

ANALYSIS OF THE EU'S NEW PACT ON MIGRATION AND ASYLUM

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Abstract

This article analyses the New Pact on Migration and Asylum which was released by the European Commission on 23 September 2020. It seeks to find out which problems the New Pact aims to address, how it intends to do so, and whether its proposals are likely to succeed in this. It does so by first laying out the current system which is being targeted for legislative reform and putting it into a historical context to explain why change is called for. It then describes the scope of the policy proposals within the New Pact and identifies where the biggest and most important changes are found. Finally, it assesses the reactions from external actors and offers remarks into what challenges and potential necessary amendments lie ahead.

Keywords: *European Union, asylum, migration, policy reform, human rights.*

1. Introduction

On 23 September 2020, the European Commission revealed its new big ambition in the area of migration and asylum: the New Pact on Migration and Asylum.¹ This new package of legislative proposals announced that it aimed to be ‘a fresh start on migration’ as it set out to repair a system that has been described as ‘broken’ and ‘not fit for purpose’.²

The New Pact comes after years of debate around asylum in Europe, propelled by an increase in boat crossings over the Mediterranean in 2015 and fuelled by various ad hoc attempts to ‘fix problems’ by the EU through an Agenda on Migration which ‘intended to address immediate challenges’, including through failed relocation plans and the controversial EU-Turkey deal.

In contrast, the New Pact ‘seeks to build a complete system by providing essential new tools for faster and more integrated procedures, a better management of Schengen and borders and for flexibility and crisis resilience.’³

This article sets out to investigate the ways in which the New Pact imagines this to be achieved and looks at points of criticism, both in terms of its ability to protect rights and to be carried out in practice. It will do so by starting to understand what the current system is and what has led to the need for such overriding change. It will then seek to explain what it is that is being proposed and on what points it fundamentally differs from what is there already. Finally, it will assess the reactions from other actors and suggest what underlying aims and assumptions need reworking in

order to achieve a common European asylum system that is both realistic and respectful of human rights.

It should be noted that, while the New Pact is namesakenly a revision of both migration and asylum policies, this article will focus solely on asylum. This has two reasons: first, it is the reform of the Common European Asylum System that provides the underlying base for discussion and secondly, the most important criticism of the New Pact in the area of legal migration so far is that a roadmap to this end is ‘a glaringly absent element’.⁴ As such, more substantial discussions on this topic will be saved for when there is more to discuss.

2. Background – what is being replaced and why?

The Common European Asylum System (CEAS) is the current frame for the set of policies relating to asylum and refugee protection in the European Union (EU). In the words of the European Commission itself, ‘[t]he Common European Asylum System sets out common standards and co-operation to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply.’⁵

The CEAS consists of the following six elements:

- The Asylum Procedures Directive which sets out the conditions for asylum decisions in EU member states
- The Reception Conditions Directive which sets out common standards for housing, health care, education and other basic needs
- The Qualifications Directive which sets out the grounds for international protection and provides

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¹ „A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity” (press release), European Commission, 23 September 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706.

² Dacian Ciolos, Malik Azmani, Fabiebbe Keller and Jan-Christoph Oetjen, „Time to fix Europe’s broken migration and asylum system,” *EUobserver*, 23 September 2020, <https://euobserver.com/stakeholders/149504>.

³ *Ibid.*

⁴ Donatienne Ruy and Erol Yayboke, „Deciphering the European Union’s New Pact on Migration and Asylum,” *Center for Strategic and International Studies*, 29 September 2020, <https://www.csis.org/analysis/deciphering-european-unions-new-pact-migration-and-asylum>.

⁵ „Common European Asylum System,” European Commission, accessed 16 March 2021, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

access to rights for those who have been granted international protection

- The Dublin Regulation which places responsibility between EU member states as to where applications for asylum should be processed
- The EURODAC Regulation which managed the EU database of asylum seekers' biometric information
- The European Asylum Support Office which supports the implementation of the CEAS in the EU member states

The CEAS was born out of the continued EU integration during the 1990s, and a mutual need for migration management on the continent, and between 1999 and 2005 the first legal instruments were introduced with an overall aim to establish minimum standards for asylum in the EU and build on the 1990 Dublin Convention. After a period of reflection, it was decided in 2008 that the system was still not strong enough to ensure sufficient and comparable levels of protection in different member states, so a round of legal reforms saw the light of day between 2008 and 2013. Most noticeably, this is when the European Asylum Support Office (EASO) was created.

Since the so-called 'refugee crisis' in the EU in 2015, criticisms over both the CEAS' ability to protect refugees and manage migration flows into EU countries have been ongoing. Several of the Directives have already been recast several times, pointing to the need for a more thorough overhaul of the entire system, and critics have also pointed out that EU member states' treatment of refugees and asylum seekers are becoming less and less conforming to international standards, rather than more.⁶

Furthermore, the 2015 spike in arrivals made it clear that the Dublin system is not working, and that current legislation is not enough to secure the level of solidarity between countries which the CEAS originally intended. Indeed, with an increase in asylum applications, mainly the southern EU member states – those with an external border and, in particular, Greece – were hit. However, efforts to relocate individuals to other member states bore almost no fruit at all, even though court cases determined that asylum seekers who had themselves moved on to another country could not be sent back to certain EU member states as this would infringe on their right to protection and basic needs.⁷

As such, after ad hoc efforts to introduce solidarity measures and legislative change, the European Commission itself admitted defeat. In the press release of the New Pact on Migration and Asylum, it states:

*'The current system no longer works. And for the past five years, the EU has not been able to fix it. The EU must overcome the current stalemate and rise up to the task. With the new Pact on Migration and Asylum, the Commission proposes common European solutions to a European challenge. The EU must move away from ad-hoc solutions and put in place a predictable and reliable migration management system.'*⁸

3. The New Pact – what is being proposed?

Following on from the above, we understand that the New Pact on Migration and Asylum was a product of an existing broken system combined with a new-found sense of crisis. But what did it actually propose? What is the content of the solution envisioned?

On the EU Commission's own fact sheet,⁹ the subtitle under 'The New Pact' reads: 'Building confidence: a new balance between responsibility and solidarity'. Below that, we learn that the areas of priority in the New Pact are: 'Stronger trust fostered by better and more effective procedures', 'Well-managed Schengen and external borders', 'Effective solidarity', 'Skills and talent', 'Deepening international partnerships' and 'Flexibility and resilience'.

Translated into actual legislative proposals, this means that the Commission is proposing five new Regulations:

1. Regulation on asylum and migration management
2. Regulation introducing a screening of third country nationals at the external borders
3. Regulation establishing a common procedure for international protection in the Union
4. Regulation on the establishment of 'Eurodac'
5. Regulation addressing situations of crisis and force majeure in the field of migration and asylum

Three recommendations:

1. Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint)
2. Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways
3. 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

⁶ Antonella Giordano, „EU ASYLUM POLICY: THE PAST, THE PRESENT AND THE FUTURE,” *The New Federalist*, 10 July 2019, <https://www.thenewfederalist.eu/eu-asylum-policy-the-past-the-present-and-the-future?lang=fr>.

⁷ Valsamis Mitsilegas, „Solidarity and Trust in the Common European Asylum System,” *Comparative Migration Studies* 2, no. 2 (2014): 186, <https://doi.org/10.5117/CMS2014.2.MITS>.

⁸ European Commission, „A fresh start on migration.”

⁹ „The New Pact: Building confidence: new balance between responsibility and solidarity” (fact sheet), European Commission, September 2020, https://ec.europa.eu/info/sites/info/files/new-pact-on-migration-and-asylum-package_1.pdf.

And a ‘Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence’.¹⁰

In particular, three different proposed changes to the current system deserve highlighting.

Firstly, the ‘new balance between responsibility and solidarity’ comes to life in an overhaul of the Dublin system, effectively retiring the old mechanism in favour of a new ‘compulsory, flexible’ form of solidarity which is still rooted in the idea of a first country of arrival, but which expands on the situations in which this principle gives way to another country in placing responsibility for processing an individual’s asylum claim. For example, the definition of ‘family’ is broader, and other previous ties to a particular EU member state (e.g., work or studies) also count. This effectively means that the first country of arrival, as a criterion, has moved further down the ranks.¹¹

In addition, the concrete features behind the ‘compulsory and flexible solidarity’ are seen in the shape of a new mechanism to be triggered in the situation where a country has reached its maximum capacity (to be calculated based on population size and GDP), which also diverts responsibility away from the first country of arrival and to another member state with a smaller proportion of asylum seekers. In this instance the ‘compulsory solidarity’ means that the new country does no longer have the right (such as it did before) just to reject the individual under the Dublin system scot-free, without assuming any kind of responsibility at all. The ‘flexible solidarity’ lies in the fact that the new country has a say in what its obligations to the first country are going to look like. Options available are to, simply, accept a relocation of the individual’s asylum case and process the claim within its own system, send the case back to the first country along with a ‘return sponsorship’, meaning that the new country will facilitate the return of a rejected asylum seeker from the first country, or provide an undefined ‘other assistance’.¹²

Secondly, the Commission proposes to transform the current European Asylum Support Office to a new ‘fully-fledged EU Agency for Asylum’ with the purpose to monitor and support national authorities in their implementation of, and compliance with, EU asylum legislation, ‘ensuring convergence in the examination of applications for international protection and providing operational and technical assistance to Member States’.¹³

Thirdly, there is across the proposals a great emphasis on international partnerships and cooperation with third countries. This is particularly evident with respect to the overall focus on returns and readmissions, but also extends far into what typically goes under the term ‘migration management’, which roughly speaking concentrates itself on controlling the number of individuals who cross European borders to begin with. This includes things like ‘border protection efforts’ at external borders, counter-trafficking action and support to third country host communities, but ‘should, according to the Commission, [also] be taken into account in all areas of the Union’s external policy, such as in development aid and more precisely, in economic cooperation, the areas of science and education, digitisation and energy, etc.’¹⁴

4. The reactions – how has it been received?

In the lead-up to the unveiling of the New Pact on 23 September 2020, EU Home Affairs Commissioner, Ylva Johansson, predicted that ‘[n]o one will be satisfied’ with the proposals.¹⁵ However, as the Center for Strategic and International Studies has suggested, this may be a sign that it represents what the EU is most realistically currently able to offer.¹⁶ Indeed, although countries like Hungary and Poland have criticised the New Pact for not going far enough in terms of aiming to stop migration altogether, and while Finland and Ireland would like to see an increased focus on human rights, no member state has rejected it blankly.¹⁷

Perhaps not surprisingly, among external commentators, such as scholars and non-governmental organisations, this expression of a ‘lowest common denominator’ has not been received with overwhelming applause. While many agree that lowering the period before refugees can apply for long-term status is good for integration, and that strengthening responsibility with more compulsory solidarity and a slight shift away from the first country of arrival principle are overall positive, they also question whether they are realistic. In a joint civil society statement, the European Council on Refugees and Exiles (ECRE), along with 88 other organisations, write that ‘[t]he complexity of what has been proposed raises doubts as to whether it is actually workable in practice.’¹⁸

¹⁰ „New Pact on Migration and Asylum: Questions and Answers” (questions and answers), European Commission, 23 September 2020, https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1707#contains.

¹¹ Ramona Bloj and Stefanie Buzmaniuk, „Understanding the new pact on migration and asylum,” *Robert Schuman Foundation*, 16 November 2020, <https://www.robert-schuman.eu/en/european-issues/0577-understanding-the-new-pact-on-migration-and-asylum>.

¹² Ruy and Yayboke, „Deciphering the European Union’s New Pact on Migration and Asylum.”

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Eszter Zalan, „Commissioner: No one will like new EU migration pact,” *EUobserver*, 18 September 2020, <https://euobserver.com/migration/149475>.

¹⁶ Ruy and Yayboke, „Deciphering the European Union’s New Pact on Migration and Asylum.”

¹⁷ *Ibid.*

¹⁸ „Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded” (statement), European Council on Refugees and Exiles (ECRE), 6 October 2020,

An element of the New Pact which has received criticism both in terms of its practicality and its ethical implications is the aforementioned ‘return sponsorship’ which critics have described as ‘strange’ and ‘contradictory’.¹⁹ Caritas Europa foresees that it ‘will not lead to predictable solidarity and responsibility sharing among [member states] on the ground, and will come at the expense of people’s rights and human dignity’,²⁰ explaining that it ‘could lead to tremendous suffering for migrants due to the unnecessary transfer to other [member states]’ and that its ‘practicality is called into question’, adding that ‘[s]ubstantial solidarity through relocation should be privileged and encouraged.’²¹ Judith Sunderland, Acting Deputy Director of the Europe and Central Asia Division of Human Rights Watch calls the proposed arrangement ‘like asking the school bully to walk a kid home’,²² and ECRE asks who ‘will monitor the treatment of rejected asylum-seekers when they arrive in countries whose governments do not accept relocation?’²³

Following on from this, also in the words of ECRE, ‘[t]he overriding objective of the Pact is clear: an increase in the number of people who are returned or deported from Europe. The creation of the role of a Return Coordinator within the Commission and of a Frontex Deputy Executive Director on Returns without similar appointments on protection standards or relocation illustrate this point.’²⁴ The question of returns, then, also opens up a discussion regarding the external factor of the New Pact. As already mentioned, plans are for an increased focus on migration in the EU’s general dealings with third countries, which has led to warnings that ‘[t]he Commission’s plan for cooperation with third countries – encouraging them to host refugees and migrants, providing them with support to do that, and boosting their own enforcement against smuggling – means these relationships will continue to be shaped by the migration issue.’²⁵

Civil society agrees, adding stark concerns over what this will mean for human rights and democratic development:

‘Attempts to externalise responsibility for asylum, and to mis-use development assistance, visa schemes and other tools to pressure third countries to cooperate on migration control and readmission agreements will continue. This not only risks contradicting the EU’s

own commitment to development principles, but also undermining its international standing by generating mistrust and hostility from and among third countries. Furthermore, using informal agreements and security cooperation for migration control with countries such as Libya or Turkey risks enabling human rights abuses, emboldening repressive governments and creating greater instability.’²⁶

Instead of relying on the unrealistic expectation that third countries can – and will – work readily towards keeping away migrants from risking their lives in the Mediterranean, the EU must assume its own responsibility and accept that ‘an EU-coordinated [search and rescue] mission is urgently needed.’²⁷ In addition, ‘cooperation with countries of origin and transit should be conditional on the respect of human rights and provide accountability mechanisms. Relationships with third countries should be based on genuine mutual interests, and should expand opportunities for regular migration.’²⁸

In the words of Philippe De Bruycker, Professor at Université Libre de Bruxelles and Founder and Coordinator of the Odysseus Network; ‘[i]f 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. [...] 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.’

5. Conclusions

So, what can we actually say about the New Pact on Migration and Asylum? The shortest answer would be that everybody agrees that it is needed but nobody agrees what it should be. In its essence, it is a continued attempt towards the same end as what was started with the Tampere conclusions in 1999, which laid the foundation for the Common European Asylum System that we have today.

Looking at the proposed changes and the reactions from different sides, it becomes clear that the difficulties in developing European asylum policies are embedded within two fundamental challenges:

<https://www.ecre.org/the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded/>.

¹⁹ Philippe De Bruycker, ‘The New Pact on Migration and Asylum: What it is not, and what it could have been,’ *EU Immigration and Asylum Law and Policy*, 15 December 2020, <https://eumigrationlawblog.eu/the-new-pact-on-migration-and-asylum-what-it-is-not-and-what-it-could-have-been/>.

²⁰ ‘Caritas Europa’s analysis and recommendations on the EU Pact on Migration and Asylum’ (position paper), Caritas Europa, December 2020, https://www.caritas.eu/wordpress/wp-content/uploads/2021/02/210212_position_Paper_EU_Pact_migration_Caritas_Europa_Final.pdf.

²¹ *Ibid.*

²² Bloj and Buzmaniuk, ‘Understanding the new pact on migration and asylum.’

²³ ECRE, ‘Joint Statement.’

²⁴ *Ibid.*

²⁵ Ruy and Yayboke, ‘Deciphering the European Union’s New Pact on Migration and Asylum.’

²⁶ ECRE, ‘Joint Statement.’

²⁷ Caritas Europa, ‘Caritas Europa’s analysis and recommendations on the EU Pact on Migration and Asylum.’

²⁸ *Ibid.*

1. Establishing a system of real functioning solidarity between 27 different countries, which is both compulsory and entered into voluntarily, while also securing rights and minimum standards around the treatment of refugees and asylum seekers.

2. Incorporating the topic of migration management into the EU's collaborations with third countries without striking deals that ignore human rights abuses or attaches speculative conditions onto separate areas such as development aid.

The first point permeates the New Pact through its central intention to create a 'new balance between responsibility and solidarity.' As we have seen, this is expressed through an envisioned solidarity which is both 'compulsory' and 'flexible'. And while some elements in the mechanism to replace the current Dublin system are welcomed by commentators (limiting slightly the default of the first country of arrival principle and introducing caps on individual countries' capacities), they have also been put under scrutiny for being too complicated to work well in practice and starved of important safeguards to secure migrants' rights.

The second point highlights the power dynamic between the EU and the wider region as it aims to introduce questions of migration into almost all interactions between European institutions and third

countries. This has led to concerns over both accountability towards migrant populations in terms of human rights abuses and the risk of selling out core values of democracy and transparency – usually championed by the EU as non-negotiable – by supporting corrupt regimes in the interest of limiting the number of asylum seekers coming to Europe.

What the two points have in common is that they are both based on the same assumption that it is the minority of asylum seekers who are in actual need of protection and on two complementary objectives: one to decrease the number of people coming to Europe and the other to increase the number who are returned or deported. From an international law perspective, however, this ignores the elementary reason to have asylum legislation in the first place: to provide a system that offers protection. As such, if the New Pact is indeed the best the EU can realistically offer at the moment, yet fails to provide acceptable levels of protection, the question going forward is not only one of legislative character, but in large parts social and economic too: how can the EU halt the race to the bottom and lift the common denominator to a place where human rights are not compromised and where refugee protection is the most important goal of having an asylum system?

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