

BLOG POST

NEW PACT ON MIGRATION: A BALANCED PROPOSAL TO BE FURTHER ENHANCED

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Herman Van Rompuy, former President of the European Council, has been credited with the idea according to which the Commission under Ursula von der Leyen has three key tasks facing it: the launch of the ecological transition, the relaunch of the European economy after the health crisis and the provision of lasting solutions for the migrant crisis which began in 2015. Of these three challenges, the third one could have the highest stakes for the political unity of the European Union and for its *raison d'être* as a community of values.

Seen from this perspective, we should welcome the publication on 23 September last of the EU's frequently postponed programme communication proposing a 'New Pact On Migration and Asylum'¹. The project had been heralded as one of the priorities of the new President as early as July 2019 and the adjective 'new' suggested a change in method. Nevertheless, the topic was perceived as being particularly divisive, with public opinion, prepared for further unemployment increases in 2021, being rubbed up the wrong way. It was necessary to wait for the European Council to rebuild its unity around other major issues, just like the 'Next Generation EU' recovery plan, before once again looking into the issue of designing a common policy on migration and asylum.

These conditions undoubtedly seem to have been met today as a result of a relative lull in migratory pressure. The tragedy of the fire at the Greek camp of Moria, by displaying the inconsistency of European asylum policies, even hastened the long-awaited clarification of the Commission's intentions. This clarification was all the more necessary as, despite the numerous visits of European capitals and despite the efforts of the competent presidencies such as that of Finland in 2019, no compromise agreement emerged between the 27 Member States until now. On this extremely thorny issue of migration, the Commission had to go it alone in fulfilling its role, that of expressing the general interest of the European Union. Braving the reservations, it crossed the Rubicon and in its approach sought to encompass all aspects of the EU's migratory policy since its beginnings in the 1990s.

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

The Commission's strengths in reaching consensus

This global approach is however not new. It was already the mindset of founding communications, such as that of 2005² which made control of the migratory flows part of an overall vision of the EU's external relations, or the European Agenda on Migration³ adopted in May 2015 in the context of the crisis, and which defined the working programme of the Commission in this domain under the previous term.

What new elements have been put forward this time by the Commission to overcome the persistent antagonism between the States, in particular concerning reform of the 'Dublin' system, which has been disputed since 2016⁴? How does it intend to initiate a virtuous process of negotiations, to "rebuild trust between Member States" on the issue of asylum, to use the expression hammered home by Ursula Van der Leyen?

On reading the impressive amount of texts that make up the new Pact⁵ and especially on hearing the political presentations of the President and the Commissioners in charge, the Commission is mainly counting on the materialisation of the regulatory instruments that met with broad consensus and whose effective implementation should help to reassure even the most suspicious States. This is especially the case for the operationalisation of the FRONTEX Agency, which was highly reinforced in terms of resources and capabilities on the basis of the new mandate adopted in 2019. Also noteworthy are the extended mandate of the European Asylum Support Office, promoted to the status of Agency, and the creation of a legal framework on resettlement. The Commission has not started anew but rather it has capitalised on the consensus achieved over the previous three years.

Consensus is the second strength explicitly emphasized by the Commission's approach. On reading the new Pact, it is understood that the Commission intends to learn from the rifts by aiming for the consensual adoption of the entire pact, in accordance with the negotiating directives on asylum adopted in mid-2018 by the European Council. Traumatized by the tussles at the European Council caused by Matteo Salvini's aggressive declarations, and afflicted by the trench warfare led by the Visegrad countries, **the Commission chose to seek the unity of the 27**, in the spirit of unity that worked for the Brexit negotiations. In this, it is not following the recommendations of the think tanks, such as the Jacques Delors Institute, which recommended that some countries move forward to overcome the blockages around reforming the Dublin Regulation⁶ but rather it is taking the risk of complexity. Subliminally, the Commission is addressing two groups of minority countries in relation to the central countries, the Visegrad group and the 'first entry' group, and is inviting them to recognise the merits of a compromise that avoids marginalising them and preserves their key interests.

2. "Migration and Development: Some concrete orientations", COM(2005) 390.

3. European Commission, A European Agenda on Migration, COM(2015) 240.

4. The Dublin Regulation, from the name of the Irish presidency under which it was created, is a cornerstone of the European asylum system. Its goal is to unambiguously determine the Member State responsible for examining an asylum application made by a third country national on entering EU territory.

5. No less than ten documents including five draft regulations and two recommendations.

6. "For a European policy on asylum, migration and mobility", Notre Europe Report No. 116, November 2018.

The essence of the responsibility-solidarity-crisis management pact

The Pact therefore intends to build a new consensus between the 27 EU States, making it possible to normalise the process of regular and irregular migration towards the EU. This would avoid the succession of dramas for which the European Council has become the final stage, when nobody agrees to accommodate the migrants salvaged at sea or to prevent a repeat of the humanitarian outrage of Moria. To do this, the Commission proposes a new solidarity scheme that could balance the principles of assigning responsibility rooted in the Dublin Regulation, which remain intact despite some regrettable declarations.

The first of these provisions, dear to the German Interior Minister Horst Seehofer, consists in **introducing an admissibility test at the external borders**. This is intended to identify the asylum seekers with very low chances of obtaining legal protection and to launch **an accelerated validation procedure** for them, thus reducing to a minimum the steps provided for in European legislation in terms of appeals and return orders (towards a third country or towards the country of origin). Carried out in holding centres (authorised by European law within certain duration limits and by exempting vulnerable persons), this procedure would be conducted under the responsibility of the country of entry but with the major support of FRONTEX and the new European asylum agency. This mechanism is somewhat reminiscent of the 'hotspot approach' devised in 2015 but never really implemented.

The operational challenge of such a mechanism lies in the contradiction between the goal of effectiveness (the duration of the procedure should be short, a few weeks, maximum) and that of guaranteeing the fundamental rights to which the EU is attached through its Charter of Fundamental Rights. In this respect, two points are especially critical: will these centres benefit from a status of extraterritoriality, as a sort of antechamber to EU territory? On what basis will the fundamental criterion of the asylum right that is non-refoulement be applied, thus forbidding the return of persons to countries where their integrity could be jeopardised? These two points have thus far been extremely controversial, not only among civil society but also sometimes among the Member States. We still remember the tragic situation at the Greek borders, just before the outbreak of the pandemic, with the forthright expulsion of migrants by Recep Tayyip Erdogan. Greece's attitude, by assuming a breach in European asylum law, did not raise any criticism from European leaders. In concrete terms, there is a danger that by restricting access to migrants' rights, such mechanisms may give rise to an avalanche of legal disputes.

The second provision of the compromise in the Pact put forward by the Commission intends to provide first line countries with the relief they request. As part of the new Pact, these would benefit from compulsory and irrevocable solidarity by relocating asylum seekers having passed the admissibility test to the other Member States. Solidarity would be built on the basis of an allocation key taking account of the capabilities and efforts of everyone⁷. **Compulsory and irrevocable solidarity in principle, but providing flexibility in its implementation:** countries hostile to any relocation would not be obliged to accommodate any asylum seekers whose request is admissible, but they would have to express their 'solidarity' in other ways. For example they would commit to taking charge of all the returns that they should have accommodated, thus becoming **'sponsors' of returns according to the Commission's ambiguous expression**, which does not exclude involuntary returns. One can see the subtlety of this provision which takes the Visegrad States with their anti-immigration rhetoric, literally. This is however somewhat perplexing in light of the

⁷. Efforts taking account for example of the resettlement of persons recognised as 'deserving international protection' from refugee camps under the responsibility of the United Nations High Commissioner for Refugees outside EU territory.

difficulties encountered by countries with a long tradition of migration, such as France, in effectively implementing return processes. They could also choose to provide expert or material support that would lighten the load of first entry countries.

This simple statement of the variations in 'compulsory and flexible solidarity' suffices to demonstrate its complexity. It would be compulsory and flexible **in the case of excessive migratory pressure** on a State, recognised by the Commission. It would be made **even more restrictive in times of declared crisis** jeopardising not only the reception capacities of a State but also the entire European asylum system: a repeat of an episode such as that of 2015 is clearly targeted. In this case, the Commission seems to have learned from the failure of the temporary protection directive adopted in 2001 and supposed to make it possible to face the emergencies of an exceptional migratory crisis. It was never applied, even in 2015, due to a lack of agreement by the Council of Ministers to trigger it. According to the new proposed Pact, at the request of a Member State and on the basis of an appraisal subject to strict criteria, the Commission would have the possibility of triggering the exceptional solidarity mechanism by drawing on a sort of permanent early warning network associating all Member States and all competent European agencies⁸. The Pact also comprises a new draft directive on a **form of temporary protection** that could be granted in an emergency, giving its beneficiaries minimal protection for a one year period.

A welcome innovation, migration governance

The Pact comprises other innovations such as the **organisation at European level of resettlement actions opening legal and safe channels of migration to persons requiring international protection**. Based on international maritime law, it also invites the Member States to make the **practice of solidarity for persons rescued at sea**⁹ stable and permanent and it recognises the **legitimacy of the humanitarian action** carried out by civil society.

The Pact also establishes a form of **forecast-based migration governance** for the practice of solidarity. Based on anticipating flows between the EU and the rest of the world, this should lead Member States to mutually inform each other of their respective asylum and legal immigration policies and should also serve to fuel a 'permanent forum' presided by the Commission to steer solidarity and the targeting of corresponding European funding. This mechanism would also be used in times of crisis and would provide a net added value to European coordination.

When combined with these structural components, will these innovations suffice to put Member States back on the path of mutual trust and cooperation called for by Ursula Von der Leyen?

The need to quickly reach an agreement...

The first aspect to consider is the timeline. Negotiations need to make progress to avoid a stalemate, whereas the number of situations stemming from ad hoc intergovernmental arrangements are being multiplied. The German Presidency realised this, and in conjunction with the Commission, undertook a specific initiative aiming to reduce pressure on the situation in the Greek islands. The danger is that in the absence of an overall agreement on common asylum rules, the dynamic specific to the Schengen area might win over. Today, this dynamic has a tendency to weaken

⁸. Commission Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration, C(2020) 6469.

⁹. 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.

common rules (and the Commission's role) to the advantage of partial arrangements and unilateral decisions under the guise of continuing health threats. Not finding a rapid solution to the collective management of asylum seekers by the EU States, means surreptitiously calling into question the principle of free movement and adopting a position of weakness in the face of the blackmail that Turkey is more than ever able to exert.

Beyond the German Presidency that seems determined to launch negotiations, the diligence of Portugal and Slovenia, who will successively take over the role of EU Council Presidency next year, will also be necessary. It is in the interests of France, who will take over from them in 2022, to see an end to these negotiations next year, if it doesn't want to inherit them at the time of its presidential elections. Paris, until now hostile to any form of relocation outside times of crisis, will undoubtedly have to make this concession to Germany and Italy. The initial position of the French government on the Pact, although drafted in general terms, welcomes the initiative and wants it to be rapidly discussed.

We may however have doubts about the feasibility of the timetable for approval of the new pact that the Commission wishes to see completed by the end of next year. These stem from the very audacity of this 'package' which lies less in its content (most of the provisions have already been mentioned) than in its method: the organisation of compulsory solidarity for all based on a foundation stone of responsibility, and the establishment of the Commission at the heart of overall governance. Nobody can claim that this approach will be easily adopted by the Council of Ministers.

...could open up other avenues

Yet, it is to be hoped that the Commission will succeed as it alone is currently in a position to build new consensus on the migration issue. Unlike with other issues, the Franco-German tandem is unable to bring the EU out of the stalemate. For the new Pact to succeed however, more than just the know-how of future presidencies is required. Four dimensions that are insufficiently developed in the Commission's current project must be included if we are to go beyond **an approach that is overly defensive or minimalist and too visibly limited to reducing the 'burden of asylum'** and by the same token runs the risk of causing inhuman situations at our borders:

The EU needs a structured international framework to organise its migration diplomacy. The new pact comprises welcome announcements in terms of 'win-win' partnerships adapted on a case-by-case basis to the personal needs of its partners, countries of origin or of transit, using a variety of foreign policy tools. There is nothing new in this, especially as the threat of using the cane of visa conditionality still looms. A real new deal would for example involve **referring to the multilateral framework adopted by the United Nations in late 2018, lending credibility to an approach that is truly in line with the** evolution of international labour migration in both the North and the South.

However, and this is the second point, **the EU would need to have a declared legal immigration policy**, intelligible for migrants and for the States of origin who we expect to help respect our rules on admission. This dimension is, as we know, is the only one capable of **remedying the root causes of irregular immigration that cannot simply be dealt with from the perspective of managing returns**. This dimension is currently lacking in the Pact as it stands. Granted, it comprises some positive concepts, taking into consideration a win-win rationale in relations with the countries of departure. With the notion of a 'partnership of talents' it sketches the outlines of an occupational mobility policy between the EU and its external partners but does not propose **any overall vision for a European policy of legal labour immigration**, leaving it to other consultations to think about it.

The importance given to the day-to-day operation of the Schengen Code, which today is experiencing a deep crisis with the uncoordinated initiatives of the Member States due to health reasons, must be reassessed. **The Schengen area needs a helmsman** as its failures act as a pretext for not applying the solidarity mechanisms provided for in the Pact.

Lastly, the success of the migration strategy cannot rest with the States alone. **It is the regions and the towns that welcome, train, accommodate and integrate: they must have their say.** Mentioning the territories that make up Europe, where mobility and exchanges take place, is also a way to recognise that European migration policy is based mainly on the awareness that Europeans have of a shared future in facing the world.

This last point implicitly highlights role of public opinion and that of civil society, whose mission is to raise awareness about future challenges. The European Union needs a vision, a narrative that with a long term view of the need for future migratory exchanges within a perspective of reciprocal interest between the EU and its partners from the North and South. **Migration remains necessary for breathing life into development, that of Europeans and of their partners.** Reciprocity forms the start of a rationale of equal rights and duties: the migrants who need to find work in Europe are entitled to be treated humanely and the EU is entitled to have the rules organising this contribution respected. It is such a vision that justifies the daring method of the new pact and the future avenues that should also be opened in its wake.

The Commission has very high ambitions that must be sustained, despite the conceptual and operational weaknesses of some of its proposals. The agreement between Institutions and Member States is an essential prerequisite to restoring EU credibility in its claim of defining a common policy and, as such, of engaging dialogue with third countries but also at global level, on the challenges of migration and mobility.

Interinstitutional negotiations will probably be long and difficult. But, during all this time the EU will be powerless to face of any 'crisis'. The proposed 'Pact' is based on a piece of architecture with the Commission as its centre of gravity. Both the Council and the Parliament could oppose this. It is however the only way to save a certain vision of the common interest and to overcome the crippling blockages stemming from the clash of interinstitutional and intergovernmental rationales. More than ever, the 'Community method' at 27 will be put to the test.

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