and Returns Policies*

One of the main novelties introduced by the Pact is the creation of a 'seamless link' between asylum and return policies, which promises to contribute to a 'quicker return of third-country nationals without a right to remain in the Union'.<sup>41</sup> This linkage between asylum and return procedures is aimed to address the issue of 'Member States' asylum and return systems operat[ing] mostly separately, creating inefficiencies and encouraging the movement of migrants across Europe'.<sup>42</sup> The Pact identified various loopholes in asylum and return procedures, notably, 'return and negative asylum decisions being issued separately, inefficient rules in case of subsequent asylum applications or of applications submitted during the last stages of return are argued to facilitate absconding and unauthorised movement of migrants across the EU, hamper returns and put a heavy burden on national administrative and judicial systems'<sup>43</sup> The Pact thus proposes to link asylum and return procedures in three main ways, introducing a single and indivisible procedure where asylum and return would be carried out in a single thread.

First, an asylum application rejection should be issued within the same administrative act with a return decision, or if issued separately, then at least 'at the same time and together'.<sup>44</sup> This combined administrative procedure endorses a procedural model which appears to be followed by a minority of Member States.<sup>45</sup> The rationale behind this policy approach is that multiple hearings are merely delaying or even jeopardising effective returns.<sup>46</sup> While the CJEU found this compressed model permissible under the Return Directive,<sup>47</sup> its implementation has been found to fall short of good administration obligations, rights of defence and *non-refoulement* guarantees.<sup>48</sup> Among the reasons for this deficient play-out of the com-

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41 Pact (n 1), 3.

42 European Commission, New Pact on Asylum and Migration, COM(2020) 609, 23 September 2020, 4.

43 Commission Staff Working Document (n 29), 5.

44 See Article 35a of the Asylum Procedure Regulation (n 19).

45 See 2017 European Migration Network Report on Effective Returns.

46 See the Governments' observations in ECJ 19 June 2018, Case C-181/16, *Gnandi*, ECLI:EU:C:2018:465.

47 Ibid.

48 See Valeria Ilareva, 'The Right to be Heard: The Underestimated Condition for Effective Returns and Human Rights Consideration' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 15; and Serge Slama, 'Duality of Jurisdiction in the Con-

bined model, the European Parliament study referred to ‘risk of *refoulement* which is not systematically assessed by the authorities on their own initiative when contemplating the issuing of a return decision’.<sup>49</sup> It should be noted that the asylum procedure assesses violation of the principle of *non-refoulement* only on limited grounds, eluding a full assessment of the risk of refoulement in compliance with Articles 2, 3 ECHR, Article 19 of the Charter and Article 5 of the Return Directive.

An added value of the 2020 Asylum Procedure Regulation compared to the 2018 Recast Return Directive proposal is that the former clearly codifies the fundamental rights safeguards developed by the CJEU in *Gnandi*, whereas these are absent from both Articles 6 and 16 of the 2018 Proposal. Notably, Article 54(1) provides that ‘the effects of a return decision shall be automatically suspended for as long as an applicant has a right to remain or is allowed to remain’. Nevertheless, the proposal should prevent situations of poor transpositions as identified by the Parliament’s report on the implementation of the Return Directive, and codify in clearer terms the obligation to individually assess additional grounds for *non-refoulement* outside the protective grounds for refugee or subsidiary protection (as set out in Articles 10 and 15 Qualification Directive<sup>50</sup>). In *Mukarubega*<sup>51</sup> and *Boudjlida*<sup>52</sup> judgments, the CJEU held that a third-country national ‘must be able to express his/her point of view on the legality of his or her stay; facts that could justify the authorities to refrain from adopting a particular return related decision; facts that justify exception(s) to the expulsion; social circumstances of the irregular migrant, including the best interests of the child, family life and the state of health of the third-country national concerned and risks of *non-refoulement*.’ These requirements should be respected by both the future Recast Return Directive and the amended Asylum Procedure Regulation.

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trol of Immigration Detention: The Case of France/Trois Hautes Juridictions Nationales pour une Directive: Une Interaction Judiciaire en Trompe l’oeil’ in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 14.

49 European Parliament Resolution on the Implementation of the Return Directive (n 12), 30.

50 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), OJ 2011 L 337/9, 20 December 2011.

51 ECJ 5 November 2014, Case C-166/13, *Mukarubega*, ECLI:EU:C:2014:2336.

52 ECJ 11 December 2014, Case C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431.

Second, the Asylum Procedure Regulation merges the appeal procedure for asylum and return decisions within the border procedure within one single procedure. Following the Pact's approach that procedural rights serve mostly for prolonging rejected asylum seekers' stay in the EU, the Asylum Procedure Regulation limits the levels of appeal to one, and turns automatic suspensive effect of appeals into an exception in border procedures.<sup>53</sup> However, this theoretical model of swifter procedures has shown its shortcomings in the Greek practice. Notably, the limited one level of judicial appeal, brevity of judicial reasoning, and lack of automatic suspensive effect of appeal have not contributed to swifter asylum and return procedures, but to a series of fundamental rights violations found by the European Court of Human Rights against Greece.<sup>54</sup> While the suspensive effect of the joined appeal can be granted either *ex officio* or by individual application, the Italian practice illustrates the practical difficulties in applying such a system.<sup>55</sup> Nevertheless, similar domestic legal procedures can lead to different results in practice, depending on various factors at play, such as: the legal system, culture, and type of competent courts to review the executive.<sup>56</sup> Therefore, the EU procedural model should leave more space for accommodation to the national legal specificities, since transplanting one procedural model that works in one jurisdiction to another might not lead to the same favourable results. In the absence of effective legal aid, it will be extremely cumbersome to motivate an appeal that will have to address both the asylum and return related legal and factual considerations during only one week. Considering that in many Member States, national funds for legal aid provided by NGOs are cut, the single right to appeal proposed by the Asylum Procedure Regulation lacks the guarantees required under Article 47 of the Charter.<sup>57</sup>

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53 See Articles 53 and 54 of Asylum Procedure Regulation.

54 Angeliki Papapanagiotou-Leza and Stergios Kofinis, 'Can the Return Directive Contribute to Protection for Rejected Asylum Seekers and Irregular Migrants in Detention? The Case of Greece' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 12.

55 Alessia di Pascale, 'Can a Justice of the Peace be a Good Detention Judge? The Case of Italy' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 13.

56 For a comparison between the Greek and German return system, see Papapanagiotou-Leza and Kofinis (n 54); and Jonas Bornemann and Harald Dorig, 'The Civil Judge as Administrator of Return Detention: The Case of Germany' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 9.

57 See, in particular, Czech Republic, Hungary and Poland.

Third, the Asylum Procedure Regulation links the detention of asylum seekers to pre-removal detention during border procedures. According to recital 40(i) and Art. 41a(5) of Asylum Procedure Regulation asylum seekers who have been detained during the border procedure ‘and who no longer have a right to remain and are not allowed to remain may continue to be detained for the purpose of preventing entry into the territory of the Member State, preparing the return or carrying out the removal process.’ Without effective legal aid this theoretical presumption of pre-removal detention risks becoming an irrebuttable presumption in practice.

The increased links between asylum and return procedures proposed by the Pact are making asylum seekers to be considered returnees as soon as administrative authorities have rejected their application, a compressed model which will entail systemic changes for many of the administrative and judicial systems, which treat the two procedures separately.<sup>58</sup> Both the 2018 Recast Return Directive and the amended Asylum Procedure Regulation proposals should better address the shortcomings identified by the EU Fundamental Rights Agency and the European Parliament in the implementation of the merged asylum and return procedure, which was found to lead in practice to ‘the reduction of safeguards which are necessary to ensure that Articles 18 and 19 of the EU Charter are not circumvented’.<sup>59</sup> As highlighted by Mouzourakis, the 2020 Pact replaces the EU law view of asylum seekers as a single, indivisible category of protected persons with a fragmented “asylum seeker” status that will cast greater complexity and uncertainty for those seeking refuge in Europe and the authorities responsible for assessing their claims.<sup>60</sup>

### *c) Accelerating Returns: Mandatory Border Procedure as the New ‘Normal’*

In order to prevent unauthorised entry into the EU and accelerate returns, the Pact introduces a novel screening procedure and a mandatory return border procedure.<sup>61</sup> The Pact’s version of the return border procedure is a compromise between the 2018 Proposal to Recast the Return Directive,

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58 According to the 2017 European Migration Network Report on Effective Returns.

59 See, FRA Opinion, ‘The recast Return Directive and its fundamental rights implications’ (17 January 2019), 32.

60 Minos Mouzourakis, ‘More Laws, Less Law: The European Union’s New Pact on Migration and Asylum and the Fragmentation of “Asylum Seeker” Status’ (2020) 26 *European Law Journal* 171.

61 Amended Asylum Procedure Regulation (n 19).

which followed restrictive domestic border systems,<sup>62</sup> and the current regular border procedure provided by the Return Directive.

The Pact's streamlined border procedure is based on two pillars: screening procedure<sup>63</sup> and a two-phased border procedure.<sup>64</sup> The screening procedure is applied to both asylum seekers (who request international protection at border crossing points without fulfilling entry conditions) and irregularly entering third-country nationals (i.e. apprehended in connection with unauthorised crossing of external borders, disembarked following search and rescue operations). After the screening procedure, individuals are redirected to the border procedure, consisting of two stages: asylum, followed by an obligatory return border procedure, in case the asylum application is rejected.

The mandatory use of border procedure was one of the issues of dissent between Member States, during the negotiations of the 2016 reform package. The Pact introduces an amended border procedure for carrying out returns,<sup>65</sup> which replaces the model included in the 2018 proposal for a recast Return Directive (see Chapter V). There are two main changes introduced by the Pact to the 2018 model of return border procedure.

First, the Pact significantly changes the personal scope of application of return border procedures. On the one hand, it limits the application by excluding children and vulnerable groups, with the exception of national security cases, and third-country nationals that have no prospect to be removed for various legal or technical reasons.<sup>66</sup> On the other hand, the Pact extends the scope of application of return border procedures to the following categories of third-country nationals: apprehended at the external border and disembarked after the search and rescue operations; relocated from another Member State. Under Chapter V of the 2018 Recast of the Return Directive proposal, the return border procedure was to be applied only to the asylum seekers rejected within border procedure. Following

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62 For instance, by Sweden and Germany, see 2020 European Parliament Implementation Assessment (n 12), 43-45.

63 Proposal for a Regulation of the European Parliament and of the Council introducing a 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 COM/2020/612 final.

64 The procedures have been described in more detail by *Lyra Jakuleviciene* and *Jens Vedsted-Hansen* in this collection.

65 See Article 41a of the amended Asylum Procedure Regulation (n 19).

66 See Article 41a(5) of the amended Asylum Procedure Regulation (n 19).



these changes, the return border procedure risks becoming the new norm replacing regular return procedures.

Second, the Pact's amended return border procedure comes with guarantees for a fairer procedure compared to the Recast Return Directive proposal of the European Commission. For instance, voluntary return will be mandatory according to Article 41a amended Asylum Procedure Regulation, whereas the 2018 Commission's proposal in the Recast Return Directive eliminated voluntariness from border return procedures. Return decisions have to provide full justification based on individual assessment instead of the brief format provided by Article 22(2) of the 2018. Moreover the Asylum Procedure Regulation provides for a series of changes to the judicial review of return decisions, which will follow the same model as the appeal against the rejection of asylum claims. Namely, the review of return decisions is to be carried out only by a court, excluding administrative authorities, which are allowed under current Art. 13 of the Return Directive.<sup>67</sup> The Pact extends the timeframe for appeal before a court from 48 hours, as proposed by the 2018 Recast the Return Directive proposal, to one week.<sup>68</sup> Judicial scrutiny over returns is extended to both facts and law ensuring thus more effective legal remedies. These proposals might increase the effectiveness of the current judicial review in return procedures. Within the current legal framework, judicial review is limited, in several Member States, to only the challenged return measure without the possibility to review the legality of other related return or asylum decisions (such as return decision, removal order, or pre-removal detention). This fragmented procedural model has contributed to a practice whereby pre-removal detention orders are maintained although the return decision is unlawful.<sup>69</sup>

The Pact's mandatory return border procedure is in certain aspects a step forward for the returnee's rights protection compared to the current situation, such as the more effective judicial review and introduction of voluntary return. In addition, the introduction of a mandatory return border procedure might enhance the fundamental rights' of third-country nationals in certain jurisdictions that do not apply the Return Directive's

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67 See Article 53 of the amended Asylum Procedure Regulation (n 19).

68 See Article 53(7)(a) of the amended Asylum Procedure Regulation (n 19).

69 See Sylvie Sarolea, 'Detention of Migrants in Belgium and the Criminal Judge: A Lewis Carroll World' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 11; and ECJ 30 September 2020, Case C-402/19, LM, ECLI:EU:C:2020:759; ECJ 30 September 2020, Case C-233/19, B, ECLI:EU:C:2020:757.



guarantees in cases of 'irregular crossings' in border areas. Under current Article 2(2)(a) of the Return Directive, Member States can decide to not apply the Directive in border cases. Although Member States are obliged to ensure the Directive's guarantees even in such cases according to Article 4(4) of the Directive, however this does not always happen in practice.<sup>70</sup>

While the Pact's return border procedure model is, on paper, more humane than the 2018 Commission's proposal due to enhanced fair trial guarantees, its play-out in practice remains challenging for the Member States. Given the extended scope of application of the border procedure, Member States will need to invest in ensuring that monitoring of border activities, and legal complaint mechanisms are effective not only on paper, but also in practice. However, it is unclear if the EU funds can be used for these purposes.<sup>71</sup> The gaps between the effectiveness of complaint mechanisms on paper and practice have been eloquently shown in relation to the current border procedures.<sup>72</sup>

In addition, the Pact's model of accelerating return procedures could further weaken an already weak role of domestic courts in migration decision-making (see *Torubarov*, Poland<sup>73</sup>). The identification of third-country nationals' legal status is attributed to administrative authorities, instead of being the result of a two-stage procedure where courts have confirmed the legality of administrative decision-making. An individual will be considered already a returnee, immediately after the administrative rejection of an asylum claim. In such circumstances, the added value of judicial dialogue for safeguarding the rule of law and judicial independence in migration decision-making is of utmost importance.<sup>74</sup>

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70 See the 2020 European Parliament Implementation Assessment (n 12), 43-45.

71 See more in the chapter by Iris Goldner in this collection.

72 Madalina Moraru and Felicia Nica, 'A Practical Evaluation of Border Activities in Romania: Control, Surveillance, and Expulsions' in Sergio Carrera and Marco Stefan, *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union* (Routledge 2020) ch 9.

73 On Hungary, see ECJ 29 July 2019, Case C-556/17, *Torubarov*, ECLI:EU:C:2019:626; on Poland, see Monika Szulecka, 'The undermined role of (national) case law in shaping the practice of admitting asylum seekers in Poland' Special Issue of the European Journal of Legal Studies; Veronica Federico, Madalina Moraru and Paola Pannia (eds), *Migrants and Law. What European Courts Say* (forthcoming in 2022).

74 Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23).

*d) A New Form of Solidarity: Return Sponsorship and Relocation of Returnees/  
Return Sponsorship as Redistribution of Solidarity*

The added value of integrating return policies in the Pact appears to be most significant for the implementation of the solidarity principle. The Pact introduces new possibilities for Member States to provide assistance to each other in carrying out returns, in the form of return sponsorship. The Commission foresees mandatory solidarity contributions but it leaves flexibility to the Member States whether to choose for relocation or return sponsorships. The Pact complements the possibilities for solidarity through relocation of asylum seekers by including 'return sponsorship' schemes, under which a Member State commits to support returns from another one.<sup>75</sup> According to Article 55 of the Asylum and Migration Management Regulation, the return solidary scheme implies logistical, financial and counselling help provided by the supporting Member State. If such efforts prove to be unsuccessful after eight months, the sponsoring Member State must transfer the returnees and continue the efforts to return them in accordance with the Return Directive. The financial contribution for a returnee under a return sponsorship is 10 000 Euros. Moreover, as part of the Solidarity Response Plan, Member States are allowed to choose the nationalities of the irregularly staying third-country nationals that they intend to sponsor.<sup>76</sup> Although the Regulation encourages the mutual recognition of return decisions by the Member State under Directive 2001/40/EC,<sup>77</sup> this principle is not made obligatory, meaning that Member States might continue with the current practice of issuing their own return decisions, even if such decisions were previously issued by other Member States. The fact that the Pact does not force the principle of mutual recognition of return decisions on the Member States is a welcomed policy approach. Thus, it avoids replicating the complex and ineffective functioning of the principle of mutual recognition of asylum decisions within the Dublin transfer system to the returns system.<sup>78</sup>

The return sponsorship builds on bilateral forms of return solidary already followed by some of the Member States.<sup>79</sup> The Pact thus replaces

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75 Article 45(1)(b) Asylum and Migration Management Regulation (n 17).

76 See Article 52(3) of the Asylum and Migration Management Regulation (n 17).

77 Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals OJ L 149, 2.6.2001, 34–36.

78 On the Dublin system shortcomings, see Francesco Maiani in this collection.

79 For instance, Belgium and France, according to the Director of Operations at the Fedasil in Belgium remarks during the 2020 ICMPD Annual Conference.

the current piecemeal approach to return cooperation based on bilateral agreements with an EU system to be monitored by the Commission. However, this model faces two major challenges. While some Member States have already expressed support for the Pact's new form of solidarity on returns (e.g. Austria), other Member States are strongly opposing this new form of solidarity.<sup>80</sup> In addition, should the return sponsorship proposal pass in its current form, the EU return policy will risk being managed by fewer Member States. Those willing to engage in return sponsorships might be Member States with a track record of human rights violations in return procedures,<sup>81</sup> or Member States that will return on the basis of diplomatic relations they have with certain third countries instead of the ties existent between the returnee and the third country.<sup>82</sup> Given that third countries will face sanctions for lack of cooperation on readmission,<sup>83</sup> some third countries will be accepting returnees even in the absence of any connection between the third country and the returnee.<sup>84</sup>

It is unclear how the return sponsorship programme, which is a procedure autonomously coordinated by the Member States, will work in parallel to the return operations carried out by Frontex.<sup>85</sup> As regards fundamental rights safeguards, even though inadequate, they are at least present

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80 Agence Europe, 'Same divergences persist between Member States on balance between responsibility and solidarity in asylum matters' (Brussels 21 November 2020) <<https://agenceurope.eu/en/bulletin/article/12609/14>> accessed 17 November 2021.

81 Jacek Bialas, 'A Lawyer's Perspective on Access to Classified Evidence in Return Cases: A View from Poland' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 17; ECJ 14 May 2020, Cases C 924/19 and C 925/19 PPU, *FMS and others*, ECLI:EU:C:2020:367.

82 See Elspeth Guild's chapter in this collection.

83 Article 25(a) of Regulation of the European Parliament and of the Council amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), 2018/0061 (COD) 15 May 2019.

84 On the limited effectiveness of such sanctions for certain third countries, see Florian Trauner's presentation at the 2021 Odysseus Conference, 'The New Pact on Asylum and Migration: Dead or Alive?'; for a more detailed commentary of return sponsorship, see Olivia Sundberg Diez, Florian Trauner and Marie De Somer, 'Return Sponsorships in the EU's New Pact on Migration and Asylum: High Stakes, Low Gains' (2021) 23 *European Journal of Migration and Law* 219.

85 See the chapter by Evangelia (Lilian) Tsourdi in this collection.

in Frontex operations, which is less the case for the return sponsorship programme.<sup>86</sup>

e) *The Promotion of Assisted Voluntary Return Programmes: Challenges for Voluntariness and Non-Refoulement*

The 2020 Pact refers to Assisted Voluntary Return as the preferred mode of return, and for this reason it adopted a dedicated Strategy in April 2021.<sup>87</sup> In theory, the promotion of Assisted Voluntary Return and reintegration programmes is the expression of a humane approach to returns. In practice, however, challenges for the protection of *non-refoulement* remain high, as shown by the recent jurisprudence of the European Court of Human Rights (ECtHR). The *N.A. v Finland*<sup>88</sup> case shows that Assisted Voluntary Return programmes implemented by Member States with the help of the International Organisation for Migration are sometimes neither ‘voluntary’, nor humane.

The new EU Strategy on Voluntary Return and Reintegration is another step forward in the creation of a common EU system for returns, one of the key ambitions of the 2020 Pact. The Strategy sets out measures to improve voluntary return mechanisms, from outreach activities to increase migrants’ awareness of the return and reintegration assistance available, to better counselling on their legal options. It also aims to strengthen coordination and exchanges between EU Member States so that they do not duplicate efforts and are able to learn from each other’s experiences with assisted voluntary return and reintegration programs.<sup>89</sup> However, the Strategy on Assisted Voluntary Return programmes does not fully address the shortcomings identified by the aforementioned jurisprudence of the ECtHR, namely the practice of Member States requiring waivers of legal responsibility to be signed by returnees. Furthermore, it should be clarified

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86 Mariana Gkliati, ‘Returns in Core of the EU Pact on Migration and Asylum and the Leading Role of Frontex’ (*Human Rights Here*, 10 January 2021) <[www.humanrightshere.com/post/blog-series-eu-new-pact-on-migration-and-asylum1](http://www.humanrightshere.com/post/blog-series-eu-new-pact-on-migration-and-asylum1)> accessed 17 November 2021.

87 Communication from the Commission to the European Parliament and the Council, The EU strategy on voluntary return and reintegration, COM/2021/120 final, 27 April 2021.

88 ECtHR, 14 November 2019, No. 25244/18, *N.A. v. Finland*.

89 Camille L. Coz, ‘EU Strategy on Voluntary Return and Reintegration’ (Migration Policy Institute Policy Brief, May 2021).

that such programmes are preceded by assessment of *refoulement* risks based on the family, private life, children rights, serious harm to health and life and dignity as developed by the European courts.<sup>90</sup>

#### 4. Conclusion: Diminished Judicial Control, Policy Fragmentation and Questionable Efficiency

While the Pact does remedy some of the shortcomings of the 2018 Recast Return Directive proposal that is in the design of the return border procedure, it also raises several concerns regarding: the measurement of 'effectiveness' of returns; the protection of the right to asylum and principle of *non-refoulement*; policy fragmentation; diminished judicial control; and domestic implementation. For instance, the Commission preserves the controversial metric of increase in absolute numbers as a proxy for the 'effectiveness' of returns, although shortcomings in the collection and reporting of such data have been raised.<sup>91</sup> It also seems to endorse some of the governmental views that procedural rights during asylum and return procedures serve mostly for prolonging rejected asylum seekers' stay in the EU, rather than safeguarding fundamental rights and prohibition of *refoulement*.<sup>92</sup> While it is unclear what data is used to reach this conclusion, European jurisprudence has shown that domestic implementation falls short of effective rights of defence standards in national systems that follow a merged asylum and return procedure.<sup>93</sup> Furthermore, in the absence of impact assessment preceding the Pact, it is unclear whether the shortened return border procedure increases efficiency of returns, when studies regarding the German "Anchor Centers" showed that the return rate is lower in mixed procedure and border centres.<sup>94</sup> Furthermore, the implementation of mandatory return border procedure comes with increased

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90 For a list of these judicial standards, see Jean-Baptiste Farcy, 'Unremovability under the Return Directive: An Empty Protection?' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 19.

91 Stutz and Trauner (n 34).

92 See the 2017 European Migration Network Report on effective returns.

93 See ECJ 16 July 2020, Case C-517/17, *Addis*, ECLI:EU:C:2020:579; ECJ, *LM and B* (n 71).

94 Benjamin Bathke, 'Asylum Procedures Not Substantially Faster at German "Anchor Centers"' (*Info Migrants*, 24 February 2021) <[www.infomigrants.net/en/post/30469/asylum-procedures-not-substantially-faster-at-german-anchor-centers](http://www.infomigrants.net/en/post/30469/asylum-procedures-not-substantially-faster-at-german-anchor-centers)> accessed 17 November 2021. For insight into Anker centres, see ECRE,

costs for frontline Member States (e.g. Italy) which have not applied so far this procedure, while it is unclear which share of the funding would be covered by the EU.<sup>95</sup> It is thus not surprising that several of the frontline Member States have rejected the use of the border procedures so far.<sup>96</sup>

Moreover, by leaving the Member States the option to decide whether to apply the Return Directive instead of the Schengen Border Code in border like cases, the amended Asylum Procedure Regulation risks creating two parallel return procedures – one that applies to the Schengen Associated States while the other one, thus offering different procedural safeguards based on nationality.<sup>97</sup>

The Pact legislative and non-legally binding acts should also pay closer attention to both the CJEU and ECtHR case-law, which has repeatedly held that return procedures must include an individual and separate assessment of the principle of *non-refoulement* from asylum cases (see cases, LM, B ). Closer attention should also be paid to the UN standards. While children's rights are better protected in the Pact compared to the 2018 Proposal, the pre-removal detention of minors is nevertheless maintained, despite the repeated UN's calls for eliminating migrant children detention.<sup>98</sup>

In conclusion, while the focus on returns and border security is important, this should not be prioritised over a rule of law-based EU returns' system. The European Commission's policy consultations should extend beyond governmental proposals, and reconsider how the procedural models it proposes on paper will play-out in a context where the European Parliament, FRA and European and domestic courts have shown a reduction of fundamental rights safeguards for some of the merged asylum and return procedures. Moreover, increasing the administrative decision-making power over judicial ones risks to weaken judicial review in a context where courts at both national and European levels are already facing increasing political pressures when giving effect to fundamental rights in asylum and return cases.<sup>99</sup>

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'The AnkER Centres: Implications for Asylum Procedures, Reception and Return' (2019).

95 See Iris Goldner Lang's chapter in this collection.

96 New Pact on Migration and Asylum: Comments by Greece, Italy, Malta and Spain, November 2020.

97 See Article 41a(8) of the amended Asylum Procedure Regulation (n 19).

98 See the Report of the UN Special Rapporteur on the human rights of migrants A/75/183, 20 July 2020.

99 Serge Bodart, Caroline Fransen and Claude Dubois, 'EU Charter and the dialog of the judges in asylum and immigration cases' (Robert Schuman Centre for Advanced Studies 2020/10) <<https://cadmus.eui.eu/bitstream/handle/1814/66309/>

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RSCAS%202020\_10.pdf?sequence=1&isAllowed=y> accessed 17 November 2021;  
ECtHR, 11 December 2018, No. 59793/17, *M.A. and others v Lithuania*.





# The Pitfalls of Migration Diplomacy: The EU Pact and Relations with Third Countries

*Elspeth Guild\**

The term externalisation of migration control has been in circulation for more than 30 years now and includes a wide range of subjects and issues ranging from visa policies to push backs of little boats at sea. It has been the subject of substantial academic consideration<sup>1</sup> and criticism from NGOs.<sup>2</sup> At the heart of the notion is that migration control engages both the countries from which (unwanted) people<sup>3</sup> leave and those where they arrive. Where those countries of entry employ diplomatic, development, financial and other tools to encourage those states from which (unwanted) people are seeking to leave to prevent their departure then the responsibility to receive them (where they claim international protection) or to expel them (where they are categorised as ‘illegal’ migrants, a term much disparaged by international institutions including the UN but used in EU law)<sup>4</sup> will not fall on the receiving state. This principle is central to readmission agreements among states, the earliest of which, for the EU, was with Hong

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1 Bernard Ryan and Valsamis Mitsilegas, *Extraterritorial Immigration Control* (Brill Nijhoff 2010); Inka Stock, Ayşen Üstübcü and Susanne U. Schultz, ‘Externalization at work: responses to migration policies from the Global South’ (2019) 48 *Comparative Migration Studies* 7.

2 For instance already in 2017 by FIHD <[www.fidh.org/en/issues/migrants-rights/the-externalization-of-migration-policies-a-scourge-for-human-rights](http://www.fidh.org/en/issues/migrants-rights/the-externalization-of-migration-policies-a-scourge-for-human-rights)> accessed 2 November 2021.

3 Who is unwanted in the EU is a complex issue: The EU border agency, Frontex reports that annually more than 300 million entries are usually recorded into the EU. About 130,000 people are refused entry and there are usually around 150,000 irregular entries. So determining who is unwanted usually boils down to a very small number of people who are seeking entry without the required documentation; Elspeth Guild, ‘Interrogating Europe’s Borders: Reflections from an Academic Career’ (2019).

4 Sébastien Chauvin and Blanca Garcés-Mascareñas, ‘Becoming less illegal: Deservingness frames and undocumented migrant incorporation’ (2014) 8.4 *Sociology compass* 422-432.

Kong in 2004<sup>5</sup> which agreements are intended to facilitate expulsion. It is manifest in the revision of the Visa Code to include expulsion related criteria to the assessment and cost of visa applications on the basis of country of origin.<sup>6</sup>

The Global Compact for Safe Orderly and Regular Migration (the Marrakesh Compact, (MC))<sup>7</sup> the UN's most recent instrument in the field of migration dating from 2018, specifically states that border management is a shared responsibility among states.<sup>8</sup> Reading this responsibility through the lens of UN human rights law, upon which the Compact is expressly founded, this means a duty on states in the exercise of state sovereignty in border control to ensure the full respect and application of their human rights obligations. The emphasis on migration control as necessarily engaging the country of departure has numerous facets. Early 21<sup>st</sup> century examples include the so-called juxtaposed controls on the UK-French border which in practice are very light touch by French border police on persons leaving the UK and very heavy handed as regards (unwanted) persons seeking to leave France towards the UK.<sup>9</sup> So in practice, heavy border controls take place exclusively in France where in pursuit of British border exclusion policies, the French border police use force against would be migrants to prevent them from leaving France.<sup>10</sup> This imbalance in the practices of shared responsibility which is a manifestation of extraterritorial border controls is evident in all the EU measures in pursuit of moving these controls into the jurisdiction of third countries. The consequence

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5 OJ 2004 L 17/23.

6 Regulation 1155/2019 (OJ 2019 L 188/55) Amending the Visa Code Regulation 810/2009.

7 <[www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf](http://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf)> accessed 4 November 2021.

8 MC para 14: "We unite, in a spirit of win-win cooperation, to address the challenges and opportunities of migration in all its dimensions through shared responsibility and innovative solutions. It is with this sense of common purpose that we take this historic step, fully aware that the Global Compact for Safe, Orderly and Regular Migration is a milestone, but not the end to our efforts."

9 <[www.gov.uk/government/news/uk-and-france-sign-action-plan-to-tackle-small-boat-crossings](http://www.gov.uk/government/news/uk-and-france-sign-action-plan-to-tackle-small-boat-crossings)> accessed 3 October 2021.

10 Sue Reid and James Franey, 'French police open fire on migrants' dinghy on Dunkirk beach with potentially lethal rubber bullets to stop their illegal boat crossing the Channel to the UK' (dailymail.co.uk, 3 October 2021) <[www.dailymail.co.uk/news/article-10050681/Horror-Dunkirk-beach-French-police-open-fire-migrants-dinghy-rubber-bullets.html](http://www.dailymail.co.uk/news/article-10050681/Horror-Dunkirk-beach-French-police-open-fire-migrants-dinghy-rubber-bullets.html)> accessed 3 October 2021.

is violations of the international human right to leave a country.<sup>11</sup> Externalisation practice is also problematic for the international obligation of non-refoulement – the duty on states not to send a person to a country where they fear persecution under the refugee convention<sup>12</sup> or a real risk of torture, inhuman or degrading treatment.<sup>13</sup> There are two strands to this source of friction for the EU: first is the country which should be preventing (unwanted) people from leaving actually a state where persecution and torture are rife including against those seeking to leave; the pressing example is Libya<sup>14</sup> where cooperation between the EU border agency, Frontex, and the Libyan coast guard has been subject to legal challenge.<sup>15</sup> Secondly, will the state which is supposed to be preventing people leaving actually going to provide them with such protection as international law indicate, they are entitled to, or just expel them onwards to somewhere else where their safety is not assured. The most prominent example here is Turkey.<sup>16</sup>

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- 11 Elspeth Guild and Vladislava Stoyanova, 'The human right to leave any country: a right to be delivered' in Christian Strohal and Stefan Kieber (eds), *European Yearbook on Human Rights* (Cambridge University Press 2018) 373-394.
  - 12 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series vol 189, 137 <[www.refworld.org/docid/3be01b964.html](http://www.refworld.org/docid/3be01b964.html)> accessed 2 November 2021.
  - 13 UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations Treaty Series vol 1465, 85 <[www.refworld.org/docid/3ae6b3a94.html](http://www.refworld.org/docid/3ae6b3a94.html)> accessed 2 November 2021; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14*, 4 November 1950, ETS 5 <[www.refworld.org/docid/3ae6b3b04.html](http://www.refworld.org/docid/3ae6b3b04.html)> accessed 2 November 2021; UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006 <[www.refworld.org/docid/47fdfaeb0.html](http://www.refworld.org/docid/47fdfaeb0.html)> accessed 2 November 2021.
  - 14 UN High Commissioner for Refugees (UNHCR), *UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea*, September 2020 <[www.refworld.org/docid/5f1edee24.html](http://www.refworld.org/docid/5f1edee24.html)> accessed 2 November 2021.
  - 15 UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998 <[www.refworld.org/docid/3ae6b3a84.html](http://www.refworld.org/docid/3ae6b3a84.html)> accessed 5 October 2021; Daniel Howden, Apostolis Fotiadis and Zach Campbell, 'Revealed: the great European refugee scandal' (*The Guardian*, December 2020); Annick Pijnenburg and Conny Rijken, 'Playing Cat and Mouse: How Europe Evades Responsibility for its Role in Human Rights Abuses of Migrants and Refugees' in Mirjam van Reisen and others (eds), *Mobile Africa: Human trafficking and the digital divide* (Langaa RPCIG 2019) ch 23.
  - 16 UNHCR, 'Legal Considerations on the Return of Asylum Seekers and Refugees from Greece to Turkey as Part of the EU–Turkey Cooperation in Tackling the

While there has been much academic attention to both of these issues and legal challenges, it has mainly been on the basis of states' human rights obligations and international criminal law.<sup>17</sup> Recently, however, another consideration has come into play: the instrumentalization of migration and refugee movements by transit states (such as Belarus, Libya or Turkey) towards the EU as a tool of international relations.<sup>18</sup> Just as the EU has sought to use international relations as a means to promote border and migration control so neighbouring states have seen new opportunities in international relations to make their participation in these projects meaningful from the perspective of their own political objectives.<sup>19</sup> While the roots of this instrumentalisation have been apparent in numerous agreements between EU states and their neighbours, such as the Italian Agreement with Ghaddafi's Libya (and subsequently),<sup>20</sup> it is also apparent in Spanish-Moroccan relations<sup>21</sup> and is the essence of the rather controversial EU Turkey Deal 2016<sup>22</sup> where the EU pays Turkey substantial sums for Turkey to prevent Syrians from coming to the EU.

One of the difficulties which has emerged as a result of these policies pursued by the EU with its neighbours (and other states) for the purposes of decreasing the numbers of (unwanted) person from entering the EU is

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- Migration Crisis under the Safe Third Country and First Country of Asylum Concept' (2017) 29 (3) *International Journal of Refugee Law* 498-508; Mariana Gkliati, 'The EU-Turkey deal and the safe third country concept before the Greek asylum appeals committees' (2017) 3 (2) *Movements, Journal for Critical Migration and Border Regime Studies* 213-224.
- 17 Jari Pirjola, 'Shadows in paradise – Exploring non-refoulement as an open concept' (2007) 19 (4) *International Journal of Refugee Law* 639-660.
  - 18 Georgia Papagianni, 'Forging an external EU migration policy: from externalisation of border management to a comprehensive policy?' (2013) 15 (3) *European Journal of Migration and Law* 283-299; Polly Pallister-Wilkins, 'Searching for accountability in EU migration-management practices' (*openDemocracy*, 2011).
  - 19 Bruno Oliveira Martins and Michael Strange, 'Rethinking EU external migration policy: contestation and critique' (2019) 5 (3) *Global Affairs* 195-202.
  - 20 Delphine Nakache and Jessica Losier, 'The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?' (2017) 25 *E-International Relations*.
  - 21 Daniel Wunderlich, 'Differentiation and policy convergence against long odds: Lessons from implementing EU migration policy in Morocco' (2010) 15 (2) *Mediterranean Politics* 249-272; Hein De Haas, 'Morocco's Migration Experience: A Transitional Perspective' (2007) 45 (4) *International Migration* 39-70.
  - 22 Narin Idriz, 'The EU-Turkey statement or the "refugee deal": the extra-legal deal of extraordinary times?' in Dina Siegel and Veronika Nagy (eds), *The Migration Crisis?* (Eleven International Publishing 2017); Margarite Helena Zoetewij and Ozan Turhan, 'Above the Law-Beneath Contempt: The End of the EU-Turkey Deal' (2017) 27 *Swiss Review of International and European Law* 151.

that it has contributed to raising migration and border control from a field the responsibility of interior ministries to ones of international relations engaging foreign ministries and most specifically the European External Action Service (EEAS). The term migration diplomacy is emerging as a way of describing this change in the scope of international relations.<sup>23</sup> Border control and migration have traditionally been responsibilities of interior ministries which are concerned with the integrity of the territory and safeguarding the people for whom the state is responsible. Thus, international relations which are the responsibility of foreign ministries, usually at loggerheads with interior ministries<sup>24</sup> have been transformed into venues where migration, border control and visa policies are on the table for inter-state discussion about cooperation or friction.<sup>25</sup>

This change in dynamic has not gone unnoticed in the EU. In her 2021 State of the Union Address the Commission President stated that the EU is facing hybrid attacks with the aim to destabilise Europe and that this cannot be tolerated.<sup>26</sup> This has been interpreted by twelve Member States, as set out in their letter to the European Commission's Vice-President on 7 October 2021<sup>27</sup> as meaning that "Europe is being destabilised by the instrumentalisation of 'illegal' immigration by State actors." Their solution to the problem is that the EU must use all operational, legal, diplomatic and financial tools to punish such states. The veiled accusation is that some states, first in line for these states are Belarus<sup>28</sup> but Turkey is a close

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- 23 Fiona B. Adamson and Gerasimos Tsourapas, 'Migration diplomacy in world politics' (2019) 20 (2) *International Studies Perspectives* 113-128; Gerasimos Tsourapas, 'Migration diplomacy in the Global South: cooperation, coercion and issue linkage in Gaddafi's Libya' (2017) 38 (10) *Third World Quarterly* 2367-85.
  - 24 Virginie Guiraudon, 'The constitution of a European immigration policy domain: a political sociology approach' (2003) 10 (2) *Journal of European public policy* 263-282.
  - 25 Didier Bigo, *Foreigners, refugees or minorities?: Rethinking people in the context of border controls and visas* (Routledge 2016); Sandra Lavenex and Flavia Jurje, 'EU/US migration policy towards emerging countries: regulatory power reversed?' (2017) 22 *Spec European Foreign Affairs Review*.
  - 26 Ursula von der Leyen, European Commission President, 'Opening address: Europe in a changing world' (2021).
  - 27 <[www.statewatch.org/media/2859/eu-12-ms-joint-letter-hybrid-attacks-pushbacks-eu-law-7-10-21.pdf](http://www.statewatch.org/media/2859/eu-12-ms-joint-letter-hybrid-attacks-pushbacks-eu-law-7-10-21.pdf)> accessed 2 November 2021.
  - 28 Oxford Analytica, 'Lithuania will try to fend off migrants from Belarus' (Emerald Expert Briefings, 2021) <[www.emerald.com/insight/content/doi/10.1108/OXAN-DB263335/full/html](http://www.emerald.com/insight/content/doi/10.1108/OXAN-DB263335/full/html)> accessed 18 November 2021.

contender<sup>29</sup> are pushing people (but not their own nationals) towards their common borders with the EU for the purpose of causing political panic in EU states about irregular migration. These EU states consider that this is a threat of state sponsored irregular migration.

Two aspects are particularly important to any analysis of this turn of international politics to the EU's disadvantage. First, the EU maintains a very strong discourse on its adherence to international human rights law and the implementation of its own Charter of Fundamental Rights. Both international and EU law require EU states to respect the principle of non-refoulement, that is that no one seeking international protection can be sent to a country where his or her safety is at risk. In order to comply with the non-refoulement obligation, state authorities need to make an individual assessment of each and every international protection claim which they receive and make an objectively justifiable decision. Negative decisions must carry a right of appeal which has suspensive effect – the individual cannot be expelled while the appeal is pending. Most Member States have developed their asylum systems sufficiently, complying with EU law on reception conditions, registration and access to procedures for asylum determination, appeal rights etc. But a substantial number either have failed to do so, most spectacularly Greece,<sup>30</sup> but including most of the signatory states of the 7 October 2021 letter or are very reluctant to comply with these rules and seek to change them (eg Denmark). For these states, externalisation is the desired solution – other states to receive and care for refugees, not them. But in seeking to achieve this objective for these states, the EU External Action Service has taken questionable action (see below) and the EU Member States have entered into non binding agreements with the exchange of eye watering amounts of money with neighbours such as Turkey to prevent arrivals. All of this is of dubious consistency with human rights commitments and the EU Charter.

So it is not surprising that many countries have noticed the efficacy of using the border control migration tool in international relations with the EU for their own benefit. Instead of simply complying with EU injunctions to prevent (unwanted) people from embarking for EU destinations

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29 Roderick Parkes, 'Migration, borders and the EU's geopolitics' (14 October 2020) <<https://dgap.org/en/research/publications/migration-borders-and-eus-geopolitics>> accessed 18 November 2021; Heaven Crawley, 'The politics of refugee protection in a post-covid-19 world' (2021) 10 (3) *Social Sciences* 81.

30 Angeliki Dimitriadi and Antonia-Maria Sarantaki, 'National report on the governance of the asylum reception system in Greece' (2019) 20 *Ceaseval Research on the Common European Asylum System*.

(with dubious consistency with international law and the right to leave) they can exact from the EU better deals on financing, development, you name it, by playing on EU fears of (unwanted) arrivals. To make the threat real, it would seem, according to some press reports that some of these states, in particular Belarus, are blatantly doing so apparently by promoting and some EU states like Lithuania are building walls and calling for common action.<sup>31</sup> No one is suggesting however that Lukashenko's Belarus is a particularly safe country for Afghan refugees.<sup>32</sup>

Thus the EU finds itself between a rock and a hard place as regards the externalisation of border and migration controls. On the one hand, it has incorporated border and migration control as a central element of its external action with the objective of ensuring that non-EU states prevent movement of unwanted people towards the EU and making this a very interesting economic proposal for them, and on the other hand upholding its claim to the highest standards of human rights and fundamental rights protection including in the area of asylum, border crossing and migration. The tension between the two objectives has rattled on for some time but the transition of regime in Afghanistan and the apparent opportunity to assist Afghan refugees to get to Europe perceived by the Belarus government has torn this delicate and incompatible co-existence apart.

### *1. The EU's Image as regards Fundamental Rights and Migration/Asylum*

The most pressing problem for the EU as regards working with other countries and international partners on migration and asylum is the EU's own image in this area. International media around the world extensively covered the 2015-16 refugee arrivals into the EU, revealing the appalling conditions of arrival and first 'reception' which pushed almost 2 million people in desperate need of refuge and assistance to walk the length of Europe in search protection. These images aroused in many viewers' minds the question: what is going on in Europe that these refugees are prohibited to catching trains, planes and buses like everyone else to arrive safely at their destinations?

As if the 2015-16 arrivals and their extensive mediatisation were not enough, the continuous loss of life though unsuccessful attempts to cross

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31 <[www.bbc.com/news/world-europe-58163073](http://www.bbc.com/news/world-europe-58163073)> accessed 2 November 2021.

32 <[www.unhcr.org/news/press/2021/10/6172af254/unhcr-urges-states-end-stalemate-belarus-eu-border-avoid-further-loss-life.html](http://www.unhcr.org/news/press/2021/10/6172af254/unhcr-urges-states-end-stalemate-belarus-eu-border-avoid-further-loss-life.html)> accessed 2 November 2021.



the Mediterranean in unseaworthy boats has also been on front pages of news outlets around the world. Images of dangerous rescues, perilous attempts and figures of estimated deaths (far surpassing even the numbers of the US-Mexico border) published by IOM, have horrified readers and viewers in many countries.<sup>33</sup> Additionally, the criminalisation of NGO rescue workers in particular in Italy including the highly mediated prosecution of Carola Rakete, the German captain of a rescue ship operating in the Mediterranean, has not helped the image of the EU as an effective promoter of human rights particularly in the field of humanitarian rescue.<sup>34</sup> Adding to the negative image, the fire at the refugee camp in Moria on the Greek island of Lesbos in September 2020 revealed to the world the degrading circumstances of life in the camp and the horror of non-existent reception facilities for thousands of vulnerable people after the fire.<sup>35</sup>

The plight of refugees and migrants seeking to arrive in Europe but blocked by national and EU funded border police has not made many friends for the EU. Roundly criticised by UNHCR on a regular basis, the treatment of refugees and migrants seeking protection and entry to the EU has also made its mark on regional and international human rights instances as well as at the UN more generally. The European Court of Human Rights has received a steady stream of cases regarding the treatment of refugees and migrants at EU external borders.<sup>36</sup> The UN Human Rights Committee has received communications alleging violations of the International Covenant on Civil and Political Rights (for instance *SDG v Italy* filed in 2020) regarding the treatment and death of refugees and migrants in the Mediterranean. The Prosecutor of the International Criminal Court has received a detailed complaint in 2019 of crimes against humanity allegedly committed by EU and national officials in the support of the loosely termed Libyan border guards' treatment of migrants and

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33 <<https://missingmigrants.iom.int/>> accessed 4 November 2021.

34 Nazzarena Zorzella and Monia Giovannetti, *Ius migrandi: Trent'anni di politiche e legislazione sull'immigrazione in Italia* (Franco Angeli 2020).

35 Vasileia Digidiki and Jacqueline Bhabha, 'EU migration pact fails to address human rights concerns in Lesbos, Greece' (2020) 22 (2) *Health and Human Rights* 291.

36 Galina Cornelisse, 'A new articulation of human rights, or why the European Court of Human Rights should think beyond Westphalian sovereignty' in Marie-Benedicte Dembour and Tobias Kelly (eds), *Are Human rights for migrants?* (Routledge 2011) 113-134; Lieneke Slingenbergh, 'The right not to be dominated: The case law of the European court of human rights on migrants' destitution' (2019) 19 (2) *Human Rights Law Review* 291-314.



refugees.<sup>37</sup> From the perspective of the regional and international judicial instances, European refugee and migration activities are taking up a lot of their time. And this is without counting the supervisory instances within the EU which have been engaged in investigating and determining legality of activities at the external borders in pursuit of deterring people from crossing them (see the numerous Fundamental Rights Agency reports, the April 2020 complaint to the EU Court of Auditors on the mismanagement of the Trust Fund for Africa regarding funding border activities, the Commission concerns about Frontex's expenditure of euros 100 million on drones used for pushbacks from Greece to Turkey October 2020 etc).<sup>38</sup>

The EU itself drew world attention to its battle against the arrival of (unwanted) persons by seeking a UN Security Council Resolution in 2015 to authorise military action against smugglers and traffickers of migrants in the Southern Central Mediterranean. Having achieved the objective of a UN Resolution, at least partially authorising military action in international waters, the EU failed dismally either to reduce the number of migrants missing in the Mediterranean (see IOM missing migrant data)<sup>39</sup> or to stop the arrival of (unwanted) persons across the Mediterranean. According to Frontex's Annual Risk Analysis 2020, irregular sea border entries in 2019 totalled 106,246 while in the previous year the figure was 113,643. Other than the two exceptional years: 2015 and 2016 when substantially larger numbers of refugees and migrants arrived irregularly in the EU, the figure of irregular sea border entries has rarely exceeded 200,000. The EU's military operation in the Mediterranean has been quietly brought to a close.<sup>40</sup> It remains, however, an outstanding example of the EU intentionally raising border control from an interior ministry issue to one of high politics within a very public venue, the UN.

The Commission's New Pact on Migration and Asylum (COM 609(2020)) issued in September 2020 reflected this conundrum facing EU policy makers. In section 6 entitled 'working with our international partners' it seeks to plot a route to engaging countries outside the EU both

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37 <[www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf](http://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf)> accessed 4 November 2021.

38 Luisa Marin, 'Is Europe turning into a "technological fortress"? Innovation and technology for the management of EU's external borders: Reflections on FRONTEX and EUROSUR' in Michiel A. Heldeweg and Evisa Kica (eds), *Regulating Technological Innovation* (Palgrave Macmillan 2011) 131-151.

39 (n 33).

40 <<https://moderndiplomacy.eu/2020/02/20/the-ending-of-operation-sophia-the-eu-s-way-from-its-human-security-approach/>> accessed 4 November 2021.

bilaterally and regionally in regulating migration towards the EU which deliver what the Pact promises will be ‘mutual benefits.’ However, there is a profound difficulty at the heart of the Pact’s approach in particular for countries outside the EU. The objective of the Pact as stated in this section is ‘to address the complex challenges of migration and its root causes to the benefit of the EU and its citizens, partner countries, migrants and refugees themselves.’

On the one hand this formulation completely fails to take into account that the ‘migrants and refugees’ referred to are in fact the citizens of those same third countries with which the EU seeks to address the challenges. The only specified citizens are EU citizens, giving the impression that other countries do not have citizens they only have prospective migrants and refugees as their inhabitants. On the other hand, by placing border control in the hands of other states which are directed to prevent (unwanted) persons from moving towards the EU, through high politics,<sup>41</sup> the EU has made itself very vulnerable to migration diplomacy where third states can use the threat of failing to stop (unwanted) movement of persons towards the EU to achieve political objectives in other fields. By allowing border control and migration to be sensationalised internally, many EU states have placed themselves in an impossible situation as regards other countries. The excessive investment of state sovereignty in “effective” border controls on persons has had the unwanted political outcome of weakening their general political position vis-à-vis third states.

## *2. The International Relations Problem*

From a more principles position in international relations, the Pact fails to take a rounded perspective of the issue of migration. All migrants are citizens of some country (except the very few who are stateless). Just as the EU seeks to defend the interests of its citizens, so other states are required to do so as well. The constitutions of countries around the world generally express the duty of the state to act in the interests of the citizens. Images of the poor treatment of people at EU borders as perceived from within the EU are images of migrants and refugees. But in other countries around

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41 Naoko Shimazu, ‘Places in diplomacy’ (2012) 31 (6) *Political Geography* 335-336; Øyvind Svendsen and Rebecca Adler-Nissen, ‘Differentiated (Dis)integration in Practice: The diplomacy of Brexit and the low politics of high politics’ (2019) 57 (6) *Journal of Common Market Studies* 1419-30.

the world, these are images of their citizens suffering degradation and humiliation by EU and Member State actors and actions.<sup>42</sup> The more mediated the EU treatment of migrants and refugees, the more problematic the question of cooperation in pursuit of EU migration goals becomes for the governments of other countries. The Pact recognises the issue at least obliquely when it states “[i]t is important to bear in mind that migration issues such as border management or more effective implementation of return and readmission can be politically sensitive for partners.” This is perhaps an understatement.

The Pact is quite opaque about how to leverage migration management cooperation as considered desirable by the Commission and Member States in the context of partnerships with third countries. It calls for the incentivization and improvement of expulsion (and readmission by third states) through the instrumentalization of other policy areas of interest to third countries, a carrot and stick approach. In the EU’s politics of sticks and carrots, the stick is primarily how to convince third states enthusiastically to embrace EU expulsions of the third state’s citizens. In light of EU Member States experience with Belarus, Libya and Turkey, this might seem both cynical and naïve simultaneously. It is cynical from the perspective of human rights protection where the objective of getting other states to prevent arrivals of (unwanted) persons will inevitably also prevent refugees from arriving and seeking durable protection. It is naïve from the perspective that the policy, accompanied by EU Member States internal political investment of state sovereignty in border controls and preventing the arrival of (unwanted) persons as rendered them highly vulnerable to these same third states. If these third states do not prevent arrivals, as a result of Member State internal sensitivity to effective border controls, a political panic can be the result. The numbers of (unwanted) people arriving may be miniscule – a few hundred – but the internal political reaction may verge on the hysterical.<sup>43</sup>

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42 Diego Acosta Arcazo, ‘The good, the bad and the ugly in EU migration law: is the European parliament becoming bad and ugly? (The Adoption of Directive 2008/115: the Returns Directive)’ in Elspeth Guild und Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Brill Nijhoff 2011) 179-205.

43 See for example the letter of twelve Member States to the Commission Vice-President of 7 October 2021 (n 27).

### *3. The Difficulty of Delivering Benefits*

The EU ‘carrots’ to achieve third countries’ acceptance of EU migration objectives vary but better access for nationals of third countries to the EU for economic purposes is an evergreen. It turns up in the Pact in the form of talent partnerships to enhance commitment to support legal migration and mobility with key partners. This is reminiscent of the mobility partnerships developed in the 2010s to encourage southern Mediterranean states, in particular, to accept readmission agreements. A good example is the mobility partnership signed by the EU with Morocco in 2013. But implementation proved embarrassing. In 2010, 10,416 Moroccan seasonal workers entered the EU (according to the Commission’s data). By 2016 the number had dropped to 3,781. Regarding entry for other remunerated activities, the data shows that while in 2010 43,334 Moroccans entered the EU in this category by 2016 the number had dropped to 6,283 (data on file with the author). These figures cast doubt on the good faith of the EU and Member States in offering enhanced employment opportunities for Moroccans in return for cooperation on border management and expulsion. The experiences of the mobility partnerships are unlikely to convince any third states that talent partnerships will result in enhanced opportunities for their citizens.

Finally, in the carrot and stick category, the Pact heralds the changes to the Visa Code which introduced a link between access to Schengen visas and the costs thereof and states’ readmission practices regarding their citizens being expelled from EU states. This linkage has been criticised as not only unfair to visa applicants who cannot be held responsible for the actions of their fellow citizens but also as likely to be counterproductive creating inequalities among states in the same region regarding access to visas and thus fostering sentiments of injustice in those which are disadvantaged.<sup>44</sup> While the European Parliament achieved a softening of the proposal, turning it from a coercive measure to one where advantages accrue to states which cooperate with the EU, the establishment of the principle is unlikely to contribute to good international relations. Here it is directly citizens of the third state who are affected not third country national transiting the state.

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44 Salvatore Fabio Nicolosi, ‘Refashioning the EU Visa Policy: A New Turn of the Screw to Cooperation on Readmission and to Discrimination?’ (2020) 22 (4) *European Journal of Migration and Law* 467-491.

The international relations weakness of the Pact is, no doubt, a reflection of flaws in the EU structures around foreign policy, international relations and diplomacy. This is not least the result of the late arrival of the competence for foreign affairs and external action in the EU in the field (2009) and the strength of national foreign ministries, still jealously guarding their powers. Additionally, the international relations field in EU law remains very divided regarding the exercise of international relations powers by different Directorates General in the Commission. For example, the negotiation of trade agreements is firmly within the competence of DG Trade which, proudly on its webpage, gives first place to these developments. In contra-distinction with international relations, the strength of interior ministries as regards migration and asylum has grown since the transfer of competence in 1999 (though formal cooperation began with the Maastricht Treaty in 1992). The tensions between DG Home and DG Trade regarding the ‘mainstreaming’ of migration objectives in international relations is often demonstrated in Brussels by the absence of representatives of DG Trade at meetings called by DG Home on this subject, of course always accompanied by apologies and reasons regarding other obligations. Institutionally the interior ministry weight in Brussels in relation to its international relations counterpart is reflected by the existence of a DG Home, very occupied by migration and asylum issues. But for international relations there is only a body, the European External Action Service (EEAS), with divided loyalties between the Commission and the Council. As almost an afterthought, the Pact mentions that close cooperation with the High Representative will be important.

#### *4. Conclusions*

The outcome for the EU of this preponderance of DG Home and interior ministry perspectives on migration and asylum in an international context is the presentation in the Pact of ‘citizens’ as exclusively EU nationals and all other people as migrants or potential migrants even when the Pact is promoting collaboration with third countries. This weakness is not inevitable but to change it will require a rebalancing of the EU institutions and their priorities to privilege good relations with third states, including the citizens of third states who determine the composition of their governments. The influence of the DG Home and interior ministry perspectives that nationals of other countries are primarily sources of threat in the form of illegal immigration which needs to be ‘addressed’ in the states where

they are present (ie their states of citizenship) will, inevitably, defeat the objective of cooperation with third states in most cases.

Equally problematic is the weaponizing of border controls by unscrupulous leaders of neighbouring states. The excessive EU Member State investment of state sovereignty in border controls to prevent arrivals of (unwanted) people has provided a rich new area for discussions with the Member States on areas of choice of those third state leaders. The way in which some Member States have permitted the arrival of even small numbers of (unwanted) people into their country to create a political and media panic has weakened their position in international relations. A consequence of this politicisation of border controls is that any apparent failure results in newspaper/media headlines, questions in Parliament and demands from opposition parties and various lobby groups for more “effective” action. The political claim that the state controls borders regarding movement of persons is no longer accepted as a rhetorical or theoretical statement but rather something which state officials in power have promised to deliver. Failure to do so makes them politically vulnerable internally resulting in external vulnerability through the dependency on neighbouring countries to prevent movement. All of this takes place notwithstanding evidence provided even by Frontex itself that there are practical limitations to border controls on persons, for instance the fact that at the best of times and under the most controlled circumstances border police have only twelve seconds to decide on the entry of an individual at an external border crossing point.<sup>45</sup>

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45 <[https://frontex.europa.eu/assets/Publications/General/12\\_seconds\\_to\\_decide.pdf](https://frontex.europa.eu/assets/Publications/General/12_seconds_to_decide.pdf)> accessed 4 November 2021.

# EU Cooperation with Third Countries within the New Pact on Migration and Asylum: New Instruments for a ‘Change of Paradigm’?

*Paula García Andrade\**

## *1. Introduction*

The New Pact on Migration and Asylum presented by the European Commission on 23<sup>rd</sup> September 2020 assigns a prominent place to cooperation with third countries of origin and transit of migrations flows,<sup>1</sup> as previous programmes and plans have, more or less continuously, been doing for more than two decades since the inception of the EU policies on immigration and asylum. As an essential element of any coherent and efficient migration policy, this external dimension receives, in the New Pact, considerable attention, occupying a whole section of the Pact – section 6, devoted to ‘working with our international partners’ – while numerous references to international cooperation can also be found throughout its other parts.

From the very start of this political orientation document, the Commission recalls how the internal and external dimensions of migration are inextricably linked,<sup>2</sup> reaffirming the conceptualization of this external dimension as it has traditionally been understood in the EU, as a means to facilitate the achievement of the objectives of the immigration and asylum policies inside the Union.<sup>3</sup> The priorities that EU partnerships with third countries should pursue range, according to the New Pact, from addressing the root causes of migration and developing legal pathways both for protection and legal migration purposes to fostering readmission and strengthening migration management capacities in third countries. All

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1 European Commission, ‘Communication on a New Pact on Migration and Asylum’ COM(2020) 609 of 23 September 2020.

2 *Ibid.*, 2.

3 See Council, ‘A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice’, Council doc no 14366/3/05 of 30 November 2005.

these aims are to be achieved through comprehensive, balanced and mutually beneficial alliances. The Commission is offering what it qualifies as a “fresh start” to assume this endeavour and even a “change of paradigm” in migration cooperation with third countries.<sup>4</sup>

Still those familiar with the international agenda of the EU on migration will have the impression that they have ‘heard this song before’. This contribution aims at assessing whether the way in which cooperation with partner countries on migration has been addressed in the New Pact preserves the existing approach or comes with any innovations, especially as far as the tools to be used are concerned. Therefore, the allegedly new Commission’s orientations and objectives will firstly be evaluated (2.); secondly, our attention will turn to the instruments foreseen for the design and implementation of the EU international cooperation on migration (3.), by identifying what is new (a), what is missing (b) and what is in excess (c) within the ‘toolbox’ of this external dimension. As more than one year has elapsed from the presentation of the Pact by the Commission, this analysis will be complemented, when possible, with an assessment of the institutional reactions to the initiatives contained in the New Pact regarding cooperation with third countries, and of the degree of advancement, if any, in their implementation.<sup>5</sup>

## 2. A ‘Change of Paradigm’ in Cooperation with Partner Countries?

According to the Commission’s press release, the Pact presents ‘a change of paradigm in cooperation with non-EU countries.’<sup>6</sup> This cooperation will be centred, as stated in the text, on comprehensive, balanced and tailor-

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4 European Commission, ‘A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity’ (Press Release IP/20/1706, 23 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706)> accessed 4 November 2021.

5 Although the Commission has taken stock of progress achieved and key developments on the objectives of the Pact in its Report on Migration and Asylum published at the end of September 2021, the degree of implementation of the external dimension is difficult to infer from the unspecific and rather prospective information provided in this report and its annex: see European Commission, Communication ‘on the Report on Migration and Asylum’, COM(2021) 590 of 29 September 2021, 15 ff, and Annex I. The state of play of recent and ongoing engagements of dialogue and cooperation by key partner can be found in Annex II to this report.

6 European Commission, ‘A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity’ (n 4).



made migration partnerships, mutually beneficial for the parties involved.<sup>7</sup> However, the revolutionary character of this approach is extremely doubtful. The approach adopted towards cooperation with third countries on migration has been ‘comprehensive’, ‘global’, ‘balanced’ - and some other synonyms - since the European Council in Tampere in 1999.<sup>8</sup> The idea was particularly ‘officialised’ at the Global Approach to Migration (GAM) adopted in 2005,<sup>9</sup> which has been considered, since then, the main political inspiring framework of the external dimension of EU migration policy. According to the GAM, cooperation with partner countries had to combine the diverse dimensions of migration in the search of a balance between fighting against irregular migration, promoting mobility and legal migration, as well as maximising migration - development synergies. Moreover, the idea of “mutually beneficial partnerships”,<sup>10</sup> in which not only EU interests but also those of partner countries are to be taken into account, already appeared at the adoption of the revised Global Approach to Migration and Mobility (GAMM) in 2011,<sup>11</sup> which also added the external dimension of asylum.<sup>12</sup>

Thus, we have indeed ‘heard this song before’. Neither the goals of mainstreaming migration into the whole external action of the EU and of mobilising different external and internal policies, nor the conditionality between mobility/legal migration opportunities and control-oriented commitments,<sup>13</sup> are innovative aspects in the EU approach. The same can be said about the political emphasis on cooperation on return, readmission and fighting against migrant smuggling, as these objectives continue to appear as the most relevant pillar of the EU stance on international cooperation on migration. It was the (already) “New Partnership Framework on

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7 COM(2020) 609 (n 1), 2.

8 Tampere European Council, Presidency Conclusions, 15-16 October 1999.

9 European Commission, ‘Communication on priority actions for responding to the challenges of migration’, COM (2005) 621 of 30 November 2005, endorsed by the European Council in its Conclusions of 15-16 December 2005 (annex I), ‘Global approach to migration: Priority actions focusing on Africa and the Mediterranean’.

10 COM(2020) 609 (n 1), 17.

11 European Commission, ‘Communication on The Global Approach to Migration and Mobility’, COM(2011) 743 of 18 November 2011.

12 Ibid 5 and 17-18.

13 See Elspeth Guild’s contribution in this book; see also Sergio Carrera and others, ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’ (European Parliament Study PE 697.130, 2021, July 2021), 45-46.

Migration”,<sup>14</sup> adopted in the summer of 2016 under the European Agenda on Migration,<sup>15</sup> that insisted on these aspects and, particularly, brought back the emphasis on securitisation and conditionality between the mutual engagements of EU and Member States, on the one hand, and third countries, on the other, turning thus the ‘global’ and ‘comprehensive’ approach into a formality, which is being now simply consolidated. And it was the 2019 reform of the Visa Code which introduced a concrete mechanism to implement conditionality between a third country’s cooperation on readmission and the issuance conditions for Schengen visas to its nationals.<sup>16</sup> That mechanism is considered unfair to EU partners’ citizens and prejudicial to good international relations,<sup>17</sup> while it could also lead to a violation of the engagements contained in the visa facilitation agreement the EU might have concluded with that country. In this regard, the New Pact and its legislative package attempt to consolidate this controversial conditionality principle by extending it, within the Proposal for an Asylum and Migration Management Regulation, to the identification of “any measure” that could improve the readmission cooperation of that country’s authorities.<sup>18</sup>

The New Pact also explicitly insists on the traditional “root causes of migration” approach, by which development cooperation is used to reduce

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14 European Commission, ‘Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration’, COM(2016) 385 of 7 June 2016.

15 European Commission, ‘Communication on A European Agenda on Migration’, COM(2015) 240 of 13 May 2015.

16 Art 25a) of Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) (OJ 2019 L 188/25). The first annual assessment of the third countries’ level of readmission cooperation, as required by this provision, was completed by the Commission in February 2021: European Commission, ‘Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy’, COM(2021) 56 of 10 February 2021.

17 Elspeth Guild, ‘Amending the Visa Code: Collective Punishment of Visa Nationals?’ (EU Immigration and Asylum Law and Policy Blog, 10 May 2019) <<https://eu-migrationlawblog.eu/amending-the-visa-code-collective-punishment-of-visa-nationals/>> accessed 4 November 2021.

18 Art. 7 of the Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management, COM(2020) 610 of 23 September 2020. In the negotiations of this regulation, there has been a broad support within the Council for the establishment of the leverage mechanism contained in this provision: Pact on Migration and Asylum - Progress Report, Council doc no 9178/21 of 31 May 2021, 7.

migration from countries of origin.<sup>19</sup> Unfortunately, controversial statements are once again put on the table, such as affirming that “assistance will be targeted as needed to those countries with a significant migration dimension”.<sup>20</sup> As we have argued elsewhere, prioritising development assistance to countries posing migration challenges means deviating EU development cooperation policy from its primary objective in the Treaties, which is eradication of poverty.<sup>21</sup> That deviation appears even more problematic in practice given that funds are limited and therefore devoting part of EU development assistance to migration purposes would mean that the needs of developing countries “without a migration dimension” would be overlooked. The Pact is therefore not only preserving the existing approach on migration cooperation with third countries, but it seems to be also incurring in the same flaws.<sup>22</sup>

EU funding will also be essential to achieve the goal of strengthening migration governance and management in partner countries through capacity building actions.<sup>23</sup> The latter applies, according to the Pact, to the fields of border management, search and rescue capacities, or well-managed asylum and reception systems. For the reasons stated above, the origin of funding is clearly relevant to this effect. EU financial support will come from AFSJ funds - the Asylum, Migration and Integration Fund and the Border Management and Visa Instrument of the Internal Security Fund –,<sup>24</sup> and is thus unrelated to development cooperation; but it

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19 See Vincent Chetail, ‘Migration and Development’ in Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer (eds), *From Tampere 20 to Tampere 2.0. Towards a new European consensus on migration* (EPC 2019), 39-48.

20 COM(2020) 609 (n 1), 20.

21 Paula García Andrade, ‘EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally?’ (2018) 55 CML Rev., 178 ff.

22 See European Parliament, Resolution of 25 November 2020 on improving development effectiveness and the efficiency of aid (INI 2019/2184), para 63, stressing how ‘making humanitarian aid and emergency aid allocation conditional on cooperation with the EU on migration or security issues is not compatible with agreed development effectiveness principle’. The European Economic and Social Committee also warns about the “temptation to make development aid and cooperation conditional on the development of migration control and/or readmission policies”, EESC Opinion on a New Pact on Migration and Asylum, SOC/649, adopted at plenary on 27 January 2021, 1.8 and 3.27.

23 COM(2020) 609 (n 1), 20-21.

24 Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund (OJ 2021 L 251/1); Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management

may also come from the new Neighbourhood, Development and International Cooperation Instrument (NDICI).<sup>25</sup> Migration-related actions to be financed under this instrument are oriented towards supporting migration management and governance, as well as the effective implementation of EU agreements and dialogues on migration with third countries,<sup>26</sup> thus not exclusively following a root causes or development-oriented approach. Although the NDICI Regulation is founded on the legal basis of the development cooperation policy and also on the one on economic, financial and technical cooperation with third countries,<sup>27</sup> the distribution of funds and their implementation in partner countries should be monitored in order to avoid the deviation of EU development cooperation from its primary objective.

The Pact also puts explicit emphasis on the operational support to the 'new partnerships' by EU home affairs agencies.<sup>28</sup> The novelty here might lie in the provisions on external action foreseen at the already existing, at the time of the presentation of the Pact, proposal for a Regulation on a European Agency for Asylum,<sup>29</sup> on whose adoption agreement has recently been reached at the first reading of the ordinary legislative procedure.<sup>30</sup> In the mandate of the Agency, cooperation with third countries appears to be more structured and strengthened - including actions, under work-

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Fund, the Instrument for Financial Support for Border Management and Visa Policy (OJ 2021 L 251/48).

25 Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009 (OJ 2021 L 209/1).

26 See the preamble (paras 50-51), Art 8.10, Annex II.3 and Annex III.4 of Regulation 2021/947. It is indicated that 10 % of the financial envelope for the Instrument should be dedicated particularly to actions supporting management and governance of migration and forced displacement. The European Council has invited the Commission to report by November 2021 on how it intends to make use of that 10% of the NDICI-Global Challenges: European Council, Conclusions, 21-22 October 2021, para 16.

27 Articles 209 and 212 TFEU.

28 See Evangelia (Lilian) Tsourdi's contribution in this book.

29 Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) 439/2010, COM(2016) 271 of 4 May 2016.

30 Agreement was reached at the end of June 2021 on the Regulation creating an EU Asylum Agency - see Letter to the Chair of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE), Council doc no 10352/21 of 30 June 2021.

ing arrangements with third countries' authorities, aimed at promoting Union standards on asylum, assisting their authorities on expertise and capacity-building for their own asylum and reception systems, as well as implementing regional development and protection programmes; support to Member States in the implementation of resettlement schemes; the Agency's participation in the implementation of international agreements concluded by the Union on asylum; as well as the deployment in third countries of liaison officers from the Agency's staff<sup>31</sup>, mirroring thus the much more developed external action of the European Border and Coast Guard Agency.

Regarding other objectives of EU cooperation with third countries, the New Pact highlights how "engagement with partner countries will be stepped up across all areas of cooperation". To that effect and although it surprisingly acknowledges that, for asylum, 'possibilities today to work with third countries are limited'<sup>32</sup>, the Commission puts the accent on improving refugee protection worldwide, supporting refugees and their hosting countries, and on developing legal pathways to Europe, both for protection and legal migration purposes.<sup>33</sup> The Pact is not however very specific on the actions through which the Union will accomplish these objectives, apart from providing funding as well as reinforcing support and mobilising national efforts both on resettlement and legal migration schemes.<sup>34</sup> Consequently, the main focus of the Pact indeed remains on "containment and deterrence of irregular movements" through cooperation on readmission and fight against migrant smuggling<sup>35</sup>, widely addressed in these new political orientations.<sup>36</sup>

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31 See article 35 of the final compromised text annexed *ibid*.

32 COM(2020) 609 (n 1), 21.

33 *Ibid*, sections 6.2 and 6.6.

34 *Ibid*, section 6.6.

35 Violeta Moreno Lax and others, 'The EU Approach on Migration in the Mediterranean' (Report, LIBE Committee, European Parliament PE 694.413, June 2021), 121. See also Erich Pichon, 'The external dimension of the new pact on migration and asylum. A focus on prevention and readmission' (Briefing, European Parliamentary Research Service PE 690.535, April 2021).

36 See sections 2.5, 5 and 6.5 of the Pact. See Madalina Moraru's contribution in this collection.

3. *Assessing the Instruments in the ‘Toolbox’: What’s New, What’s Missing, What’s in Excess?*

Whilst EU cooperation with partner countries occupies a prominent place in the New Pact, detailed attention has not however been paid to clarify the set of instruments the EU and its Member States have at their disposal to implement this external dimension. In the following lines, an assessment will be made on the (limited) innovations as well as the omissions in the New Pact as regards the toolbox for cooperation with third countries, including also what, in my view, should have been left outside the Pact.

a) *What is New?*

In addition to refer to already existing instruments such as readmission agreements, status agreements, or visa facilitation commitments, the Pact introduces the idea of launching Talent Partnerships under the objective of developing legal pathways to Europe and, more particularly, advancing cooperation with partner countries on mobility and legal migration.<sup>37</sup> The proposed new instrument appears as an EU policy framework to cooperate with third countries through Union’s coordination and funding directed at better matching labour and skills needs in EU Member States, as well as supporting mobility schemes for work or training and capacity building in labour market, skills intelligence, vocational education, integration of returning migrants and diaspora mobilisation. The Commission’s proposal seems inspired from the so-called Global Skills Partnerships,<sup>38</sup> which are foreseen in the UN Global Compact for Safe, Orderly and Regular Migration<sup>39</sup> and take the form of bilateral agreements used to foster skills development, by which the country of destination provides capacity building and financing to train potential migrants in countries of origin with the skills needed in the country of destination. As they create skills before migration takes place so that brain drain is avoided and they also include training for non-migrants, they constitute both a migration management and a development tool. Talent partnerships are also presented

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37 COM(2020) 609 (n 1), 23.

38 See Centre for Global Development, ‘Global Skills Partnership’ <<https://gsp.cgdev.org/learn-more/>> accessed 4 November 2021.

39 Global Compact for Safe, Orderly and Regular Migration, adopted in Marrakech on 10-11 December 2018 and endorsed by the UNGA on 19 December 2018 (A/RES/73/195), para 34.e).

as ‘part of the EU’s toolbox for engaging partner countries strategically on migration’,<sup>40</sup> and thus an incentive for control-oriented cooperation. The design and use of these instruments have been discussed in a conference organised by the Commission in June 2021, to which representatives of Member States, the European Parliament as well as social and economic partners attended. Talent Partnerships seem to be open to support the mobility of both students, graduates and skilled workers, providing also opportunities for vocational education, training, integration support for returning migration, diaspora mobilisation, as well as expertise and analysis on employment needs.<sup>41</sup> The Commission has nonetheless clarified that these instruments rely on the experience of previous pilot projects on legal migration already developed since 2017 under the European Agenda on Migration and focused on African countries.<sup>42</sup>

According to the Pact, a strong engagement of Member States will be needed in the design and implementation of Talent Partnerships, most probably because of the exclusive power they preserve on determining the volumes of admission of migrant workers to the EU under art. 79.5 TFEU, although it is unclear whether these instruments will provide for real schemes for the admission of labour migrants or the real impact that attracting talent to the EU may have on the development of countries of origin.<sup>43</sup> Unfortunately, only a timid intervention of the Union is offered through this new instrument – mainly in the form of coordination and funding - as in the rest of ‘legal pathways’, both for legal migration and protection purposes, that the Commission is suggesting.<sup>44</sup> This evidences,

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40 COM(2020) 609 (n 1), 23.

41 European Commission, ‘Talent Partnerships: Commission launches new initiative to address EU skills shortages and improve migration cooperation with partner countries’, (Press Release IP/21/2921, 11 June 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_2921](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2921)> accessed 4 November 2021. See also the Talent Partnership site within the European Commission website <[https://ec.europa.eu/home-affairs/policies/migration-and-asylum/legal-migration-and-integration/talent-partnerships\\_en](https://ec.europa.eu/home-affairs/policies/migration-and-asylum/legal-migration-and-integration/talent-partnerships_en)> accessed 4 November 2021.

42 See European Commission, ‘Communication on the Delivery of the European Agenda on Migration’, COM(2017) 558 of 27 September 2017, 19; and COM(2021) 590 (n 5), 21.

43 In this sense, see the EESC Opinion on the New Pact (n 22), 3.32.

44 Such as the Commission Recommendation of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, C(2020) 6467. Concerns have been raised on the lack of ambitious proposals in the Pact to provide safe pathways for migrants and asylum seekers: Katharina Eisele and Meenakshi Fernandes, ‘The European Commission’s New Pact on Migration and Asylum. Horizontal substitute impact

once again, a certain lack of will on the part of the EU in honouring the Treaty objectives to make the most of its competences to develop ‘a common immigration policy’ and ‘a common European asylum system’.

The New Pact also refers to tailor-made Counter Migrant Smuggling Partnerships with third countries, by which the EU will provide support in capacity building on law enforcement and operational capacities, information exchange and actions on the ground through common operations and joint investigative teams, as well as information campaigns on the risks of irregular migration and on legal alternatives.<sup>45</sup> As these elements are already being part of the EU external action on migration in the form of common operational partnerships, with the support of EU Agencies also highlighted in the Pact, we may wonder whether we are in front of a formal cooperation instrument of a truly innovative character or just a new label for addressing anti-smuggling cooperation. The renewed EU Action Plan against migrant smuggling for the period 2021-2025, presented by the Commission in September 2021, clarifies to a certain extent this issue, when indicating that one of the main pillars of the Plan consists of the establishment of reinforced cooperation with partner countries and other international organisations through Anti-Smuggling Operational Partnerships, as more structured and coherent frameworks encompassing several components such as assistance in establishing solid legal frameworks against smuggling, building operational capacity of national and local authorities, supporting border management capacities, offering operational support to law enforcement and judicial cooperation, reinforcing cooperation on identity and document fraud or engagement against State-led instrumentalization of migration.<sup>46</sup> A central role in the design and implementation of these partnerships is to be played by Member States authorities and EU agencies, together with the support of CSDP missions on strategic advice and capacity-building activities.<sup>47</sup>

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assessment’ (Study of European Parliament Research Service PE 694.210, August 2021), 92.

45 COM(2020) 609 (n 1), 16.

46 European Commission, ‘Communication on A renewed EU action plan against migrant smuggling (2021-2025)’, COM(2021) 591 of 29 September 2021, 12-14.

47 Ibid, 14.



*b) What is Missing?*

Firstly, certainty on the toolbox of the external dimension of EU migration policy is clearly missing in the Pact. More particularly, it remains uncertain whether previous instruments used by the EU to cooperate with third countries on migration would continue to be explored and proposed, such as Mobility Partnerships (MPs) and Common Agendas on Migration and Mobility (CAMMs), the emblematic instruments of the GAMM. Apart from implementing existing ones,<sup>48</sup> will these general and comprehensive policy frameworks for migration cooperation continue to be offered to new priority countries? Are, for instance, Talent Partnerships conceived as an instrument serving to finally honour the legal migration engagements included in MPs? Will the latter be replaced with new general umbrella-like instruments or will the EU simply address the different dimensions of migration through diverse and specific agreements and arrangements with partner countries? Without having accurate replies to these questions, I would rather bet on the second alternative and thus on the abandonment of MPs and CAMMs as general policy frameworks of cooperation given that the Union has been departing, already in a material sense, from the GAMM in the past years and that the drafting of the Pact and subsequent documentation no longer refer to these instruments. This can be inferred, for instance, from the progress report on the Pact issued by the Council Portuguese Presidency which uses a broader language to refer to new partnerships with third countries in line with the Commission's Pact.<sup>49</sup>

Secondly, a reference to association agreements is also missing in the New Pact as an important tool, in my view, of the EU external action on migration. The potential of this explicit external competence, enshrined in Art. 217 TFEU, to address legal migration issues avoiding the complications inherent to the exercise of Union external competences in this field is

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48 MPs have been signed with Moldova, Cape Verde (2008), Georgia (2009), Armenia (2011), Morocco, Azerbaijan, Tunisia (2013) Jordan (2014), and Belarus (2016). CAMMs have been adopted with Nigeria, Ethiopia (2015) and India (2016).

49 The Portuguese Presidency confirms the strong consensus among Member States “for the rapid operationalisation of comprehensive, tailor made and mutually beneficial partnerships with key partner countries” and asks the Commission “to prepare the implementation of a roadmap on mutually beneficial partnerships with third countries of origin and transit”: Council Presidency, Pact on Migration and Asylum - Progress Report, Council doc no 9178/21, 31 May 2021.

to be highlighted.<sup>50</sup> In addition to the traditional importance of association agreements for integration purposes by providing, through their migration clauses, a reinforced status of rights for migrants coming from associated countries,<sup>51</sup> Association Councils have also been used in recent years as tools to formalise migration dialogues with partner countries<sup>52</sup> or developing cooperation on specific migration-related fields, such as social security coordination.<sup>53</sup> Considering the relevance that association agreements have for migration purposes and, particularly, in light of the limited attention devoted in the Pact to the strengthening of the legal migration component of EU cooperation with third countries,<sup>54</sup> it is indeed unfortunate that the Pact does not highlight the impact and added value of these ‘global’ international agreements.

c) *What is in Excess?*

Unfortunately, some other instruments are still there, receiving attention in the Pact as tools of international cooperation on migration. I refer, on the one hand, to military missions and operations launched under the Common Security and Defence Policy (CSDP), which, according to the New Pact, “will continue making important contribution” to the fight against migrant smuggling.<sup>55</sup> In spite of the advantages for migration cooperation that the mobilisation of all the arsenal of EU external action may

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50 García Andrade, ‘EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally?’ (n 21).

51 See, among others, Steve Peers, ‘EC immigration law and EC association agreements: fragmentation or integration?’ (2009) 34(4) *European Law Review*, 628-638. Katharina Eisele, *The External Dimension of the EU’s Migration Policy. Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill 2014).

52 See Paula García Andrade and Iván Martín, ‘EU cooperation with third countries in the field of migration’ (Study for the European Parliament PE 536.469, October 2015) <[www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL\\_STU%282015%29536469\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU%282015%29536469_EN.pdf)> accessed 4 November 2021, 28-30.

53 See Council decisions establishing the Union’s position on social security coordination in the Association Councils of certain North-African and Balkan countries published at OJ 2010 L 306.

54 In this field, the New Pact only refers to the Talent Partnerships addressed in sub-section a) above and to ‘additional efforts on visa facilitation’, see COM(2020) 609 (n 1), 23.

55 COM(2020) 609 (n 1), 16.

have, it is at least debatable, in my view,<sup>56</sup> whether CSDP instruments may be used for migration purposes in light of the horizontal delimitation of competences. The application of the ECJ doctrine of the adequate legal basis and the mutual non-affectation clause of Art. 40 TEU may rather lead to the need of resorting to a TFEU instrument such as Frontex and its powers to launch joint operations with and in third countries, including capacity-building and training activities.<sup>57</sup>

On the other hand, soft law is still present too. Non-legally binding instruments are preserved - implicitly as usual - as a tool for migration management cooperation in the Pact. It is true that the political relevance and added value of soft law instruments of cooperation must be acknowledged, either as a locomotive of subsequent hard law instruments (e.g. MPs) or as a way to achieve – a quite otherwise difficult - consensus at the international level (e.g. UN Global Compacts). It is however worrisome to find an explicit reference to soft law precisely on readmission cooperation. Indeed, the New Pact refers both to “EU agreements and arrangements”,<sup>58</sup> the latter exemplified in the Joint Way Forward on migration issues between Afghanistan and the EU,<sup>59</sup> the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Au-

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56 We have analysed this issue in García Andrade (n 21), 182 ff and in Paula García Andrade, ‘La base jurídica de la celebración de acuerdos internacionales por parte de la UE: entre la PESC y la dimensión exterior del Espacio de Libertad, Seguridad y Justicia. Comentario a la sentencia del Tribunal de Justicia de 14 de junio de 2016, Asunto C-263/14, Parlamento c. Consejo’ (2017) 41 *Revista General de Derecho Europeo*. See Panos Koutrakos, ‘The nexus between CFSP/CSDP and the Area of Freedom, Security and Justice’ in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook in EU Common Foreign and Security Policy*, (Edward Elgar Publishing 2018) 296-311.

57 In the draft action plan for Niger, the Commission has announced the negotiation of working arrangements between Frontex and EUCAP Sahel Niger and EUBAM Libya, evidencing the need for, at least, the Agency’s involvement in these CSDP missions. Draft Action Plan: Niger, Council doc no 11950/21 of 20 September 2021, 3.

58 COM(2020) 609 (n 1), 21.

59 See Annex to the Commission Decision of 4 October 2016 on the signature on behalf of the European Union of a ‘Joint Way Forward on migration issues between Afghanistan and the EU’, <[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2016\)6023&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2016)6023&lang=en)> accessed 4 November 2021.

thorisation to Stay,<sup>60</sup> the EU-Ethiopia Admission Procedures,<sup>61</sup> and some other informal EU readmission arrangements,<sup>62</sup> in which legal safeguards, democratic accountability and monitoring seem all the more necessary.<sup>63</sup> In addition, the proposed Talent Partnerships are very likely to present the form of non-binding agreements, although we will have to wait for the effective launching of these instruments in practice. To this effect, it should be recalled how the Pact endorses a system “fully grounded on European values and international law”, which means that cooperation instruments and their implementation must abide by the safeguards inherent to the rule of law and to other EU structural principles of EU external relations such as institutional balance, democracy and transparency.<sup>64</sup>

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60 See Annex to the Commission Decision of 8 September 2017 on the signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay, <[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2017\)6137&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2017)6137&lang=en)> accessed 4 November 2021.

61 Admission Procedures for the Return of Ethiopians from European Union Member States, <[www.statewatch.org/media/documents/news/2018/jan/eu-council-reg-ueges-return-ethiopians-15762-17.pdf](http://www.statewatch.org/media/documents/news/2018/jan/eu-council-reg-ueges-return-ethiopians-15762-17.pdf)> accessed 4 November 2021.

62 Up to now, the EU would have adopted readmission arrangements also with Gambia, Guinea and Ivory Coast: COM(2021) 56 (n 1), 6.

63 See Juan Santos Vara, *La dimensión exterior de las políticas de inmigración de la Unión Europea en tiempos de crisis* (Tirant lo Blanch 2020), 19-46; Caterina Molinari, ‘Parallel Paths that Need to Cross?: EU Readmission Deals and Constitutional Allocation of Powers’ (*Verfassungsblog*, 29 September 2020) <<https://verfassungsblog.de/parallel-paths-that-need-to-cross/>> accessed 4 November 2021; and Andrea Ott, ‘The “Contamination” of EU Law by Informalization? International Arrangements in EU Migration Law’ (*Verfassungsblog*, 29 September 2020), <<https://verfassungsblog.de/the-contamination-of-eu-law-by-informalization/>> accessed 4 November 2021.

64 See Ramses A. Wessel, ‘Normative transformations in EU external relations: the phenomenon of ‘soft’ international agreements’ (2021) 44 (1) *West European Politics*; and Andrea Ott, ‘Informalization of EU Bilateral Instruments: Categorization, Contestation and Challenges’, (2020) *Yearbook of European Law*, 569-601. In particular, we have addressed the specific role to be played by the European Parliament in international soft law instruments in Paula García Andrade, ‘The role of the European Parliament in the adoption of non- legally binding agreements with third countries’, in Juan Santos Vara and Soledad Sánchez Rodríguez-Tabernero (eds), *The Democratization of EU International Relations through EU Law* (Routledge 2018), 115-131.

#### 4. *Concluding Remarks*

The New Pact on Migration and Asylum presented by the Commission attributes great political importance to its external dimension by qualifying cooperation with partner countries as one of the most salient pillars of the EU migration policy. Even the definition of the EU “comprehensive approach” of the whole policy, inserted in article 3 of the Proposal for an Asylum and Migration Management Regulation, includes cooperation with third countries as its first component.<sup>65</sup> In addition, the relevance of this external dimension appears uncontroversial and brings together a strong consensus among EU Member States, contrary to the major disagreements that some aspects of the internal dimension of the Pact have stirred up. However, in contrast to the Commission’s position, the orientation and objectives the Pact assigns to EU international cooperation on migration do not follow neither a ‘change of paradigm’ nor a ‘fresh start’, but ‘more of the same’, just the existing approach with slight nuances.

The fact that nearly most of the objectives, features and instruments of the cooperation to be established with third countries on migration are not new, probably explains why the emphasis put by the New Pact on effective implementation of the existing rules seems particularly apposite for the external dimension. Indeed, further new instruments for cooperation might not be necessary, the accent is thus to be put in exploiting the toolbox the Union has at its disposal and in honouring the commitments in which it has already engaged.

Precisely, an essential duty to respect when implementing this external dimension and putting into practice the toolbox of cooperation instruments is the need to ensure coordination between the supranational and national levels of action, especially in a field in which the intertwinement of EU and Member States’ competences is so evident.<sup>66</sup> To this effect, the Commission’s New Pact highlights that the EU and its Member States

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65 Article 3.a) of the Proposal refers to ‘mutually-beneficial partnerships and close cooperation with relevant third countries, including on legal pathways for third-country nationals in need of international protection and for those otherwise admitted to reside legally in the Member States addressing the root causes of irregular migration, supporting partners hosting large numbers of migrants and refugees in need of protection and building their capacities in border, asylum and migration management, preventing and combatting irregular migration and migrant smuggling, and enhancing cooperation on readmission’.

66 García Andrade, ‘EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally?’ (n 21).

shall act united and calls for an effective and systematic coordination between both levels of action.<sup>67</sup> The Pact does not specify however – just as the Stockholm Programme ten years ago, which also insisted on this duty of coordination and the need for complementarity between the Union and Member States’ action –<sup>68</sup> the ways and means by which this coordination should take place. It appears of little use to reformulate approaches, priorities or instruments if one of the most pressing institutional challenges for the effectiveness of this external dimension is not adequately addressed.

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67 COM(2020) 609 (n 1), 18.

68 European Council, ‘The Stockholm Programme — An open and secure Europe serving and protecting citizens’ (OJ 2010 C 115/1), particularly sections 6 and 7. Regarding the New Pact, the Portuguese Presidency of the Council invited Member States “to share information on the main aspects of their bilateral cooperation in migration and mobility areas, in relation to the issue of strengthening migration partnerships with selected priority countries”, which “will serve as an important element for the further implementation of the partnerships”: Council doc no 9178/21.

# Financial Aspects of the EU's New Pact on Migration and Asylum: Towards Stronger EU-Funded Policy Implementation?

Iris Goldner Lang\*

On 23 September 2020 – at the time of what seemed (but turned out not) to be the photo finish of the negotiations of the 2021-2027 Multiannual Financial Framework (MFF) – the European Commission proposed the New Pact on Migration and Asylum with the appended package of new legislative proposal. The aim of this article is to look at the financial implications of the Migration Pact and examine whether the ambitions of the new Pact are reflected in the 2021-2027 MFF. The text will try to respond to two questions. Firstly, it will examine whether the Migration Pact generates new costs for the EU and its Member States and whether these costs have been calculated into the MFF; and secondly, it will consider whether the creation of additional costs by the Migration Pact could interfere with its successful adoption and implementation.

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## 1. Introduction

On 23 September 2020 – at the time of what seemed (but turned out not) to be the photo finish of the negotiations of the 2021-2027 Multiannual Financial Framework (MFF) – the European Commission proposed the New Pact on Migration and Asylum (Migration Pact) with the appended package of new legislative proposal.<sup>1</sup> The aim of this article is to look at the financial implications of the Migration Pact and examine whether the ambitions of the new Pact are reflected in the 2021-2027 MFF. The text will try to respond to two questions: Firstly, it will examine whether the Migration Pact generates new costs for the EU and its Member States and whether these costs have been calculated into the MFF and, secondly, it will consider whether the creation of additional costs by the Migration Pact could interfere with successful negotiations, adoption and implementation of the Migration Pact.

The timing of the Commission's proposal of the Migration Pact coincides with the final phase of extremely difficult negotiations on the adoption of the 2021-2027 MFF and the "Next Generation EU" recovery fund. The agreement among Member States on the new seven-year budget ended at the longest ever meeting of the European Council on 21 July 2020. According to the European Council Conclusions, EU leaders agreed that the new MFF would amount to € 1,074.3 billion with an additional € 750 billion for the Recovery Fund.<sup>2</sup> Out of that amount, a total of € 22.7 billion has been proposed under Heading 4 titled 'Migration and Border Management'. Out of this amount, € 8.7 billion has been dedicated to Asylum and Migration Fund (AMF),<sup>3</sup> € 5.5 billion to Integrated Border Management Fund (IBMF)<sup>4</sup> and € 5.1 billion to the reinforced European Border and Coast Guard Agency (EBCGA).

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- 1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A New Pact On Migration And Asylum, COM(2020) 609 final, 23 September 2020. For the Migration and Asylum Package see here: <[https://ec.europa.eu/info/publications/migration-and-asylum-package\\_en](https://ec.europa.eu/info/publications/migration-and-asylum-package_en)> accessed 7 November 2021.
  - 2 Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, 21 July 2020, EUCO 10/20, CO EUR 8, CONCL 4. All the amount provided in this text are in 2018 prices.
  - 3 Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund, COM/2018/471 final, 12 June 2018.
  - 4 Proposal for a Regulation of the European Parliament and of the Council establishing, as part of the Integrated Border Management Fund, the instrument for



In addition, the external dimension of migration will be an important component of the Neighbourhood, Development and International Cooperation Instrument (NDICI),<sup>5</sup> whose financial envelope would amount to € 70.8 billion.<sup>6</sup> In the political agreement between the European Parliament and EU Member States on 10 November 2020, it was confirmed that the total MFF would amount to € 1,074.3 billion with the additional € 750 billion for the Recovery Fund. When compared to the European Council conclusions from 21 July 2020, ten programmes received top-ups. Among them are also three funds important for the financing of EU migration and asylum policies. First, the Integrated Border Management Fund (IBMF) received an additional € 1 billion and will now amount to €6.5 billion. Second, the European Border and Coast Guard Agency (EBCGA) received an additional €0.5 billion and now amounts to €5.6 billion. Finally, NDICI received an additional €1 billion and is thus allocated €71.8 billion.

Due to the disagreement on the rule of law conditionality, the adoption of the 2021-2027 MFF was delayed until 17 December 2020, when the Council unanimously adopted the new Regulation.<sup>7</sup> The new MFF came into force on 1 January 2021. As opposed to the settled future of the new MFF, the future of the Migration Pact is far less certain. It is questionable whether the legislative proposals put forward by the Commission will ever be adopted and, if so, what their final versions will look like. As will be shown later in the text, precisely the financial implications of the Migration Pact are among the reasons behind the uncertain prospects of the new Pact, as they could impact both the negotiations preceding its adoption and its successful implementation.

The chapter will be structured in four sections. This introduction will be followed by an explanation of the functioning and the current state of affairs related to the new MFF, with particular focus on the funding of activities related to migration and asylum. The third section will focus on

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financial support for border management and visa, COM/2018/473 final, 12 June 2018.

- 5 Proposal for a Regulation of the European Parliament and of the Council establishing the Neighbourhood, Development and International Cooperation Instrument, COM/2018/460 final, 14 June 2018.
- 6 Beatrix Immenkamp, 'EU Legislation in Progress: 2021-2027 MFF. A new neighbourhood, development and international cooperation instrument: Proposal for a new regulation' (European Parliamentary Research Service PE 628.251, Brussels July 2021) 1-11.
- 7 Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, OJ L 433 I/11, 22 December 2020.

the Migration Pact and examine the financial implications of screening, border procedures and relocations by considering whether the costs of these activities have been calculated in the new MFF and, if so, how and to what degree. The concluding section will discuss whether the costs of the novelties foreseen by the Migration Pact could interfere with its successful adoption and implementation.

## *2. EU Migration and Asylum Policies in the 2021-2027 Multiannual Financial Framework*

Generally, the asylum, migration and border control budget has taken a rather small percentage of the EU budget (e.g. 1.4% in 2016) and it has grown rather slowly over the budgetary periods.<sup>8</sup> This is partially due to the intergovernmental nature of these policies until the Treaty of Amsterdam and partly to their sensitivity, which has prompted Member States to prefer retaining control of the resources allocated to these policy areas.

A more ambitious asylum and migration budget has been agreed only with the 2021-2027 MFF. The previous experience of insufficient funding during the 2015/16 refugee influx, which led to the reshuffling of funds and significant use of contingency margins and flexibility instruments, is one of the factors to have spurred these developments. However, three points need to be made here.

First, the emphasis of the new MFF is on the fight against irregular migration and smuggling, and border-control capacity building. Consequently, the proposal suggests a significant increase in allocations to the external dimension of migration management and asylum and a comparably smaller raise for their internal dimension. The fact that the budget for these policies is undergoing the highest increase in relative terms supports the argument that it is politically easier to negotiate a budgetary increase in this politically sensitive area than to reach an EU-wide agreement on a change of EU migration and asylum legislation, such as the one proposed by the Migration Pact.

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8 For an analysis of the use of EU funds for migration, asylum and integration in the 2014-2020 budgetary period, see Darvas Zsolt and others, 'EU Funds for migration, asylum and integration policies' (Study for the European Parliament PE 603.828, Brussels April 2018) 1-52. See also Rachel Westerby, 'Follow the Money II: Assessing the use of EU Asylum, Migration and Integration Fund (AMIF) funding at the national level 2014-2018' (United Nations High Commissioner for Refugees and European Council on Refugees and Exiles, Brussels 2018) 1-64.

Second, the amounts agreed for migration and asylum in the 2021-2027 MFF represent a significant increase in comparison to the 2014-2020 € 10 billion budget spent on migration and asylum. However, at the same time they also amount to a 26% decrease in comparison to the € 31 billion proposed by the Commission for the new budgetary period.

Finally, whereas the EU budget plays only a complementary role and is not intended to replace national expenditures in the areas of migration and asylum, the fact remains that the general EU budget – including funds for migration and asylum – remains too modest to cover the actual needs. Only a more radical reshaping of EU resources would enable the EU budget to cover the costs more substantially than it does today. Despite these difficulties associated with the MFF in general, the new EU migration and asylum budget is a step in the right direction, as it aims to respond to some of the most pressing challenges in the area of migration and asylum.

### *3. Financial Implications of the Migration Pact*

The Migration Pact consists of nine instruments.<sup>9</sup> Five of them are Commission proposals for regulations and four are soft law instruments, three of which are recommendations and one a guidance. This chapter will focus on three legislative proposals: the Proposal for a Regulation introducing screening of third-country nationals at the external borders (further in text: Screening Proposal),<sup>10</sup> the Amended proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (further in text: Amended Asylum

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9 For an overview of the main novelties and challenges of the Migration Pact, see Daniel Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the "New" Pact on Migration and Asylum' (EU Migration Law Blog, 28 September 2020) <<http://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/>> accessed 7 November 2021.

10 Proposal for a Regulation of the European Parliament and of the Council introducing a 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, COM(2020) 612 final, 23 September 2020.

Procedures Proposal)<sup>11</sup> and the Proposal for a Regulation on asylum and migration management (further in text: Management Proposal).<sup>12</sup>

Based on the explanatory memoranda of all the Commission's legislative proposals contained in the Migration pact, including the Screening Proposal, the Amended Asylum Procedures Proposal and the Management Proposal, all expenses resulting from the Migration Pact can be covered under the new MFF.<sup>13</sup> Consequently, no additional financial or human resources are requested based on the wording of the legislative proposals. However, the proceeding analysis will show that it is questionable to what degree the new MFF can cover the costs of the new tasks envisaged by the Proposal for two reasons. First, the usual co-financing rate for the AMF and the BMVI is 75% of the total eligible expenditure of the activity, meaning that Member States have to cover the rest of the costs. Second, financial implications of the Migration Pact could neither be taken into consideration in the Commission's proposal of the new MFF, which was drafted much before the Migration Pact, nor were they considered in the Member States' negotiations on the 2021-2027 MFF and it remains to be seen whether the resources contained in the thematic facility – which is the flexible part of the AMF and the BMVI – will suffice to cover the Member States' needs.

This section will be divided into three sub-sections. It will, first, discuss financial implications of screening procedures, then of border procedures and, finally, of relocations. Each sub-section will first briefly outline the main elements of each of the three procedures, which is necessary in order to understand their financial implications.

#### *a) Financial Implications of Screening Procedures*

The aim of screening procedures – as regulated by the Screening Proposal – is to strengthen the control of persons entering the Schengen area and

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11 Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2020/611 final, 23 September 2020.

12 Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23 September 2020.

13 See, e.g. point 4 of the Explanatory Memorandum of the Screening Proposal and point 4 of the Explanatory Memorandum of the Management Proposal.

refer them to the appropriate procedure.<sup>14</sup> During the procedure, third-country nationals are not allowed to enter the territory of the Member State unless it becomes apparent, during the screening, that they meet the entry conditions as required by the Schengen Borders Code.<sup>15</sup> According to the Screening Proposal, screening applies to all third-country nationals who have crossed the external border in an unauthorised manner, to those who have applied for international protection during border checks without fulfilling entry conditions, as well as to those disembarked after a search and rescue operation.<sup>16</sup> It is performed by national authorities, which may be assisted by the European Border and Coast Guard Agency and the European Union Agency for Asylum.<sup>17</sup> Additionally, each Member State has to establish an independent monitoring mechanism to ensure compliance with fundamental rights.<sup>18</sup>

Point 4 of the Explanatory Memorandum of the Screening Proposal estimates that the financial resources necessary for the implementation of the Proposal are € 417 626 million for the period 2021-2027. It further provides that the Proposal “has implications for the EU budget” and continues that “the following elements of the screening will potentially require financial support: infrastructure for the screening; creation and use/upgrade of the existing premises at the Border Crossing Points and reception centres; access to the relevant databases at new locations; hiring of additional staff to carry out the screening; training of border guards and other staff to carry out the screening; recruitment of medical staff; medical equipment and premises for the preliminary health checks, where appropriate; and setting up the independent monitoring mechanism of fundamental rights during the screening.” However, point 4 further provides that “the expenses related to these new tasks can be covered by the resources available to the Member States under the new MFF” and that “no additional financial or human resources are requested” from the EU budget.

This opens up the question to what degree the tasks stipulated by the Screening Proposal can be covered by the new MFF. As explained previously, the costs of any new tasks envisaged by the Screening Proposal could not be included in the Commission’s proposal of the new MFF, as it was drafted in 2018, much before the Screening Proposal was put forward.

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14 Art 1 of the Screening Proposal.

15 Art 4 of the Screening Proposal.

16 Art 1 of the Screening Proposal.

17 Art 6(7) of the Screening Proposal.

18 Art 7(2) of the Screening Proposal.

These costs were also not subject to negotiations on the MFF among the Member States and between the Council and the European Parliament. For this reason, any new costs resulting from the Screening Proposal could not have been calculated into the costs covered by the MFF. However, a number of tasks proposed by the Screening Proposal are actually not new, so their costs are not new.<sup>19</sup> Identity, registration and security checks, as well as preliminary vulnerability assessments – as the mandatory elements of the screening exercise prescribed by Art. 6(6) of the Screening Proposal – are already part of Member States' obligations based on the Schengen Borders Code and the Eurodac Regulation. On the other hand, even though health checks have not been prescribed by EU migration and asylum law so far, Member States have, in practice, started conducting them in response to the COVID-19 pandemic. However, in case of the adoption of the Screening Proposal, health checks will become one of the Member States' obligations stemming from EU law and applicable also in the pandemic-free times. Nevertheless, it is questionable to what degree Member States will be able to acquire EU funding for the costs of health checks, which will encompass the recruitment of medical staff, the purchase of medical equipment and ensuring adequate premises.

Additionally, the screening procedure will result in a de-briefing form containing the information as to whether the person should be directed to the asylum, border or return procedure. This is likely to require the hiring of extra staff and their training, which will create new costs for Member States. Further, the Screening Proposal envisages the establishment of an independent monitoring mechanism. This will also create additional costs, which have not been envisaged by the MFF, as such a mechanism will require the presence of lawyers, NGOs and other staff/bodies at the external borders and their likely further engagement in the form of writing reports and recommendations. Also, Art. 6(1) of the Screening Proposal envisages that the screening takes place “at locations situated at or in proximity to the external borders”. In many Member States this is likely to require the adjustment and upgrading of border infrastructure, as well as enabling access to relevant databases at the external borders. Finally, since all these activities are going to take place at the borders, without authorizing third-country nationals to enter the territory of a Member State and preventing

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19 For an analysis what is new and old in the Screening Proposal, see Lyra Jakulevičienė, 'Re-decoration of existing practices? Proposed screening procedures at the EU external borders' (EU Migration Law Blog, 27 October 2020) <<https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/>> accessed 7 November 2021.

their absconding, Member States will have to create sizable facilities where third-country nationals will be accommodated during the screening and border procedures.<sup>20</sup>

Consequently, even though a number of tasks envisaged by the Screening Proposal will not be new, one can expect a considerable increase of Member States' costs related to the activities and the infrastructure needed at the external borders. It is questionable how much of these new costs will, in the end, be covered from the EU budget and how much will fall on national budgets, primarily of frontline Member States, which create the EU's external borders. Namely, the relevant EU funding instrument for the task encompassed by the Screening Proposal – as well as for other activities related to border management – is the BMVI, which is part of IBMF.<sup>21</sup> Based on the 2018 IBMF Proposal, in the 2021-2027 budgetary period 60% of the IBMF will be allocated to the Member States' predetermined national programmes, whereas the remaining 40% of the total IBMF envelope, i.e. € 3 207 000 000, will be allocated to the thematic facility, which enables flexibility by allowing the disbursement of IBMF funds for Member States' specific actions, Union actions and emergency assistance, all based on the initiative of the Commission.<sup>22</sup> Consequently, 40% of IBMF is flexible, meaning that it could be used to finance the activities which have not been initially planned. However, it is difficult to predict which initially unanticipated activities will in the end be covered from the thematic facility, especially in case Member States' demands for the flexible part of the IBMF envelope exceed the available resources.

Additionally, even in cases in which the Commission decides to financially support new costs resulting from the implementation of the Screening Proposal, the contribution from the EU budget will not cover the total expenditure of the task. In most cases, the Union co-financing rate will not exceed 75% of the total expenditure of a project.<sup>23</sup> In exceptional cases, the Union contribution can be increased to 90% for actions listed in Annex IV of the IBMF Proposal and for specific actions of high EU added

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20 For the discussion on border procedurs, see sub-section 3.2.

21 See Point 3.1 of the Legislative Financial Statement Annexed to the Screening Proposal, which provides that that the budget line expenditure for the tasks encompassed by the Screening Proposal is Heading 4 of the MFF, more particularly BMVI, as part of IBMF.

22 Point 4 of the Explanatory Memorandum and Art 7(2)(b) and 8(1) of the IBMF Proposal.

23 Art 11 of the IBMF Proposal.

value, which are defined by the Commission in its work programmes.<sup>24</sup> Full 100% funding may be granted for operating support and emergency assistance, whereas the Commission sets the co-financing rate and the maximum support from IBMF.<sup>25</sup> Consequently, with the adoption of the Screening Proposal, Member States – primarily frontline ones – will face a number of financial uncertainties associated with its implementation. They will certainly have additional implementation costs and it is questionable to what degree and at which co-financing rates these costs will be covered from the EU budget.

*b) Financial Implications of Border Procedures*

Once the screening procedure is over, third-country nationals are channelled into asylum, border or return procedures. Border procedures are a novelty, stipulated by the Amended Asylum Procedures Directive. The aim of a border procedure is “to quickly assess at the external borders whether applications are unfounded or inadmissible and to swiftly return those with no right to stay”, thus enabling Member States “to require applicants for international protection to stay at the external border or in a transit zone in order to assess the admissibility of applications”.<sup>26</sup> Consequently, border procedures are conceptualised as a novel, pre-entry step, whereby asylum applications would be assessed without authorizing the applicants’ entry into the Member State’s territory and, in case of a negative decision, a return border procedure would follow immediately.

Even though border procedures do not preclude the host Member State from carrying out the procedure for determining which Member State is responsible for examining the asylum application, based on the Management Proposal, the intention behind the Amended Asylum Procedures Proposal obviously was to encourage a widespread use of border procedures in frontline Member States. Generally, national authorities are entitled to choose whether to channel the asylum applicant to a border procedure or a regular asylum procedure.<sup>27</sup> However, it is likely that, in most cases, they will prefer to keep asylum applicants at the external borders, instead of allowing them to enter deeper into the national territory.

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24 Ibid.

25 Ibid.

26 Recital 40a of the Preamble to the Amended Asylum Procedures Proposal.

27 Art 41(1) of the Amended Asylum Proposal.



Additionally, border procedures will be compulsory in three cases: where an asylum seeker has presented false documents, where they are considered a danger to national security or public order, or in case the applicant is of a nationality (or in case of a stateless person, is a former habitual resident) of a third country with the refugee recognition rate below 20%, unless the circumstances in that country have changed or the asylum seeker belongs to a category of persons for whom the low recognition rate is not representative.<sup>28</sup>

The whole procedure is intended to be highly efficient and fast. Border procedures should not exceed 12 weeks, starting from the date when the application is registered for the first time, with an additional 12-week time limit for the return procedure.<sup>29</sup> The short time limit poses considerable risks both in terms of the protection of applicants' rights and the feasibility of the whole procedure, especially in case of high numbers of arrivals. Even though the Amended Asylum Procedures Proposal provides an elaborate framework aimed at ensuring applicants' fundamental rights and the right to an effective remedy, it is questionable whether the frontline Member States will have enough financial, operational and human resources to implement and respect these rules in practice.<sup>30</sup>

Generally, any new procedure which sets additional operational and administrative requirements on Member States inevitably generates new financial costs. First, frontline Member States will have to hire and train additional staff in order to comply with the 12-week time limit, while at the same time respecting applicants' rights. Second, the facts that border procedures will take place at the external borders and that they will preclude the applicants' entry into the Member States' territories has two implications. First, it implies that Member States will resort to detention during the 12-week period and will, consequently, have to make significant investments in setting up the adequate infrastructure for that

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28 Art 40(1)(c), (f) and (i)) of the Amended Asylum Proposal. By way of exception, a Member State is not required to apply border procedures for nationals of a third-party country that does not cooperate sufficiently in readmission (Art 41(4)). Additionally, the application of border procedures is limited with regard to unaccompanied minors, who can be subject to border procedures only provided they come from a safe third country, are considered a threat to national security or public order or have presented false documents (Art 41(5)). Finally, border procedures do not apply to vulnerable applicants in case adequate support cannot be provided within the framework of the border procedure (Art 19(3)).

29 Art 41(11) of the Amended Asylum Procedures Proposal.

30 Art 53 of the Amended Asylum Proposal.

purpose.<sup>31</sup> Second, the whole border procedure will – in line with its name – take place at the external borders, thus requiring the setting up of necessary facilities where all the border activities will take place. Even though Member States do not need to set up such facilities at every border crossing point or at every section of the external borders where migrants might be apprehended or disembarked and they can choose the locations anywhere close to the external borders and transfer applicants to these locations, regardless of where the application was initially made, border facilities should be located in such a way “to avoid too many and overly time consuming transfers”.<sup>32</sup> Consequently, the implementation of border procedures will be a highly costly and demanding task, which will fall on the shoulders of frontline Member States.

Again, it is questionable whether the frontline Member States will have sufficient financial resources to be up to task. Insufficient investment in border procedures will result in poor implementation of the Migration Pact and serious violations of third-country nationals’ rights. It will also trigger increased discontent of frontline Member States and mutual accusations among Member States and EU institutions. Consequently, without sufficient EU financial support, border procedures could do more harm than good.

According to the Explanatory Memorandum of the Amended Asylum Procedures Proposal, Member States will be able to make use of the AMF funds in order to support investments in the infrastructure created for the purpose of border procedures, while the European Asylum Support Office (EASO) and Frontex will be able to support Member States with staff within their respective mandates.<sup>33</sup> However – as in the case of the financial support for screening from BMVI, which was discussed in the previous section – it remains to be seen whether the AMF will contain sufficient funds for all the Member States’ needs. Again, as in the case of BMVI, potential EU financial support would come from the thematic facility, which amounts to 40% of the total financial envelope of the AMF

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31 Art 41a(7) and Recitals 40f, 40h and 40i of the Preamble to the Amended Asylum Procedures Proposal. According to Recital 40f of the Preamble, detention is not compulsory, but Member States “should nevertheless be able to apply the grounds for detention during the border procedure in accordance with the provisions of the [Reception Conditions] Directive”.

32 Point 4 on page 15 of the Explanatory Memorandum of the Amended Asylum Procedures Proposal.

33 Point 4 on page 12 of the Explanatory Memorandum of the Amended Asylum Procedures Proposal.

and which enables flexibility for the actions which have not been initially planned.<sup>34</sup> According to the Explanatory Memorandum of the Amended Asylum Procedures Proposal, it is expected that the resources contained in the AMF will be sufficient. Only time can confirm the accuracy of this presumption. In any case, the Explanatory Memorandum provides that “the Proposal does not impose any financial or administrative burden on the Union” and “has no impact on the Union budget”.<sup>35</sup>

Additionally, the Union co-financing rate from the AMF will in most cases not exceed 75% of the total expenditure of the project.<sup>36</sup> It can, exceptionally, be increased to 90% for actions listed in Annex IV of the AMF Proposal and for specific actions of high Union value.<sup>37</sup> Full 100% funding could be granted for operational support and for emergency assistance.<sup>38</sup> The co-financing rate for Union support to border procedures will depend on the Commission’s decision, so it cannot be predicted at this stage.

*c) Financial Incentives for Solidarity: EU Budgetary Plans for Relocations*

Over the past decade, solidarity has been one of the most burning and controversial issues of EU migration and asylum policies. In this context, relocations were one of the main stumbling blocks in finding a solution that would be acceptable to all Member States and EU institutions. The Management Proposal aims to find a compromise among opposed national interests by enabling Member States to choose (to a certain degree) among different solidarity tools offered by the Management Proposal when providing help to the most pressured Member States. The Proposal introduces a ‘solidarity pool’ – a set of solidarity contributions benefiting a Member State under migratory pressures or subject to disembarkations following search and rescue operations.<sup>39</sup> Solidarity contributions consist of relocations of asylum seekers who are not subject to border procedures, relocations of asylees, ‘return sponsorships’ of illegally staying third-coun-

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34 According to Art 8 of the AMF, out of € 10 415 000 000 of the total financial envelope, € 6 249 000 000 will be allocated to the programmes implemented under shared management and € 4 166 000 000 to the thematic facility.

35 Point 4 on page 12 of the Explanatory Memorandum of the Amended Asylum Procedures Proposal.

36 Art 12 of the AMF Proposal.

37 Ibid.

38 Ibid.

39 Art 45(1) of the Management Proposal.

try nationals and capacity-building and operational support measures in the Member State under migratory pressure.<sup>40</sup> The share of solidarity contributions by each Member State will be calculated based on the size of the population (50% weighing) and the total GDP (50% weighing).<sup>41</sup> Even though Member States are free to choose solidarity contributions, the Management Proposal provides a correction mechanism in order to prevent a situation where they would mainly or only choose capacity-building and operational support, thus completely avoiding relocations and return sponsorship.<sup>42</sup>

This chapter will not go into the analysis (and critique) of the issue whether solidarity arrangements set by the Management Proposal respond to the actual needs of the most affected, frontline Member States.<sup>43</sup> The aim of the following paragraphs is to examine whether relocations – as the most contentious solidarity tool – will be covered from the EU budget and, if so, whether the amounts allocated for relocations will be a sufficient incentive to encourage Member States to choose relocations from the ‘solidarity pool’ set by the Management Proposal.

The Management Proposal foresees that transfer costs for relocations will be paid from the thematic facility of the AMF, mainly through direct management or, depending on the situation, through shared management, by topping up national programmes.<sup>44</sup> The AMF foresees relocations as one of the possible uses of the AMF thematic facility. However, it does not envisage a special financial envelope which would be allocated exclusively for relocations.<sup>45</sup> For this reason, the Management Proposal has an additional role of amending the future AMF Regulation. This is visible both from its title and from Art. 72, which stipulates that Member States will re-

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40 Ibid.

41 Art 54 of the Management Proposal.

42 Art 48(2) and 53(2) of the Management Proposal.

43 On the analysis of solidarity in the Migration Pact, see Francesco Maiani, ‘A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact’ (EU Migration Law Blog, 20 October 2020) <<http://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>> accessed 7 November 2021. For the discussion of solidarity in the context of the refugee crisis, see Iris Goldner Lang, ‘The EU Financial and Migration Crises: Two Crises – Many Facets of Solidarity’ in Andrea Biondi, Egle Dagilytė and Esin Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar Publishing 2018) 133-160.

44 Point 1.6. of the Legislative Financial Statement Annexed to the Management Proposal.

45 Point 2.2. of the Legislative Financial Statement Annexed to the AMF Proposal.

ceive a € 10 000 contribution for each relocation of asylum seekers, asylees and illegally staying third-country nationals subject to return sponsorship, whereas the contribution is increased to € 12 000 for unaccompanied minors.<sup>46</sup> The same allocations apply in case of resettlements.<sup>47</sup> This approach, whereby a legal act is amended by adopting a completely different act, might not be the conventional way to make legislative changes. However, it is understandable considering the fact that the European Commission did not want to make changes to its AMF Proposal at the last moment before the trialogues, as this would probably prolong the procedure and delay its adoption.

Point 4 of the Explanatory Memorandum of the Management Proposal specifies that the total financial resources needed for the implementation of the Management Proposal for the period from 2021 until 2027 will amount to € 1 113 500 million, which should cover the costs of all relocations.<sup>48</sup> This is a significant amount, but in case more asylum seekers would need to be relocated and transferred, the Management Proposal suggests that additional resources should be requested.<sup>49</sup> The lump sums of € 10 000 and € 12 000 are also considerable, but it is questionable whether they will create a sufficient incentive for Member States to opt for more relocations.

The experience from the two Relocation Decisions from 2015 is not promising. These Decisions were adopted in the midst of the 2015/2016 refugee influx.<sup>50</sup> Both decisions stipulated that the Member State of relocation would receive a lump sum of € 6 000 for each relocation.<sup>51</sup> The adoption of the Relocation Decisions was openly opposed by Slovakia, Romania, Hungary and the Czech Republic, which voted against the second Relocation Decisions during the qualified majority voting in the Council of Ministers. Slovakia and Hungary started annulment actions against the second Relocation Decision before the Court of Justice, calling into question

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46 Art 72(2) of the Management Proposal.

47 Art 72(1) of the Management Proposal.

48 Point 4 of the Explanatory Memorandum of the Management Proposal.

49 Ibid.

50 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15 September 2015; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24 September 2015.

51 Art 10 of both Relocation Decisions.

its legality, but the Court dismissed their actions.<sup>52</sup> Most importantly, after the expiry of the two-year implementation period of the two Relocation Decisions, the results were disappointing. Out of 98 256 relocations, only 34 705 third-country nationals (21 999 from Greece and 12 706 from Italy) were relocated. Obviously, neither the financial incentive, nor the fact that non-compliance with the prescribed relocation quotas would amount to the violation of their obligations under EU law motivated certain Member States to relocate.<sup>53</sup> The lump sums offered by the Management Proposals are more generous than the ones prescribed by the Relocation Decisions, but it is questionable whether this will make a change.

#### 4. Concluding Remarks: The Impact of Financial Costs on the Implementation of the Migration Pact

The implementation of the Migration Pact – in particular screening, border procedures and relocations – will generate considerable financial costs due to new procedures and administrative and operational requirements they impose on Member States. The implementation of the Pact will demand new infrastructure, equipment, operational activities, including transfers of third-country nationals, recruitment and training of new staff, access to databases and setting up of a new independent monitoring mechanism. New tasks will mostly fall on the shoulders of frontline Member States and those states where most relocations will take place. The Management Proposal foresees considerable funding for relocations, by proposing an amendment to the new AMF, which would enable financial support to the Member States of relocation, covered from the AMF thematic facility. However, all the three legislative proposals discussed above – the Management Proposal, the Screening Proposal and the Amended Asylum Procedures Proposal – envisage that the AMF and the IBMF financial envelopes will contain sufficient funding to cover the costs incurred by the implementation of the new instruments. Whereas this might be true for relocations, it is difficult to predict whether it is accurate for border

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52 ECJ, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, ECLI:EU:C:2017:631.

53 In the end, the Commission started infringement proceedings against Poland, Hungary and the Czech Republic and the Court decided that they failed to fulfil their obligations under EU law (ECJ, Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v Poland, Hungary and the Czech Republic*, ECLI:EU:C:2020:257).

and screening procedures and how much of the costs will in the end be covered by national budgets, due to the limitations of the AMF and the IBMF thematic facilities, both in terms of their size and the Union co-financing rates.

One can expect that the statements about sufficient funding will not convince frontline Member States. Consequently, they will surely insist on laying down the specifics of the screening, border and return procedures that will define who does what and who pays for every single step of the procedures. The financial component of the Migration Pact will surely play a major role in the future negotiations.

Additionally, the complexity and deficiency of the rules proposed by the Migration Pact create an additional risk in terms of the link between the financial impact of the Pact and its successful implementation. The rules set by the Migration Pact, as they currently stand, will make it difficult to properly implement the new procedures and make them work in practice. High financial costs will make their implementation even more challenging, as screening, border procedures, relocations and returns can be properly implemented only provided Member States are sufficiently equipped, capacitated and trained. If this is not the case, new procedures might create the opposite effect from the desired one, as certain Member States might end up with more delays and violations of EU law, including asylum seekers' rights, than they used to have. It is questionable how the Commission will react to such violations and whether it is going to try to compensate for the deficiencies of the procedures by being reluctant to start infringement proceedings against the mostly affected, frontline Member States, in case they are not able to perform. For all these reasons, it is questionable whether the money that will be invested in the implementation of the Migration Pact will be proportionate to the outcomes of the new procedures, in case they do not satisfy the expectations, in terms of their efficiency, speed and protection of fundamental rights.





# Political Agreement on a Recast Asylum Reception Conditions Directive: Continuation of Tents, Containment and Discipline?

*Lieneke Slingenberg\**

In its 2020 New Pact on Migration and Asylum, the European Commission did not include a proposal for a new legal instrument on the reception conditions for asylum seekers. Instead, the Commission indicated that it supported the political agreement reached on its 2016 proposal for a recast of the Asylum Reception Conditions Directive. Even though the Commission urged the European Parliament and Council to adopt this proposal as soon as possible, this has, to date, not happened.

According to the Commission, this proposal, as amended by the political agreement reached between Parliament and Council, 'will ensure asylum seekers are received under harmonised and decent conditions throughout the EU. It will help prevent unauthorised movements within the EU by clarifying the rights and obligations of asylum seekers'.<sup>1</sup> This chapter will examine if and how the proposal meets this purpose. After describing the background and choice of instrument in section 1, section 2 discusses the scope of the proposed recast directive, also in light of the proposed Screening Regulation. Section 3 examines the changes proposed regarding material reception conditions. As asylum seekers everywhere in Europe, from Greece to the Netherlands, are often housed in improvised premises like tents and sport halls, this section addresses, in particular, the question whether the proposal would make an end to such practises. Section 4 discusses the proposal's emphasis on restricting the freedom of movement of asylum seekers and shows how this enables the continuation of current containment policies. As regards access to the labour market, section 5 demonstrates that while the proposal ensures earlier access, it also

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1 Commission, 'New Pact on Migration and Asylum - Building on the progress made since 2016: Questions and Answers' (Press corner, 23 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_1723](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1723)> accessed 9 November 2021.

includes new grounds for excluding asylum seekers from employment. Section 6 examines the proposed grounds for reducing and withdrawing reception conditions and shows how the proposal both increases and limits Member States' disciplinary power in this regard. Finally, section 7 discusses the element of the proposal that most clearly ensures an increase in asylum seekers' rights: the treatment of (unaccompanied) children.

### 1. *Background and Choice of Instrument*

Conditions for the reception of asylum seekers have been a matter of EU law since 2003, when the first Directive on minimum standards for the reception of asylum seekers 2003/9/EC<sup>2</sup> was adopted. As that Directive allowed Member States 'a wide margin of discretion concerning the establishment of reception conditions at national level' (see 2008 Commission proposal<sup>3</sup>), a recast was adopted in 2013. In 2016, as part of the European Agenda on Migration, the European Commission published again a proposal for a recast of the Asylum Reception Conditions Directive. This was considered necessary, as the reception conditions 'continue to vary considerably between Member States both in terms of how the reception system is organised and in terms of the standards provided to applicants'.<sup>4</sup> The proposal aims, therefore, once again to further harmonise the reception conditions in the EU. In addition, it aims to reduce incentives for secondary movements and increase applicants' self-reliance and possible integration prospects.

In 2018, the Council of the EU and the European Parliament reached provisional agreement on the proposal. However, the political representatives of the member states (in Coreper) could not agree with the compromise text and it was concluded that 'further attempts at the technical level should be made to gain further support from delegations'.<sup>5</sup> Subsequently,

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2 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L031.

3 Commission, 'Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)' COM(2008) 815 final.

4 Commission, 'Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast)' COM(2016) 465 final.

5 Council of the European Union, 'State of play and guidance for further work - Proposal for a Directive of the European Parliament and of the Council laying down

the presidency presented some amendments to the compromise text, on the basis of which negotiations had to be reopened.

In its 2020 New Pact on Migration and Asylum,<sup>6</sup> the European Commission indicated that it supports the political agreement reached and urged for adoption ‘as soon as possible’. From the ‘roadmap’, it appears that this should happen in the second quarter of 2021.<sup>7</sup> In its ‘state of play’ update of September 2021, the Commission writes that it is ‘mainly due to the package approach’<sup>8</sup> that, to date, the provisional compromise reached between Parliament and Council has not been endorsed by Council and urges Parliament and Council again to ensure the quick adoption.<sup>9</sup>

Contrary to the proposals on asylum procedures<sup>10</sup> and qualification for international protection,<sup>11</sup> the Commission does not propose a Regulation to deal with the reception conditions of asylum seekers. According to the Commission: ‘Considering the current significant differences in Member States’ social and economic conditions, it is not considered feasible or desirable to fully harmonise Member States’ reception conditions’. Hence, the proposal aims to *further* harmonise, not to *fully* harmonise. As the new

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standards for the reception of applicants for international protection (Recast)’ (2019) 5458/19.

- 6 Commission, ‘On a New Pact on Migration and Asylum’, COM(2020) 609 final.
- 7 Commission, ‘Annexes to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum’, COM(2020) 609 final.
- 8 Especially Member States at the external border insist on treating all CEAS legislation as a package (Nikolaj Nielsen, ‘EU ‘front-line’ states want clearer migration rules’ (*EUobserver*, 26 November 2020) <<https://euobserver.com/migrati on/150196>> accessed 9 November 2021).
- 9 Commission, Annex 1 to the Report on Migration and Asylum, 29 September 2021, COM(2021) 590 final.
- 10 Commission, ‘Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’ COM(2020) 611 final; European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’ COM(2016) 467 final.
- 11 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents’ COM(2016) 466 final.

instrument will still be a Directive, the provisions included in the proposal need to be implemented in national legislation after adoption.

In this chapter I will discuss the most important changes laid down in the 2016 Commission proposal and the provisional compromise text,<sup>12</sup> published in October 2020<sup>13</sup> and the further proposed amendments by the Council<sup>14</sup> (referred to together as ‘the proposals’), as compared to the current Asylum Reception Conditions Directive 2013/33/EU,<sup>15</sup> against the background of relevant case law of the Court of Justice of the European Union (CJEU). I will not pay attention to the detention of asylum seekers, as this is dealt with in the chapter by Galina Cornelisse in this volume.

## 2. Scope: What about the Screening Procedure?

The provision on scope, Article 3 of Directive 2013/33/EU, has not been changed substantively by any of the proposals. However, the moment as from which Member States should provide reception conditions has been clarified in Article 16 of the proposals. This provision indicates that Member States should make material reception conditions available as from the moment applicants make their application in accordance with Article 25 of the proposed Asylum Procedure Regulation.<sup>16</sup> This article stipulates that an application is ‘made’ when somebody expresses a ‘wish for international protection to officials of the determining authority or other authorities referred to in Article 5(3) or (4)’. Accordingly, this would make it clear

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12 Council of the European Union, ‘Conditional confirmation of the final compromise text with a view to agreement - Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)’ (2018) 10009/18 ADD 1.

13 ‘EU: Tracking the Pact: Secret documents on reception conditions and qualification for international protection’ (*Statewatch*, 1 October 2020) <[www.statewatch.org/news/2020/october/eu-tracking-the-pact-secret-documents-on-reception-conditions-and-qualification-for-international-protection](http://www.statewatch.org/news/2020/october/eu-tracking-the-pact-secret-documents-on-reception-conditions-and-qualification-for-international-protection)> accessed 10 November 2021.

14 Council of the European Union, ‘State of play and guidance for further work - Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast)’ (2019) 5458/19.

15 Council and European Parliament Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

16 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’ COM(2016) 467 final.

that from the moment an applicant expresses a wish to apply for international protection, (s)he falls under the scope of the Asylum Reception Conditions Directive, no formal lodging or registration is necessary. This is in conformity with the interpretation by the CJEU of the current Asylum Procedure Directive 2013/32/EU<sup>17</sup> in the case of *VL*.<sup>18</sup>

In this light, it is hard to understand the Commission's remarks in the explanatory memorandum to the new Proposal for a Screening Regulation.<sup>19</sup> The Commission states that persons who apply for international protection at the border crossing point or during the screening procedure, should be considered as applicants for international protection. However, '*the legal effects concerning the Reception Conditions Directive should apply only after the screening has ended*' (italics LS), according to the Commission. This also seems to follow from Article 9(2) and (3) of the Proposal for a Screening Regulation that obliges Member States to identify special reception needs and provide adequate support. This is an obligation that already follows from the Asylum Reception Conditions Directive (see below); so, apparently, the idea is that this Directive does not yet apply. Accordingly, the different proposals (on reception conditions, asylum procedures and screening) are clearly not yet completely in line with each other. This should be clarified during the legislative procedure. In order to safeguard a dignified standard of living, which is required under the Charter (see below) and in order to ensure legal clarity and a high level of harmonisation, the Asylum Reception Conditions Directive should apply during the screening procedure.

As regards the authorities to which applicants can express their wish for international protection, the new proposals are more limited than the current provisions. The current provisions, as interpreted by the CJEU in *VL*, allow for making an application with a broad range of authorities, not limited to those that are qualified to register applications under national law. This helps, according to the CJEU, to ensure applicants effective access to the procedure. The proposed Asylum Procedure Regulation, however, limits the definition of 'making an application' to expressing a wish

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17 Council and European Parliament Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.

18 CJEU, *Ministerio Fiscal v VL*, C-36/20, ECLI:EU:C:2020:495.

19 Commission, 'Proposal for a Regulation of the European Parliament and of the Council introducing a 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' COM(2020) 612 final. See also the chapter in this volume.

for international protection to one of the authorities that are explicitly entrusted with registering applications under EU or national law, in line with Articles 5(3) and (4) of the proposed Regulation. For the scope of the new Asylum Reception Conditions Directive this means that applicants would no longer fall under the scope if they express their wish to an authority that is not competent to register applications.

### 3. *Material Reception Conditions: The End of Tents?*

While it is well known that many asylum seekers have to live in dire conditions in tent camps in Greece, also asylum seekers in Germany<sup>20</sup> and in the Netherlands<sup>21</sup> are currently sheltered in tents, without any privacy. ‘No more Morias’ is, according to the European Commission, an important aim of the new pact.<sup>22</sup> In addition, the Commission states that the proposal for a new asylum reception conditions directive ensures decent conditions throughout Europe. Does that mean that housing asylum seekers in tents will no longer be possible under the proposals? What do the proposals stipulate as regards the quality of the conditions to be provided to asylum seekers?

#### a) *Definition of Material Reception Conditions*

Member States are required to provide asylum seekers with material reception conditions. Under the current Asylum Reception Conditions Directive 2013/33/EU, these conditions are defined as ‘the reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance (Article 2(g)). The Commission proposes to add ‘other

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20 ‘Germany sees sharp rise in migrants arriving via Belarus’ (*Euronews*, 13 October 2021) <[www.euronews.com/2021/10/13/germany-sees-sharp-rise-in-migrants-arriving-via-belarus](http://www.euronews.com/2021/10/13/germany-sees-sharp-rise-in-migrants-arriving-via-belarus)> accessed 9 November 2021.

21 ‘Almere gets tent camp to house 450 refugees as housing crisis worsens’ (*Dutch news*, 18 October 2021) <[www.dutchnews.nl/news/2021/10/almere-gets-tent-camp-to-house-450-refugees-as-housing-crisis-worsens/](http://www.dutchnews.nl/news/2021/10/almere-gets-tent-camp-to-house-450-refugees-as-housing-crisis-worsens/)> accessed 9 November 2021.

22 Speech of Commissioner for Home Affairs Ylva Johansson on 17 September 2020 <[https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/intervention-european-parliament-plenary-session-debate-need-immediate-and-humanitarian-eu-response\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/intervention-european-parliament-plenary-session-debate-need-immediate-and-humanitarian-eu-response_en)> accessed 9 November 2021.

essential non-food items matching the needs of the applicants in their specific reception conditions, such as sanitary items' to the definition of material reception conditions (Article 2(7)). The Compromise text limits this to 'personal hygiene products', a clear and important addition.

As regards the obligation to provide a daily expenses allowance, the Commission proposes no changes. The European Parliament agrees with this 'in order to ensure a minimum autonomy to the applicants'. The Council, however, wishes to provide Member States the possibility of providing the daily expenses allowance fully in kind or in vouchers. As a compromise, a new definition of the daily expenses allowance is included in the compromise text:

*'an allowance provided to applicants periodically for them to enjoy a minimum degree of autonomy in their daily life in the form of a monetary amount, vouchers, or in kind, for example in products, or a combination of any of the three, provided that such an allowance includes a monetary amount' (Article 2(7a))*

The presidency of the Council emphasized<sup>23</sup> that this definition does not specify the starting moment for providing the monetary amount, nor the exact part that it should constitute.

The current Asylum Reception Conditions Directive contains a few additional obligations for the provision of housing in kind, for example to use premises that are specifically adapted or meant for the housing of asylum seekers; to take into consideration gender and age-specific concerns of asylum seekers when housing them; to ensure that transfers of asylum seekers to another reception facility only take place when necessary; and to ensure that reception centre personnel are adequately trained. Member States can, however, deviate from these obligations when housing capacities normally available are temporarily exhausted, provided this is duly justified and for as short as possible (paragraph 9).<sup>24</sup> The Commission proposal does not propose significant changes to this provision. The compromise text adds two grounds for deviating from the general obligations:

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23 Council of the European Union, 'Conditional confirmation of the final compromise text with a view to agreement – Reception Conditions Directive 2013/33/EU' (2018) 10009/18.

24 See on this: Lieneke Slingenberg, 'Reception Conditions Directive (recast): Relevance in Times of High Numbers of Asylum Applications' in Paul E. Minderhoud and Karin Zwaan (eds), *The recast Reception Conditions Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf legal publishers 2016) 9-26.

when housing capacities normally available are temporarily unavailable due to 1) a disproportionate number of persons to be accommodated or 2) a man-made or natural disaster. This does, however, not add much, as temporary exhaustion can have many causes, which makes these two new grounds rather superfluous. The compromise adds an additional safeguard as well, by requiring Member States to include these three situations in their contingency plan (Article 28) and to inform the Commission and the European Agency for Asylum about the activation of their contingency plan.

Hence, while the inclusion of personal hygiene products is an important addition to the definition of material reception conditions, the new definition of the daily expenses allowance would provide Member States with more discretion to decide on the quality of the conditions. As regards housing, the proposals do not limit Member States' possibilities to house asylum seekers in premises that are not specifically adapted or meant for housing asylum seekers, such as tents or sport halls, but do install a control mechanism.

*b) The Unclear but Relevant 'Dignified Standard of Treatment'*

Member States need to ensure that material reception conditions 'provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health' (Article 16(2) of the Commission proposal). The Commission does not propose any changes as regards this standard compared to the current Directive 2013/33/EU. In three provisions, however, the Commission refers to another standard of treatment: a 'dignified standard of living'. Member States can deviate from the regular standard of treatment and merely ensure a dignified standard of living in three situations: if 1) in duly justified cases, they exceptionally set different modalities for reception conditions when an assessment of special needs is required or when housing capacities normally available are temporarily exhausted (Article 17(9)); 2) they are not the responsible Member State under the Dublin Regulation for the applicants concerned (Article 17a(2)); and 3) they replace, reduce or withdraw reception conditions on one of the grounds laid down in Article 19. A 'dignified standard of living' is, therefore, the absolute minimum that Member States should ensure under all circumstances, and that lies below the regular minimum level of an 'adequate standard of living' (that, on its turn, may lie below the adequate standard of treatment for nationals, see Article 16(6)). Even though the concept of a dignified standard of living is, as an absolute



minimum standard of treatment, one of the key concepts of the Directive, this concept is not further defined. It is unclear what kind of provisions need to be available to ensure applicants a dignified standard of treatment and how this differs from the general adequate standard of treatment.

To confuse things further, the compromise text has replaced the term ‘dignified standard of treatment’ with ‘a standard of living in accordance with Union law, including the Charter of Fundamental Rights of the European Union, and international obligations’. The general standard of treatment in the compromise text is formulated as ‘an adequate standard of living for applicants, which guarantees their subsistence, protects their physical and mental health and respects their rights under the Charter of Fundamental Rights of the European Union’. As both standards of treatment refer to the Charter of Fundamental Rights, the difference between the two is even harder to understand.

In the case of *Haqbin*,<sup>25</sup> the CJEU was asked to interpret the provision on reduction and withdrawal of reception conditions. The CJEU concluded, with reference to Article 1 of the Charter, that a sanction that consists in the withdrawal, even if only a temporary one, of material reception conditions relating to housing, food or clothing is irreconcilable with the requirement to ensure a dignified standard of living for the applicant.

Accordingly, the current Directive 2013/33/EU already clearly stipulates the *elements* of the concept of material reception conditions (housing, food, clothing) that Member States should provide and these elements are, according to the CJEU, also required to ensure a dignified standard of living. The proposals add one element (personal hygiene items), but do not provide any new and further guidance as regards the *quality* of these elements. In addition, the proposals explicitly allow Member States to provide these elements at a lower standard in certain enumerated circumstances. It is unclear what this lower standard entails, which leaves room for interpretation. Arguably, therefore, the proposals still leave ample room for housing applicants in tents.

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25 CJEU, *Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, C-233/18, ECLI:EU:C:2019:956.

4. *Emphasis on Residence Restrictions: Continuation of Containment Policies*

Current policies on the reception of asylum in Europe are characterized by, and criticised for its containment of asylum seekers.<sup>26</sup> It seems that the Commission, Council and Parliament all agree that such policies should continue, as the proposals have much more emphasis on restrictions on freedom of movement as compared to the current Asylum Reception Conditions Directive 2013/33/EU.<sup>27</sup> This is especially the case for the compromise text, in which no less than three provisions deal with residence restrictions. Articles 6a, 6b and 7 include four different kinds of residence restrictions that increase in the degree of severity:

Article	Residence restriction	Condition	Consequence of non-compliance
6a	Allocate applicants to specific accommodations	For reasons of management of their asylum and reception systems	Losing the entitlement to material reception conditions (Article 6a(4)).
6b	Allocate applicants to a geographical area within their territory, that they can only leave with permission	For the purpose of ensuring swift, efficient and effective processing of applications in accordance with the Asylum Procedure Regulation, effective monitoring of applications or geographic distribution of applicants	Reduction or withdrawal of the daily expenses allowance or reduction of other material reception conditions (Article 19(2)(a)).
7(2)	Reporting obligations	To ensure that the decisions referred to in Article 7(1) are respected or to effectively prevent applicants from absconding	Reduction or withdrawal of the daily expenses allowance or reduction of other material reception conditions (Article 19(2)(a))

26 See for example: René Kreichauf, ‘From forced migration to forced arrival: the campization of refugee accommodation in European cities’ (2018) 6 *Comparative Migration Studies* 7; Martina Tazzioli, ‘Governing migrant mobility through mobility: Containment and dispersal at the internal frontiers of Europe’ (2020) 38 *Environment and Planning C: Politics and Space* 3; Guiseppe Campesi, ‘Between containment, confinement and dispersal: the evolution of the Italian reception system before and after the “refugee crisis”’ (2018) 23 *Journal of Modern Italian Studies* 490.

27 See also the chapter by Galina Cornelisse in this volume.

Article	Residence restriction	Condition	Consequence of non-compliance
7(1)	Decide that an applicant is only allowed to reside in a specific place, that they can only leave with permission	For reasons of public order or to effectively prevent the applicant from absconding, where there is a risk of absconding	<ul style="list-style-type: none"> <li>• Losing the entitlement to material reception conditions (Article 7(1))</li> <li>• Reduction or withdrawal of the daily expenses allowance or reduction of other material reception conditions (Article 19(2)(a))</li> <li>• Detention, provided there is still a risk of absconding ((Article 8(3)(c))</li> </ul>

The provisions also include different safeguards, such as in Article 6a that Member States need to ensure that applicants effectively benefit from their rights under this Directive and take into account family unit and in article 6b that Member States need to ensure that the geographical area is sufficiently large, that there is access to necessary public infrastructure and that the applicants’ unalienable sphere of private life is not affected. However, both these provisions also indicate that Member States are *not* required to adopt administrative decisions to allocate applicants and from Article 25(1) it appears that Member States do *not* have to enable applicants to lodge an appeal against the allocation (only against refusal of permission to leave or against the consequences for non-compliance). From the accompanying document to the compromise text it appears that allocation to a geographical area ‘without any administrative or judicial decision’ was of crucial importance for the Member States, on which the European Parliament had strong reservations. Article 7 has more procedural safeguards, does not allow Member States to act without any administrative decision and does provide for judicial protection.

As all three provisions have ‘may clauses’,<sup>28</sup> use general and broad conditions, and two of them allow Member States to act without an administrative decision, this is a clear example of an issue on which Member States still have a lot of discretion. This is further strengthened by the proposed definition of absconding. This is an important concept, as it is not only used as a new ground for restricting applicants’ freedom of movement (Article 7) but also as a new ground of detention (Article 8) and for reduction and withdrawal of material reception conditions (Article 19). Until now, EU law does not contain a definition of this concept,

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28 The Commission proposed to lay down in Article 7 that Member States ‘shall’ where necessary decide on the residence of applicants in a specific place, but this is not formulated as an obligation anymore in the compromise text.

even though it is already a relevant concept in for example the Dublin III Regulation (EU) No 604/2013.<sup>29</sup> The Commission proposes to define absconding as ‘the action by which an applicant, in order to avoid asylum procedures, either leaves the territory where he or she is obliged to be present (...) or does not remain available to the competent authorities or to the court or tribunal’ (Article 2(10)). This definition includes the intention to avoid asylum procedures in the concept of absconding. In the compromise text, this definition has been changed and simply refers to the ‘action by which an applicant does not remain available to the competent administrative or judicial authorities’ (Article 2(11)). Leaving the territory of the Member State without authorisation is mentioned as an example of absconding, but only if this is for reasons which are not beyond the applicant’s control. The compromise text does no longer refer to any intention behind or purpose for not remaining available. From accompanying documents to the compromise text,<sup>30</sup> it appears that the definition of absconding is almost entirely based on the Council position, as this was one of the provisions of ‘crucial importance to the Member States’. Deleting a reference to the intention is, therefore, intentional. Even though the ordinary meaning of the term ‘absconding’ implies ‘the intent of the person concerned to escape from someone or to evade something’, according to the CJEU in the case of *Jawo*,<sup>31</sup> this will not be part of the EU definition if the compromise text on this is adopted. Probably this is due to the fact that the authorities will likely encounter considerable difficulties in providing proof of the intentions of persons concerned, as also noted by the CJEU in the case of *Jawo*.

Accordingly, even though the current containment policies are heavily criticised, the proposals do not severely limit the possibilities of Member States to implement such a policy. On the contrary, the proposals’ emphasis on residence restrictions could encourage Member States to use them, albeit with some limitations stemming from additional safeguards included in the proposals.

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29 Council and European Parliament Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31.

30 Council of the European Union, ‘Conditional confirmation of the final compromise text with a view to agreement – Reception Conditions Directive 2013/33/EU’ (2018) 10009/18.

31 CJEU, *Jawo v Bundesrepublik Deutschland*, C-163/17, ECLI:EU:C:2019:218.

*5. Labour Market: Earlier Access but More Exclusions*

Next to harmonisation, one of the main aims of the recast of the Directive is to increase applicants' self-reliance and possible integration prospects. In line with this, the Commission proposes to oblige Member State to provide applicants with access to the labour market six months after the lodging of the application, instead of the current nine months. The compromise text stipulates that the deadline of six months starts after the *registration* of the application (for which, contrary to the formal lodging of an application, strict deadlines are laid down in the proposal for an Asylum Procedures Regulation). Both proposals do not change that access to the labour market only needs to be provided if no decision on the application for international protection has been taken by the competent authorities within these six months. Accordingly, if the authorities decide to reject the application for international protection within six months (which is the normal time limit for deciding on an asylum application under the proposed Asylum Procedure Regulation), applicants can still be denied access to employment during the entire asylum procedure, including the appeal phase. Also the possibility to give priority to nationals, Union citizens or lawfully staying TCN's when filling a specific vacancy stays intact.

In addition, the proposals introduce two new *exclusions* from the labour market. First of all, Member States are not allowed to grant access to the labour market to applicants whose application is examined in an accelerated asylum procedure, in accordance with Article 40(1)(a)–(f) of the proposed Asylum Procedure Regulation. The compromise text adds that if access is already granted, it will be withdrawn. This includes applicants who have withheld relevant facts, are from a safe country of origin or are found to have made an application merely to delay or frustrate a return decision. Since the proposals use the term 'shall', Member States have no discretion to grant them the possibility to work.

Secondly, the proposals lay down that applicants who are subject to a Dublin transfer decision should be excluded from access to the labour market (Article 17a of the Proposals). The Court of Justice has recently ruled that under the current Directive 2013/33/EU applicants as regards to whom a transfer decision has been taken *cannot* be excluded from the labour market<sup>32</sup>. Interestingly, the Court of Justice did not only base its

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32 CJEU, *KS and Others v The International Protection Appeals Tribunal Ireland and Others*, C-322/19 and C-385/19, ECLI:EU:C:2021:11.

judgment on the text of the Directive but also on the requirement to ensure a dignified standard of living and on the Directive's objective to 'promote the self-sufficiency of applicants'. The reasoning adopted by the Court would, therefore, still be relevant if the new Proposals are adopted. In this light, the lawfulness of these exclusions from the labour market would be questionable.

The proposals further lay down that applicants should receive equal treatment with nationals as regards terms of employment, freedom of association and affiliation, education and vocational training, branches of social security, recognition of diplomas and access to appropriate schemes for the assessment, validation and recognition of applicants' prior learning outcomes and experience. This kind of equal treatment also helps, according to the Commission, to avoid distortions in the labour market. Even though equal treatment on these issues will be the main rule, the proposals allow Member States to restrict this in different ways, for example by excluding grants and loans related to education and vocational training or social security benefits which are not dependent on periods of employment or contribution. On these issues, Member States, therefore, retain some discretion.

#### *6. Reduction and Withdrawal: Disciplining Asylum Seekers*

Since the first Directive on reception conditions (2003/9/EC) Member States have been allowed to reduce or withdraw reception conditions on a limitative number of grounds, for example if an applicant does not comply with certain obligations, has lodged a subsequent application or has abandoned the place of residence. In this way, the threat of poorer living conditions or homelessness can be used to influence asylum seekers' behaviour. By adding two new grounds for withdrawing or reducing reception conditions, the proposals increase this kind of disciplinary power. At the same time, the proposals also limit this power, by reducing the grounds for withdrawal of all reception benefits and by more often requiring a strong justification.

Just as in the 2008 proposal<sup>33</sup> for a recast of this first Directive, the Commission proposes in its 2016 proposal to delete the possibility to entirely

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33 Commission, 'Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)' COM(2008) 815 final.

*withdraw* all reception conditions on one of these grounds. Instead, the Commission proposes to allow Member States to reduce or withdraw the daily expenses allowance or to replace financial benefits with benefits in kind. The accompanying document to the compromise text shows that, again, the Member States are not willing to give up their possibility to entirely withdraw all reception conditions. Yet, they are willing to limit this to the situation that an applicant ‘has seriously or repeatedly breached the rules of the accommodation centre or has behaved in a violent or threatening manner in the accommodation centre’. Based on the case of *Haqbin*, however, this possibility might no longer be lawful, as the CJEU has ruled that a withdrawal of material reception conditions on the basis of violent behaviour is not in conformity with Member States’ obligation to ensure a dignified standard of living and with the proportionality principle.<sup>34</sup>

A new ground for withdrawing material reception conditions is laid down in Article 17a of the proposals. Just like access to employment (see section 5 above), Member States should end the provision of material reception conditions when another Member State is responsible for dealing with the application on the basis of the Dublin Regulation.<sup>35</sup> Contrary to the grounds for reducing and withdrawing laid down in Article 19 of the proposals, this provision does not use a ‘may’ clause, which means that Member States do not have any discretion in this regard. In addition, the safeguards laid down in the provision on withdrawal and reducing conditions (e.g. as regards proportionality, justification, objectivity, all addressed in a decision) do not apply. The compromise text holds that the transfer decision shall state that the relevant reception conditions have been withdrawn, unless a separate decision is issued. Apparently, a separate decision is not necessary for withdrawing the reception conditions based on a transfer decision. However, one important safeguard is included in Article 17a: Member States are still required to ensure the absolute minimum standard of living (see section 3 above) after the withdrawal of the regular reception conditions, which should include, as the case of *Haqbin* suggests, at least some kind of housing, food and clothing.

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34 CJEU, *Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, C-233/18, ECLI:EU:C:2019:956.

35 The Commission proposed to also allow Member States to reduce reception conditions if an asylum seeker has been sent back after having absconded to another Member State (Article 19(2)(h) Commission proposal), but this ground is not included in the compromise text.

In addition to withdrawing material reception conditions in case of violent behaviour or after a transfer decision, the compromise text proposes to allow Member States to reduce or withdraw the daily expenses allowance or, if this is duly justified and proportionate, reduce other material reception conditions on one of the enumerated grounds. As compared to the current Asylum Reception Conditions Directive 2013/33/EU, this means that the justification requirement now also applies to decisions to reduce (and not withdraw) material reception conditions (other than the daily expenses allowance). However, contrary to the Commission proposal, the possibility to reduce material reception conditions stays intact. I believe the Commission's proposal to only allow Member State to reduce the daily expenses allowance or to replace financial benefits with benefits in kind provides clearer rules. It is hard to imagine how reduced benefits in kind are different from a situation in which those benefits are withdrawn, but a dignified standard of living is still ensured, as required under the proposals.

The proposals contain one new ground for reduction/replacement of reception conditions: material reception conditions can be reduced/replaced and the daily expenses allowance can be withdrawn if applicants fail to participate in mandatory integration measures. The compromise text adds an exception for circumstances outside the applicant's control. Even though both proposals introduce a shorter time limit for accessing the labour market as a means to increase integration prospects for applicants, both proposals apparently also see integration as a duty for refugees that can be enforced by withholding benefits.

### *7. Better Protection of (Unaccompanied) Children*

While the foregoing sections discussed proposals that would provide some increase in rights and protection for asylum seekers, but would also preserve significant discretion for Member States to continue current policies of containment and 'campization' and included new grounds to exclude asylum seekers from rights, the proposals as regards children give a less mixed picture, as they clearly increase children's rights. Children profit from the more clearly formulated general obligation to identify special needs; their representation is better safeguarded; and they profit from earlier access to the mainstream education system.



*a) Concept of Vulnerability Deleted*

Both the old (2003/9/EC) and the current Asylum Reception Conditions Directive (2013/33/EU) refer to the concept of vulnerability and stipulate that Member States should take into account the specific situation of vulnerable persons (Articles 17 and 21 respectively). Whereas Directive 2003/9/EC limited this obligation to persons found to have special needs, Directive 2013/33/EU lays down the opposite and holds that only vulnerable persons may be considered to have special needs. Both directives also include a list of examples of vulnerable groups. In its 2016 proposal the Commission deletes all references to vulnerability and specifies that Member States need to take into account the specific situation of applicants with special reception needs. The Commission also proposes to delete the list of examples of vulnerable groups, but the compromise text includes and extends this list of examples of persons who are ‘more likely to have special reception needs’. This might blur the obligation a bit again, as the possible special needs of all applicants need to be assessed. In addition, the proposals further clarify the assessment procedure for identifying special needs, by including specific obligations for the personnel of the competent authorities and, in the compromise text, a deadline for completing the assessment.

*b) Representatives for Unaccompanied Minors*

The proposals lay down a time limit for Member States to designate a guardian/representative for an unaccompanied minor. The Commission proposes to oblige Member States to assign a guardian for unaccompanied minors within five working days of the making of an application. The compromise text sticks to the current formulation of a ‘representative’ instead of a guardian and extends the time limit for designating one to 15, and exceptionally 25, working days (both at the wish of the Council). However, this proposal obliges Member States to designate a person who is suitable to provisionally assist the minor until a representative has been designated. Both proposals further clarify Member States’ obligations by including a definition of guardian/representative and by stipulating that a guardian/representative is not put in charge of a disproportionate number of unaccompanied minors. In the compromise text this is even set on a maximum of 30 (exceptionally 50). This maximum number was included at the wish of the European Parliament.

*c) Access to Education*

The Commission did not propose any changes to the provision on schooling and education for minors. Under the current Directive 2013/33/EU, Member States need to grant minors access to the education system under similar conditions as their own nationals, but are allowed to provide this education on accommodation centres and to postpone access for three months from the date the asylum application is lodged (Article 14). The compromise text increases children's rights significantly in this regard, as it proposes to stipulate that access to education should be granted in the mainstream education system and can only be postponed for a maximum of two months. Only by way of a temporary measure, for a maximum of one month, are Member states allowed to provide education outside the mainstream system. The accompanying document to the compromise text suggests that these safeguards are included because they were of fundamental importance to the European Parliament.

*8. Conclusions*

If the current compromise text on a recast for the Asylum Reception Conditions Directive will be adopted, as urged by the Commission in the New Pact on Migration and Asylum, many current practises and policies can be continued. As this chapter shows, this is true for housing asylum seekers in improvised premises such as tents or sport halls, subjecting asylum seekers to geographical restrictions and reporting duties, coercing asylum seekers to comply with obligations in the asylum procedure by threatening to reduce or withhold basic provisions and excluding asylum seekers from access to the labour market during the entire asylum procedure. In addition, new possibilities for restrictive treatment are proposed, such as withdrawing reception conditions if another Member State is responsible, coercing asylum seekers to participate in integration activities and allocating applicants to a geographical area, that they can only leave with permission, without any administrative or judicial decision.

Even though the proposals do not put an end to these practises and policies, they do propose more and better safeguards against deprivation, for example by requiring Member States to inform the Commission if they rely on exceptional housing arrangements and by requiring Member States to ensure a minimum standard of treatment in all circumstances. In addition, the proposals include a few new rights for applicants, for example to be provided with personal hygiene products, to equal treatment as

nationals as regards some working conditions and social security benefits, and (for minors) to timely access to the mainstream education system.

The proposals are not completely in line with recent CJEU case law, that is adopted after the compromise text was drafted. This is not necessarily a problem. The legislator is, of course, free to change the legislation. If the judgments are based on the wording of the current provisions (e.g. the *V.L.* case on the scope of the Directive or the *Jawo* case on the definition of absconding), these judgments will no longer be relevant if the proposals are adopted. But where the proposals refer to human dignity and/or the EU Charter on Fundamental Rights and the CJEU (partly) based its interpretation on those rights and concepts as well (such as in the *Haqbin* case on temporary withdrawing reception conditions and the *K.S. and others* case on access to employment), this becomes more problematic. As regards the exclusions from employment and from all material reception conditions, the lawfulness of the proposals is questionable. The concept of a ‘dignified standard of living’, and the differences with the general standard of living for applicants (if any), need, therefore, to be further clarified in the final negotiations.



# Labour Migration in the ‘New Pact’: Modesty or Unease in the Berlaymont?

Jean-Baptiste Farcy and Sylvie Sarolea\*

Creating legal avenues to the European Union (EU) is undoubtedly a central component of a comprehensive and balanced immigration policy. Although asylum attracts most of the media coverage and the political attention, the vast majority of third-country nationals entering the EU are coming for other purposes than international protection. This could suggest that the EU legal migration system is working well. To be sure, immigration for family and educational purposes are addressed almost comprehensively by secondary EU legislation. While Directives 2003/86/EC<sup>1</sup> and 2004/38/EC<sup>2</sup> set out the conditions of family reunification, the admission of students and researchers is now spelt out in the recast Directive (EU) 2016/801<sup>3</sup>.

However, when it comes to labour migration, the EU policy is relatively underdeveloped. Harmonisation in this field is limited both in scope and intensity: EU directives regulate the admission and stay of a few categories of workers only and the flexibility provided by the existing EU legislation protects rather than challenges the autonomy of national authorities.<sup>4</sup> The EU *acquis* is also fragmented and EU instruments lack effectiveness. As

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1 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L251/12.

2 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L158/77.

3 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L132/21.

4 Jean-Baptiste Farcy, *L'Union européenne et l'immigration économique: les défis d'une gouvernance multi-niveaux* (Anthemis 2021).

argued convincingly, fragmentation is both the cause and the consequence of a minimum harmonization loop where low harmonization at the EU level appears as a self-reinforcing mechanism leading to low usage of EU tools and more fragmentation.<sup>5</sup> As a result, it should not come as a surprise that the recent “fitness check” of the EU acquis on legal migration concluded that “the current legal migration framework had a limited impact vis-à-vis the overall migration challenges that Europe is facing”.<sup>6</sup>

Given the limited added value of EU directives on labour migration, it was not unreasonable to expect a new look, or even a “fresh start”, on this issue. For sure, more could be done at the EU level to manage effectively immigration by designing legal avenues for all workers irrespective of their skills, and through balanced cooperation with third countries. The rights of labour immigrants could also be enhanced to avoid exploitative situations and ensure fair treatment in line with the Treaties. The European Commission could also trigger a new narrative on immigration where labour immigrants are not only a subsidiary labour force fixing gaps and needs.

The “New Pact” however fails to convince. Unfortunately, labour immigration continues to be treated as a secondary matter (1). No legislative proposal is actually put forward and a number of core dilemmas remain unresolved (2). Written in evasive terms, the Communication on a New Pact on Migration and Asylum raises more questions than it provides answers to.

### *1. New Instruments or More of the Same?*

As the European Commission acknowledges, the development of legal pathways to Europe for work purposes not only helps alleviate the pressure on irregular routes, but it is also in line with the EU’s interests. Invariably, the Commission considers that the admission of labour immigrants is justified by demographic considerations (an ageing and shrinking population in many Member States) and labour market needs. As the Covid-19 pandemic highlighted, third-country workers are overrepresented in a number of key sectors (agriculture, health care, domestic workers ...). More impor-

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5 See European Parliament, ‘The Cost of Non-Europe in the Area of Legal Migration’ (PE 631.736, March 2019), xiii.

6 European Commission Staff Working Document, ‘Fitness Check on EU Legislation on Legal Migration’ SWD (2019) 1055 final of 29 March 2019, 105.

tantly, the Commission is concerned that the EU is currently losing the “global race for talent”. Thus, the argument is that efforts should aim at attracting and retaining larger numbers of (highly) skilled professionals.

The Commission hopes to do so in two different ways: (i) by way of cooperation with third countries and (ii) by way of internal legislation. In order “to match people, skills and labour market needs”, the Commission is to launch “Talent Partnerships” which will provide a comprehensive EU policy framework as well as funding support. Knowing that legal pathways are a key factor for partner countries, the Commission hopes to convince them to cooperate on broader migration-related issues. Although the Communication remains silent on the content and the scope of these partnerships, it is likely that they will be a scaled-up version of current pilot projects on labour migration. This means that “Talent Partnerships” would be bilateral in nature, tailored to the interests of the participating Member State and the partner third-country, and involving the private sector as far as possible. In any case, opening up legal pathways for (talented) labour migrants through bilateral agreements is hardly a novelty. Legal migration is indeed one of the four strategic objectives of the Global Approach to Migration and Mobility. However, since 2005 achievements have been limited which undermines the reputation and the credibility of the EU on the international stage.<sup>7</sup>

Internally, the Commission intended to give yet another push to the reform of the Blue Card Directive.<sup>8</sup> The goal of the reform proposal is to attract and retain larger number of highly-skilled workers across the EU. The impact assessment of the 2009 Directive noted that, in comparison with other countries including the USA, Canada and Australia, the EU “appears less effective in retaining talents and in converting its attractiveness into increased actual numbers of highly-skilled workers coming to work into the EU”.<sup>9</sup> Indeed, despite the adoption of a directive setting common

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7 Elspeth Guild, ‘Negotiating with Third Countries under the New Pact: Carrots and Sticks?’ (*EU Migration Law Blog*, 27 November 2020) <<https://eumigrationlawblog.eu/negotiating-with-third-countries-under-the-new-pact-carrots-and-sticks/>> accessed 18 November 2021.

8 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L155/17.

9 European Commission Staff Working Document, Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing Directive 2009/50/EC, 9 June 2016, ADD1 10012/16, 4.

standards, the EU remains a fragmented territory for third-country workers and secondary legislation has done little to improve their mobility across the EU.<sup>10</sup>

Since 2016, negotiations over the reform proposal made by the Juncker's administration have stalled, mostly due to the unwillingness of Member States to give up their own national schemes. From the outset, the Council made clear that EU Member States would reject such a proposal.<sup>11</sup> As argued by Lucie Cerna, "Member States are not necessarily interested in a level-playing field since they compete with each other and prefer rather to rely on their own high-skilled immigration policies".<sup>12</sup> In the future, the Blue Card will thus continue to coexist with national instruments. While competition between national and EU schemes is in contradiction with the development of a *common* immigration policy, the existence of parallel national schemes is not a problem *per se* for suppressing those schemes would not help to attract more highly skilled workers to Europe. Quite the contrary in fact. As argued by Jo Antoons and Andreia Ghimis, both practitioners,

*"National schemes are often more flexible than the EU Blue Card and more foreigners tend to qualify under national admission criteria (if these are not adapted for the Blue Card). Furthermore, labour market realities change very rapidly and EU instruments take very long to negotiate. EU and national authorities' ability to respond to these changes in due time would thus be affected dramatically".*<sup>13</sup>

Although the Commission would prefer to have a single European scheme with no concurring national programs, it did acknowledge eventually that national schemes tailored to domestic needs offer greater flexibility.<sup>14</sup>

After five years of negotiations, the European Parliament (EP) and the Council have finally come to an agreement over the reform of the Blue Card Directive. The plenary of the EP approved the text in September 2021

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10 Elspeth Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration' in Mark Freedland and Cathryn Costello (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) 98-118.

11 Presidency of the Council of the European Union, 'Legal Migration – what can we do better?', 18 September 2019, LIMITE 12269/19.

12 Lucie Cerna, 'The EU Blue Card: preferences, policies and negotiations between member states', (2014) 2 *Migration Studies* 73, 80.

13 Jo Antoons and Andreia Ghimis, 'What it takes to have a successful new Blue Card scheme: The practitioner's viewpoint' (2021) 26 *ELJ* 264, 272.

14 European Commission, 'Communication on a New Pact on Migration and Asylum' COM(2020) 609 final of 23 September 2020, 25.



and the Council followed suit in October.<sup>15</sup> This agreement puts an end to a five-year drought in the field of legal migration for no legal text has been adopted since the 2016 Directive on students, researchers and trainees.

For highly skilled workers to prefer the blue card rather than parallel national schemes, conditions of admission and stay should be more attractive. To that end, the EP and the Council came to a consensus and agreed that in many respects (such as procedural rights, application fees, equal treatment and family reunion) more favorable rules relating to national schemes must apply to Blue Card holders.<sup>16</sup>

In order to further increase the attractiveness of the Blue Card, the EU legislature agreed to lower the salary threshold (to be set between the average salary and 1.6 times the average salary), in particular for young graduates (the salary threshold *may* be cut by 20%) and occupations with a 'particular need of third-country national workers'.<sup>17</sup> Access to the labour market is also extended but the agreed text fails to set common standards: within the first year of employment, change in occupation *may* be subject to a labour market test and an official approval.<sup>18</sup> After that, Blue Card holders *may* only be required to inform Member States about a change of job. Family reunification is also upheld and facilitated. The maximum processing time is 90 days and family members can take up any employment or self-employment in the Member State concerned.

Provisions on intra-EU mobility remain however largely disappointing (see chapter V of the new directive). Despite the adoption of common standards on entry, Member States wished to retain their control over the admission of third-country highly-skilled workers, including those who already reside in another EU Member State. The right to work in another EU Member State on the basis of the Blue Card delivered by the first Member State is limited to 90 days in any 180-day. For longer periods, a new application for another Blue Card is still required. Therefore the Blue Card is yet to be truly "blue".

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15 Directive 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC, OJ L382/1.

16 See Articles 11(6), 13(5), 16(7) and 17(10).

17 Article 3(3-5).

18 Article 15.

Other measures put forward in the “New Pact” include a revision of the Long-Term Residents Directive 2003/109/EC<sup>19</sup> - currently under-used compared to national schemes<sup>20</sup> - and a review (thus not a revision) of the Single Permit Directive 2011/98/EU<sup>21</sup>. The Commission stated that such a review would explore ways to clarify the scope of the Directive, including admission for low and medium skilled workers. Here, the “New Pact” creates unnecessary confusion since the “single permit” directive does not regulate conditions of entry and stay, but aims to simplify procedures and to create a common set of rights for all migrant workers irrespective of their skills or reason of entry.<sup>22</sup> A separate text on the admission and stay of medium-skilled workers and professionals would thus be preferable.<sup>23</sup> Yet for now, the admission of medium and low-skilled workers (with the exception of seasonal workers) remains regulated at national level only.

In the longer run, the Commission also aims to set out options to develop an EU Talent Pool based on the “expression of interest” system in place in Canada and New Zealand.<sup>24</sup> In these countries, the central objective is to deal with the backlog of highly-skilled workers awaiting admission

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19 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L16/44.

20 European Commission, ‘Report to the European Parliament and the Council on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents’, COM(2019) 161 final of 29 March 2019.

21 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L343/1.

22 As recently recalled by the Court of Justice, Article 12 of the Single Permit Directive “is not limited to ensuring equal treatment for holders of a single work permit but also applies to holders of a residence permit for purposes other than to work, who have been given access to the labour market in the host Member State” (CJEU, *O.D.*, C-350/20 [GC], 2 September 2021, ECLI:EU:C:2021:659, para 49). Given the wide personal scope of that provision, it is a useful tool to ensure equality between nationals and third-country nationals but also among third-country nationals themselves. For a critical assessment see: Ana Beduschi, ‘An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive’ (2015) 17 EJML 210.

23 Tesseltje de Lange and Kees Groenendijk, ‘The EU’s legal migration *acquis*: Patching up the patchwork’ (*European Policy Centre*, 16 March 2021) <[www.epc.eu/content/PDF/2021/Immigration\\_Issue\\_Paper.pdf](http://www.epc.eu/content/PDF/2021/Immigration_Issue_Paper.pdf)> accessed 18 November 2021.

24 OECD, *Building an EU Talent Pool: A New Approach to Migration Management for Europe* (March 2019); Maria Vincenza Desiderio and Kate Hooper, ‘The Canadian

through a dynamic ranking system. In the EU, the relevance of a Talent Pool is somewhat different. The core idea would be to set up an online platform where skilled third-country nationals can express their interest in migrating to the EU, thus allowing local employers to recruit among a pool of pre-screened candidates. Unlike admission to Canada or New Zealand, labour immigrants cannot enter European countries without a job offer. By matching employers with a pre-selected pool of third-country workers, the EU Talent Pool would facilitate the recruitment process.

For our purposes, it is also relevant to point out what is NOT included in the Communication. For instance, the idea of an immigration code, advocated for by the European Commission and academics alike a few years ago, has disappeared. The "New Pact" is also vague on the admission of non-seasonal low and medium skilled workers, although this is arguably an important gap in the European legislation as the European Parliament has acknowledged.<sup>25</sup> No measure is proposed with regards to the admission of self-employed or entrepreneur migrants either.<sup>26</sup> While a growing number of Member States are setting up start-up visas and schemes to attract entrepreneurs and investors, the EU is yet to offer an EU-wide scheme that would allow them to reap the full benefits of the single market.<sup>27</sup> Clearly the ambition is not to extent the personal scope of the EU labour migration policy – irrespective of actual needs – but to focus on the attraction and retention of larger numbers of skilled and talented workers.

Last but not least, the facilitation of intra-EU mobility is not touched upon either, with the (very modest) exception of highly skilled workers

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Expression of Interest System: A Model to Manage Skilled Migration to the European Union' (Migration Policy Institute, March 2016).

- 25 European Parliament, Draft Report on new avenues for legal labour migration, Committee on Civil Liberties, Justice and Home Affairs, 9 October 2020, 2020/2010(INI). Restrictions on the mobility of medium or low-skilled workers is a social and political construct that is not however empirically grounded. See Régine Paul, 'How 'Low-Skilled' Migrant Workers Are Made: Border-Drawing in Migration Policy' in Conny Rijken and Tesseltje de Lange (eds), *Towards a Decent Labour Market for Low-Waged Migrant Workers* (Amsterdam University Press 2018), 57 – 78.
- 26 Tesseltje de Lange, 'Welcoming talent? A comparative study of immigrant entrepreneurs' entry policies in France, Germany and the Netherlands' (2018) 6 *Comparative Migration Studies* 27.
- 27 European Commission, 'Migratory Pathways for Start-Ups and Innovative Entrepreneurs in the European Union' (EMN Synthesis Report for the EMN Study 2019, December 2019).

under the new Blue card scheme. Although the promotion of intra-EU mobility should be a key component of the EU's legal migration policy, as it provides clear added value that cannot be achieved at national level only, the mobility of third-country nationals remains subject to strict conditions, thus reinforcing the significance of national borders.

*In fine*, the overall impression is that the Commission has decided not to decide. Using vague terms and referring to consensual objectives such as attracting more highly-skilled workers to Europe, the Commission avoids making concrete pledges. If anything, new clothes are being put on past initiatives. Although no new legislative proposal is put forward, the Commission will continue to support (mostly financially) and coordinate national pilot projects that aim to manage labour migration. For the rest, there is no convincing reasons to believe that the current administration will succeed where others have failed in the past as a number of contradictions remain unresolved.

## 2. *Unresolved Contradictions and Dilemmas behind the EU Labour Migration Policy*

The EU's capacity to bring about a new direction to the current labour immigration policy is impaired by both legal and political obstacles.<sup>28</sup> Although Article 79 TFEU calls for a "common immigration policy", Member States retain the right to determine volumes of admission for people coming from third countries to seek employment (§ 5 of that provision). As a consequence, Member States can limit the application of secondary EU legislation by setting a cap to the number of labour immigrants they admit on their territory. Another consequence of that provision is that the EU's external action is dependent on Member States' willingness to act.<sup>29</sup> Irrespective of the level of harmonisation achieved internally, the EU should refrain from making offers to its partners without the participation of its Member States, or at least some of them. Therefore, the development of "Talent Partnerships" may be blocked by the unwillingness of Member States to participate. Indeed, since 2015 and the adoption of the European Agenda on Migration, only a handful of Member States have set up pilot

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28 Jean-Baptiste Farcy, 'Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests?' (2020) 22 EJML 198.

29 Paula García Andrade, 'EU external competences in the field of migration: How to act externally when thinking internally' (2018) 55 CML Rev. 157.

projects on labour migration. Nevertheless, the Commission stated that “the EU has a strong track record in labour mobility schemes”.<sup>30</sup>

The exclusive competence of Member States to set volumes of admission for labour immigrants can be seen as a consequence of their political reluctance to act in common in the field of labour migration. For decades, and at least since the 1987 case *Germany et al. v. Commission*,<sup>31</sup> Member States have tried to limit the reach of the EU's intervention in this politically sensitive field. Although the Commission considers that the EU immigration policy needs to reflect the integration of the EU economy and the interdependence of national labour markets, Member States are hardly convinced of the need to forgo their own legislation in favour of harmonised EU rules. As the long-awaited reform of the Blue Card Directive showed, their reluctance is persistent even for highly-skilled workers - arguably the least contentious group of labour migrants. Despite the alleged interdependence of Member States' economies and labour markets, needs are actually different from one country to another and labour policies are mostly national. For instance, while Estonia wishes to attract investors and start-ups in line with its digital economy policy, Germany experiences labour shortages in highly-skilled occupations, and Spain traditionally needs workers in the tourism and agriculture sectors. In that sense, the call for a common labour immigration policy is in contradiction with the diversity of labour market situations and employment policies across the EU.

Moreover, while the Commission is trying to build a system that “manages and normalises migration for the long term”,<sup>32</sup> the paradigm of the EU labour immigration policy remains unchanged. The admission of migrant workers continues to be dependent on short-term economic needs and the demand of local employers. In order to “normalise” migration, we should no longer see labour immigration purely as a solution to current socio-economic problems in destination countries. In the future, the EU should offer a new narrative on labour immigration and move towards a more hybrid system, according to which labour migrants are for instance selected in light of different criteria (language, age, past experiences in the

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30 European Commission, ‘Communication on a New Pact on Migration and Asylum’ (n 14), 23.

31 CJEU, *Federal Republic of Germany et al. v Commission of the European Communities*, Joined cases C-281, 283, 284, 285 and 287/85, 9 July 1987, ECLI:EU:C:1987:351.

32 European Commission, ‘Communication on a New Pact on Migration and Asylum’ (n 14), 1.

destination country, professional experience,...) and not only on the basis of immediate economic needs.

Overall, the question of the added value of the EU labour immigration policy must be asked. Although the EU has achieved partial harmonisation in respect of some categories of labour immigrants, the EU *acquis* lacks effectiveness (take for instance the low number of Blue cards issued in most Member States). In my view, the reason is to be found in the limited added value of EU rules.<sup>33</sup> Why would employers and workers alike choose to fill an application for an EU Blue Card if that permit does not offer much more than its national counterpart?<sup>34</sup> In fact, EU schemes mostly replicate national programmes and EU directives contain a relative high number of flexible provisions ('may clauses') that safeguard national discretion.<sup>35</sup> The absence of truly operative intra-EU mobility provisions in EU labour immigration directives is the most blatant example.<sup>36</sup> Such a weakness in the EU *acquis* is arguably the consequence of a low level of trust and national resistance in a sensitive political field.<sup>37</sup>

To conclude, in the field of legal migration, and labour immigration in particular, not much is to be expected in the months (and years?) to come since the European Commission – aware of its limited powers – refrains from making new pledges. Although a new narrative and new policy instruments could strengthen the EU *acquis* on labour immigration, the "New Pact" does not include any specific proposals on the matter which continues to be treated as a secondary and long-term issue. First and fore-

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33 For more see Farcy, *L'Union européenne et l'immigration économique: les défis d'une gouvernance multi-niveaux* (n 4). See also: European Parliament, 'Legal Migration Policy and Law, European Added Value Assessment' (September 2021); European Commission Staff Working Document, 'Fitness Check on EU Legislation on Legal Migration' (n 6), 93-100.

34 Antoons and Ghimis (n 13), 269.

35 Christoof Roos, 'How to Overcome Deadlock in EU Immigration Politics' (2013) 51 *International Migration* 67, 75; Anaïs Faure Atger, 'Competing Interests in the Europeanization of Labour Migration Rules' in Elspeth Guild and Sandra Mantu (eds), *Constructing and Imagining Labour Migration* (Ashgate 2010), 170.

36 Sara Iglesias Sanchez, 'Free movement of third country national in the European Union? Main features, deficiencies and challenges of the new mobility rights in the Area of Freedom, Security and Justice' (2009) 15 *ELJ* 791. See also: Ségolène Barbou des Places, 'L'empreinte des nationalismes sur le droit de l'immigration de l'Union européenne' (2018) *Revue trimestrielle du droit européen* 725.

37 Tesseltje de Lange, 'The EU Blue Card Directive: A Low Level of Trust in EU Labour Migration Regulation' in Carolus Grütters and Tineke Strik (eds), *Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers 2013), 17-25.

most, in order to design new legal pathways, the Commission will need to work closely with the Member States whose disagreements and reluctance to act in common will be the most significant obstacle to overcome.





# Integration in the New Pact on Migration and Asylum: A Key Element of a Successful Migration Policy, but no EU Legislative Competence

*Ulrike Brandl\**

## 1. Introduction

Integration in European Union migration policy is a topic characterised by the gap between the lack of legislative competence of the EU<sup>1</sup> and the essential importance of comprehensive, effective and targeted integration measures for a successful migration policy. Integration has always been a key element for a prosperous relation between citizens and immigrants and gained more importance in the aftermath of the so-called refugee crisis in 2015 and 2016, when even the cohesion of societies seemed endangered by the increase of refugees and migrants intending to take up long-term residence in Member States. In practice, the design of integration measures as a prerequisite for residence titles and the difficulty to pass integration (language) tests is a core debate in many Member States.<sup>2</sup>

The ongoing efforts for a recast of the EU migration legislation are accompanied by a strategy to support and strengthen national integration policies. The New Pact on Migration and Asylum presented by the European Commission on 23<sup>rd</sup> September 2020 contains a separate chapter

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- 1 Article 79 (2) TFEU provides the legal basis for the adoption of measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification; (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation; (d) combating trafficking in persons, in particular women and children. Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
- 2 See Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, COM[2019] 162 final, 29 March 2019.

with the title “Supporting integration for more inclusive societies”.<sup>3</sup> The reference to inclusive societies shows the socio-political importance of integration. The success of integration policies is a decisive factor for the acceptance of the legislative acts by Member States and finally for an effective national implementation.

Chapter 8 of the New Pact enumerates a number of recommendations for Member States to promote integration. The Pact announced the elaboration of a new Action Plan on Integration and Inclusion 2021 - 2027, which was published by the Commission on 24<sup>th</sup> November 2020.<sup>4</sup> The Action Plan is a comprehensive document, which stresses key principles and values regarding integration and inclusion and focuses on actions in main sectoral areas like education and vocational training, employment and skills, health and housing.

This contribution intends to give an insight into the development of integration policies in the EU and into the content of the Pact and the Action Plan on Integration and to highlight several critical issues. These are the unstructured reference to rights of migrants deriving from legally binding obligations and measures which should be implemented to support a successful integration. It would have been better to confirm that rights have to be guaranteed without discrimination and that supporting measures are intended to provide assistance for full inclusion. Furthermore, the Pact and the Action Plan cover all migrants and even nationals with a migratory background. On the one hand, this approach can be seen as an inclusive one, as it refers to all aspects of a prosperous coexistence. On the other hand, it could lead to the effect that the measures are not targeted enough as they are designed to apply to diverse categories.

## 2. *Previous Efforts to Promote Integration*

The Action Plan 2021-2027 is the successor of the Action Plan 2016.<sup>5</sup> The promotion of integration measures in the EU however started much earlier. Already the 1999 European Council in Tampere referred to the necessity to create a common integration policy.<sup>6</sup> Under the heading “Fair

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3 New Pact on Migration and Asylum, COM[2020] 609 final, 23 September 2020.

4 Action Plan on Integration and Inclusion 2021-2027, COM[2020] 758 final, 24 November 2020.

5 Action Plan on the integration of third country nationals, COM[2016] 377 final, 7 June 2016.

6 Tampere European Council, Presidency Conclusions, 15 and 16 October 1999.

treatment of third country nationals” the Conclusions demanded fair treatment for those who reside legally on the territory of Member States. The Conclusions continued by referring to the aim that a “more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens”.<sup>7</sup> In 2004, the Council adopted the EU Common Basic Principles for Immigrant Integration Policy.<sup>8</sup> These principles enumerated 11 short-worded basics for the development of future integration measures. The Justice and Home Affairs Council reaffirmed them in 2014.<sup>9</sup> In 2011, the European Commission set out a European Agenda for the integration of third-country nationals.<sup>10</sup>

Already the EU Common Basic Principles pointed to the important fact that integration is a “two-way process” involving immigrants and residents of Member States. Principle 2 referred to the required respect for European values. The further principles included employment, basic knowledge of the host society's language, history and institutions, access to education and the participation of immigrants in the democratic process. Enabling immigrants to acquire basic knowledge of language, history and institutions, access for immigrants to institutions, as well as to goods and services equal to national citizens are enumerated as well. The Principles also stressed the importance of frequent interaction between immigrants and citizens.

In 2008, the Union also established a European Network on Migration (EMN) by a Council decision, which was later on amended by a regulation.<sup>11</sup> This regulation provided for financing the network through the Asylum, Migration and Integration Fund. The alignment of integration measures with funding possibilities brought an important input into the development of integration projects in the Member States. EMN has the task to provide information on migration and asylum in order to support

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7 Ibid, III.

8 Press Release, 2618th Council Meeting Justice and Home Affairs, Council Conclusions, Immigrant Integration Policy in the European Union, 19 November 2004.

9 Justice and Home Affairs Council Meeting Luxembourg, 5 and 6 June 2014. In these Conclusions the Council also referred to the fact that “integration is a long-term and multi-faceted process that takes place at a national, regional and local level and in which reception measures play an important role”.

10 European Agenda for the Integration of Third-Country Nationals, COM[2011] 455 final, 20 July 2011.

11 Council Decision 2008/381/EC establishing a European Migration Network [2008] OJ L131/7. The decision was amended by Regulation (EU) 516/2014 establishing the Asylum, Migration and Integration Fund [2014] OJ L 150/168.

policymaking in the European Union. EMN also informs the general public on migration and asylum. In 2017, the Commission and European social and economic partners signed the European Partnership for Integration.<sup>12</sup> This partnership was established with the aim to foster the integration of refugees into the labour market. The Commission funded a variety of projects. Employers, chambers of industry and commerce, trade unions and migrant associations were supported in joining forces to reach the goal.

The European Partnership for Integration is an example of a set of targeted measures. The majority of previous documents (e. g. the Action Plan 2016 and many others) containing plans, ideas and concrete measures about the promotion of integration were characterized by a mixture of an enumeration of deficits in integration policy and ideas and recommendations about projects that are perceived as being supportive to successful integration. A further common characteristic is the fact that the documents did not distinguish between different categories of migrants. They referred to third country nationals in general, to persons who were granted asylum or subsidiary protection as well as to persons who intended to stay permanently or for a certain period for employment or for other reasons. Furthermore, the documents complained about the difficult situation with regard to access to employment, education and social inclusion in general. They lamented about these deficits without a clear distinction between rights which have to be guaranteed to third country nationals and other mainly supportive measures which make integration easier.

The Action Plan 2016 frequently referred to the situation in 2015/2016 with high numbers of persons seeking protection in the EU Member States. The Plan mirrored the difficult and demanding situation in 2016 and specified a number of aims. The text confirmed that the EU policy framework is designed to support States to develop and strengthen their national integration policies. The Commission announced to deliver operational and financial support. The Action Plan also provides for a review process carried out by the Commission.

The text discloses the discrepancy between EU citizens and third country nationals in the areas of employment, education and social inclusion. This discrepancy concerns the legal and also the factual situation. With regard to the conclusions drawn and the measures which should be adopt-

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12 See 'A European Partnership for Integration' <[https://ec.europa.eu/home-affairs/system/files/2017-12/20171220\\_european\\_partnership\\_for\\_integration\\_en.pdf](https://ec.europa.eu/home-affairs/system/files/2017-12/20171220_european_partnership_for_integration_en.pdf)> accessed 23 November 2021.

ed there was however no clear distinction between rights of third country nationals which have to be guaranteed on the one hand and measures which are designed to support integration measures on the other. The text did not differentiate between legal obligations contained in International Law and national law such as the right to education, workers' rights and several social rights and other areas where migrants should have access to.

The wording of the Action Plan reveals a strong focus on the economic burdens caused by consequences of non-integration. The Commission clearly highlighted that it would be a waste of resources if migrants would not be integrated in time and that there "is a clear risk that the cost of non-integration will turn out to be higher than the cost of investment in integration policies". On the other hand, the Commission pointed to the fact that integration needs vary widely and have to be adapted accordingly. The Commission also stressed the necessity to take the situation of vulnerable groups into account and to design integration measures according to their needs. A further aim is to respect the interests of migrants and of receiving societies, to improve the welfare of all members of society and to create inclusive societies.

Part 4 of the Action Plan 2016 structured the measures useful for the integration process in the various phases of migration. It started with measures for the first phase, the so-called pre-departure or pre-arrival phase and then continued with the phase where migrants are already present in the receiving states and where access to education, to the labour market, to vocational training and to basic services are fundamental for successful integration. In this phase, migrants should be empowered to active participation and social inclusion in the receiving society. For each phase, the Commission announced the next steps to be realised by the Commission itself and encouraged Member States to conduct integration measures. The structure of this part would be useful and could lead to a more goal-oriented approach.

The Action Plan referred to the two main tools suitable to reach the aims. These are policy coordination and funding. Coordination and funding led to a number of successful integration projects in the following years. An overview of concluded and on-going integration projects is available here.<sup>13</sup>

The 2016 Action Plan is characterised by a variety of aims, by reference to a variety of areas where support is needed and by highlighting some

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13 <[https://ec.europa.eu/migrant-integration/eu-grid/implementation-2016-action-plan-integration\\_en](https://ec.europa.eu/migrant-integration/eu-grid/implementation-2016-action-plan-integration_en)> accessed 16 December 2021.

deficits existing and disparities between migrants' rights and the rights of nationals. It is also clearly visible that the Plan was published in a time of highly increased numbers of persons arriving and the challenges to host states and the societies in these states. Though we still see many deficits in Member States integration policies, the 2016 Action Plan was definitely an important step in framing integration policy. The Commission funded valuable projects to support the dialogue between migrants and citizens under the Horizon 2020 programme.<sup>14</sup>

### 3. *Chapter 8 of the New Pact on Migration and Asylum: Integration of Migrants Should Lead to More Inclusive Societies*

Chapter 8 of the Pact 2020 shapes the aims of integration. Everyone who is legally present in the EU should have the possibility to “participate in and contribute to the well-being, prosperity and cohesion of European societies”. Chapter 8 repeats the unstructured reference to immigrants and to persons who have been granted asylum or subsidiary protection. To give an overview of numbers, the Commission referred to statistics which show that around 21 million non-EU nationals were legally resident in the EU in 2019.<sup>15</sup>

The text then again stresses the necessity to make a compromise and to adopt integration measures which are designed to give benefits to the “individuals concerned, and the local communities into which they integrate”. This approach was already included in the 2016 Plan but receives more attention now.

The New Pact uses a different wording than previous documents on integration. It often mentions the importance of the European way of life but does not define it. This leads to the question of what exactly is the “European way of life”? One could assume that its basis can be found in Article 2 TEU. According to this article the “Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons

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14 Horizon 2020 Framework Programme <<https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/topic-details/migration-09-2020;freeTextSearchKeyword=;typeCodes=1;statusCodes=31094501,31094502;programCode=H2020;programDivisionCode=31047893;focusAreaCode=null;crossCuttingPriorityCode=null;callCode=Default;sortQuery=openingDate;orderBy=desc;onlyTenders=false;topicListKey=topicSearchTablePageState>> accessed 23 November 2021.

15 Source of statistics in this paragraph: Eurostat. UK figures not included.

belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. The Pact itself does not shed light on the notion “European way of life”, the Action Plan 2021-2027 however goes into a few more details with regard to giving some contours to this notion.

The Pact repeats the enumeration of obvious deficits in various areas. These include unemployment, lack of educational or training opportunities and limited social interaction. The Commission then stresses that the integration of migrants should be a key element in the general EU agenda to promote social inclusion. In chapter 8 the Commission announced the intention to adopt an Action Plan on integration and inclusion for 2021-2024. It was adopted two months later with a timeframe from 2021 to 2027.

The Commission stresses the intention to provide strategic guidance and to set up concrete measures to foster inclusion. The areas covered are broader than previous ones and comprise social inclusion, employment, education, health, equality, culture and sport. The text however mainly enumerates the fields where integration is needed, the strategic guidance is still missing.

The text then continues with a slightly more structured approach than the Action Plan 2016. The Commission aims to make a distinction between rights and actions designed to guarantee full access to these rights and the support of integration in other areas. Migrants shall be enabled to “fully benefit from the European Pillar of Social Rights”. The Commission also referred to the recent renewal of the European Partnership for Integration to offer opportunities for refugees to integrate into the European labour market.

The Commission announced to establish an informal expert group on the views of migrants. This group should also support the framing of the Action Plan 2021-2027. The first meeting of the expert group was already held on 13<sup>th</sup> November 2020 and the group contributed to the preparation of the Action Plan 2021-2027.

#### *4. Action Plan on Integration and Inclusion 2021-2027*

The Action Plan 2021-2027 as well as previous documents enumerate a number of actions, programs and measures to support integration. The Actions Plan highlights the importance of inclusion and inclusive societies. It again refers to the European way of life and sheds some light on the

content of the notion. The text emphasizes that the need to empower those facing disadvantages, to provide for equal opportunities for all to enjoy their rights and participation in community and social life are elements of the European way of life. Reference is also made to the respect for common European values as enshrined in EU Treaties and in the Charter of Fundamental Rights.

The Action Plan talks about the European way of life and about inclusive societies in general, but does not mention any possible negative consequences of integration for the immigrants such as the potential loss of identity of certain groups. The two-fold approach to make a compromise between migrants' rights and expectations and between the perceptions of receiving societies is a key element on the UN Global Compact on Migration as well. The Compact intends to create a mutual respect for customs, traditions and cultures of both societies. As already elaborated in a commentary to the GCM integration measures should not require assimilation but only respect of local traditions, customs and rules.<sup>16</sup>

The Action Plan does not define the notions integration and inclusion. In social sciences and other disciplines positive and negative effects of inclusion, integration and assimilation attract much more attention. The results of research in these disciplines should be integrated in the framing of integration policy. Several suggestions which are an excellent starting point for the discussion are the promotion of a feeling of togetherness having in mind that this feeling cannot be prescribed by legislation but has to develop within societies with the support of state policies and a holistic approach towards integration instead of highlighting specific elements.<sup>17</sup>

Part 2 contains a summary of previous integration efforts, presents results and shows statistics. Part 3 enumerates a number of key principles of integration policy. The Commission then highlights the need to respect rights but does not refer to details. It is interesting that the document again points to the European "Pillar of Social Rights" without going into details. The Social Pillar as an initiative launched by the European Com-

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16 Ulrike Brandl, 'Progress made in integration and social inclusion: Objective 16 "Empower migrants and societies to realise full inclusion and social cohesion" in the review process' (Refugee Law Initiative Blog, 19 November 2018) <<https://rli.blogs.sas.ac.uk/2021/02/18/progress-made-in-integration-and-social-inclusion-objective-16-empowerment-of-migrants-and-societies-to-realize-full-inclusion-and-social-cohesion-in-the-review-process/available>> accessed 23 November 2021.

17 See Ilke Adam and Daniel Thym, 'Integration' in Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer (eds), *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration* (European Policy Centre 2019).



mission in 2017 refers to social rights for people across Europe but it is not specifically designed to improve access of migrants to social rights.

Member States are obliged to guarantee social, economic cultural rights to migrants. Restrictions are only allowed when they are justified and legitimate according to international and national law. Additional support and integration measures including incentives for a participation in these measures is helpful and should be promoted, there is however no legal obligation to grant the support.

Inclusion for all is one of the slogans of the Action Plan and this inclusion should not only focus on migrants but also on nationals with a migrant background. As already mentioned, the needs of persons with regard to integration and also the expectations of receiving societies vary widely and it would have been better to refer to the needs of different categories of persons in a structured way and not in a holistic approach.

A more nuanced approach is included in a special part of the Action Plan under the heading “targeted support where needed”. This is a useful additional enumeration of specific needs of certain groups. It would however have been better to structure all the planned actions in this coordinated way. Under the mentioned heading, the Commission enumerates specific challenges for newly arrived migrants, challenges for Member States under migratory pressure and the protective needs of children, especially unaccompanied children.

Part 4 points to actions in main sectoral areas. This part contains a more structured approach to future integration measures in the sectors education and training, employment and skills and health and housing. In each section, the Commission announces measures to be enacted by the Commission itself and measures, which are recommended to Member States. This part of the Action Plan contains a comprehensive list of targets and actions.

The next part enumerates actions supporting effective integration. Again, funding is a central point in this enumeration. The Commission announced increased opportunities for EU funding under the 2021-2027 Multiannual Financial Framework.<sup>18</sup> The budget for integration is included in the renewed Asylum, Migration and Integration Fund, the amount is € 9.882 billion.<sup>19</sup>

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18 Multiannual Financial Framework 2021-2027 <[https://ec.europa.eu/info/publications/multiannual-financial-framework-2021-2027-commitments\\_en](https://ec.europa.eu/info/publications/multiannual-financial-framework-2021-2027-commitments_en)> accessed 23 November 2021.

19 Regulation (EU) 2021/1147 of the European Parliament and of the Council establishing the Asylum, Migration and Integration Fund [2021] OJ L 251/1.

The Commission also announced a comprehensive monitoring and a mid-term review at the end of 2024. Furthermore, regular implementation reports analysing progress and highlighting areas of common challenges are foreseen. Furthermore, a new Eurobarometer on integration will be launched.

### 5. *EU Competence to Legislate*

The most important question in the area of integration is the lack of EU competence to legislate in the field of integration. In general, the European Union has a shared competence for developing a common immigration policy. Article 79(4) TFEU refers to the establishment of measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories. Thus, only supportive measures may be adopted, harmonisation of laws and regulations is explicitly excluded. The Union may not use Article 352 TFEU as a legal basis either, as Article 352(3) again excludes harmonisation of Member States' laws or regulations.

The possibility to act is limited to support and to coordinate. Consequently, the aims mentioned and the initiatives planned can only be a recommendation to Member States. The Commission also has the possibility to fund integration projects and to establish institutions with the task to support integration. Soft law instruments are created based on a special form of intergovernmental policy-making – the open method of coordination (OMC).

### 6. *EU Efforts to Foster Integration and the Global Compact On Migration*

Integration and social inclusion are also key topics in the Global Compact for Safe, Orderly and Regular Migration ('GCM').<sup>20</sup> Objective 16 of the GCM aims to increase the empowerment of migrants and societies to realize full inclusion and social cohesion. It is astonishing that neither the

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20 Global Compact for Safe, Orderly and Regular Migration, 13 July 2018, available on A/CONF.231/3 - E - A/CONF.231/3. The Compact was formally adopted at the Intergovernmental Conference to adopt the Global Compact for Safe, Orderly and Regular Migration, 10 – 11 December, Marrakech and later on adopted as a resolution by the UN General assembly, UNGA Res 73/195.

New Pact nor the Action Plan refer to the GCM and its objective 16. In general, the response to the GCM and the follow up seem to be quite unimportant for the EU. The EU submitted a written contribution to the first review round held according to the monitoring process established by the Pact. The EU report is quite general and only points to progress made with regard to integration.<sup>21</sup> The report refers to numerous activities, there is however no direct reference to the New Pact on Asylum and Migration in the (at that time still planned) Action Plan on Integration and Inclusion for 2021-2027 published by the Commission on 24<sup>th</sup> November 2020.

Several statements in the Basic Principles and in many other EU documents are still of core importance for a successful integration and are repeated in much more detail in the UN Global Compact on Migration.

## *7. Conclusions*

In theory the added value of the new Action Plan is high as it refers to the most important sectors where integration support is essential. There are however several weaknesses. A shortcoming is the unstructured approach with planned integration measures for all migrants and also EU citizens with migrant background. Furthermore, the Action Plan does not distinguish between rights which have to be granted to migrants and voluntary additional supportive integration measures. The Action Plan 2021-2027 stresses the notions European way of life and inclusive societies in general, but does not mention any possible negative consequences of integration measures.

The New Pact and the Action Plan 2021-2027 again reveal the challenges with regard to integration. The Action Plan is an ambitious enumeration of actions and measures to be implemented by the Commission and comprehensive encouragements to Member States. If and how Member States follow these plans will depend also depend on financial support by EU funding and on their own vision of integration as a cornerstone of a successful migration policy.

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21 Contribution by the EEAS/European Commission Services to the Regional Review of the Global Compact for Safe, Orderly and Regular Migration in the UNECE Region (12-13 November 2020).