



Odysseus Network

ULB

Academic Network for Legal Studies on Immigration and Asylum in Europe

The Special Series of blogposts on the “New” Migration and Asylum Pact

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dead or alive?”

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FOREWORD

Reforming the Common European Asylum System was never supposed to be an easy task. Upon presenting the New Pact on Migration and Asylum, Commissioner Johannsson 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 Member States' interests might support a pragmatic approach: 'let's work on this'. National representatives in the Council have certainly done so over the past 12 months, advancing technical debates on the different pieces of legislation, and the European Parliament appears committed to finding a common position among its members. Nevertheless, there is no realistic prospect of adoption.

Views among the Member States seem to be almost irreconcilable juxtaposed on core questions. The sheer complexity of the different proposals stretching over dozens of pages with hundreds of highly complex provisions are one factor causing difficulties during negotiations. Debates are complicated further by uncertainties over the practical feasibility of the reform package. States at the southern borders are sceptical whether swift border procedures and effective return 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 special section of the Odysseus blog, whose official title reads 'EU Immigration and Asylum Law', which I had the pleasure of coordinating, was meant to provide readers with early comments of high quality written by eminent legal experts from across Europe. We published more than 20 contributions between September 2020 and March 2021, which were widely consulted by literally thousands of readers. I'm grateful to contributors for the efforts they put into writing the blogposts. The widespread sense of frustration about the complexity of the legal material, entrenched implementation deficits, and the potential of human rights violations arguably facilitated the positive reception by the audience.

We have decided to republish the special section on the occasion of conference organised by the Odysseus Network on 9 and 10 September 2021: 'the New Pact on Migration and Asylum: dead or alive?'. Moreover, contributors have agreed to update their contributions thereafter in light of developments over past months and the insights gained during the deliberations with all participants at the conference. It will be made available on the websites [of the Odysseus Network](#) and [of the blog series](#) during the month of October. Interns of the Odysseus Network, notably Marco Paron Trivellato, and student assistants of my chair at the University of Konstanz deserve credit for their valuable support over the past year.

Asylum legislation is certainly no pleasant object of analysis, and the multifaceted political, ethical, and legal dimensions of the 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 to contact the authors directly in case of comments; they will certainly appreciate your feedback.

Konstanz, September 2021

Daniel Thym

European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum

by [Daniel Thym](#)

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Five years after the peak of the 2015 policy crisis, the European Commission launched what it labelled as a 'new' Pact on Migration and Asylum. The academic [Odysseus Network](#) for legal studies on immigration and asylum in Europe is the natural setting to provide a timely and quality review of the diverse aspects of the Commission proposals. They will be published in a special collection of more than a dozen blogposts written by eminent experts from across Europe over the next weeks. We have designed a [specific website](#) to bring together

the individual contributions in an overarching format – and invite you to consult it on a regular basis or to [subscribe to our newsletter](#) informing you about new blogposts.

OVERARCHING ENQUIREIES

Three overarching questions define an overall assessment of the reform package. Firstly, one is bound to notice that **the law is not enough** – as the situation on the Greek islands amply illustrates: living conditions for asylum seekers are insufficient, procedures take years to complete and returns after rejection often fail. Similar deficiencies exist elsewhere in Europe. Northern countries complain about the notorious failure of the takeback procedure under the Dublin system. NGOs rightly worry about possible pushbacks in Croatia. Our assessment of the Commission proposals will have to be guided by the understanding that legislative reform is a necessary, but insufficient condition for a functioning asylum system. We need to ensure that the law in the books is being applied in practice.

Secondly, we will have to answer the question: **is the ‘[fresh start](#)’ a reality or an illusion?** In the [press material](#), the Commission was eager to highlight the novelty factor, since [‘the current system no longer works’](#). At closer inspection, it is less clear to what extent the discursive framing is supported by the nitty-gritty of the legislative proposals. Digging into the [more than 300 pages](#), one is bound to discover rules that

contradict the label of a ‘fresh start’. Other provisions are controversial. It is the ambition of the special collection of blogposts to combine an in-depth knowledge with a style of argument that can be read and understood by a broader audience, thereby advancing the debate about the merits of the ‘pact’.

Thirdly, the idea of **‘solidarity and responsibility sharing’**, which the Commission emphasised in the political [Communication](#), aptly captures the tensions inherent in any debate about migration and asylum in Europe. Member States have different views about their ‘fair’ share, especially when it comes to the reform of the infamous Dublin system. At the same time, solidarity and responsibility are not confined to interstate relations. Migrants and refugees have rights (and also some obligations), which must inform our analysis of the proposals.

It seems to me that - notwithstanding the rhetoric emphasis on ideas such as ‘solidarity’, ‘responsibility’ or ‘fresh start’ – the reform package is more about pragmatism than 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 usually prefer such grand designs). It is in essence a piece of *realpolitik*, which – according to the [lexical definition](#) – is defined more by the needs and circumstances of the relevant actors than by morals or ideology. That may explain some of the idiosyncrasies of the proposals, which,

nonetheless, will have to be judged in terms of adequately balancing countervailing claims to migration management and human rights, supranational cooperation and state action. This introduction will continue by shortly presenting seven themes, which reiterate the overarching difficulties described above.

1. „SCREENING LIGHT“: HARDLY A NOVELTY

The Commission put much emphasis on having proposed [‘for the first time’](#) a pre-entry screening covering identification of all people. It proposed a [‘Screening Regulation’](#) as one of the successor instruments to the seemingly abolished Dublin III Regulation. Closer inspection of the proposal, which is discussed in detail by [Lyra Jakuleviciene](#), does not support the Commission’s claim. 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 Member States have introduced anyway in response to the COVID-19 pandemic. Even the timeframe of 5 to 10 days mirrors the obligations under Article 6(1), (7) of the current [Asylum Procedures Directive](#). The screening exercise is a smart new label, but hardly a novelty in substance.

One example illustrates the point. The screening would support fast asylum procedures if it helped clarifying the identity of each individual effectively. However, Article 10

concentrates on checking biometric and other information with existing databases. The reference to ‘data or information provided by or obtained from the third-country national concerned’ (Article 10(1)(b)) could possibly be read to require Member States to exploit information in smart phones or 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 as intense – and controversial – methods. It is quite telling that the rather short form in the annex to the [Screening Regulation](#) asks domestic authorities to give an ‘initial indication’ of the nationality. Apparently, the screening is not much more than a first registration and identification attempt.

A comparison with the [non-paper of the incoming German Presidency](#), published last autumn, shows how a beefed up pre-screening procedure might have looked like. The German government had suggested a prima facie inspection of the merits of asylum claims, which the Commission does not propose. The de-briefing form is only expected to ‘point to’ any elements that might possibly influence the choice of procedure (Article 14(2)). Similarly, the decision whether to relocate someone is taken elsewhere (Article 14(3)). In essence, the new proposal is not much more than a slightly reinforced border check and asylum registration.

In light of the overarching enquiries presented above, an additional lacuna stands out. The incoming German Presidency had pondered an autonomous decision-making function for the future Asylum Agency and Frontex, which could possibly have conducted the pre-screening independently in a few years, after initially supporting the ‘frontline’ Member States. This innovative idea did not find its way into the Screening Regulation, which, rather, entrusts the task on national authorities with the support of the agencies ‘within the[ir] mandate.’ The latter does not, at present, authorise such independent decision-making and the Commission does not propose to give the agencies additional powers in the ‘pact’.

[Lilian Tsourdi](#) discusses executive functions and involvement in decision-making in more detail in her blogpost on the agencies.

2. BORDER PROCEDURES: ADMINISTRATIVE BOTTLENECK

In contrast to the screening, the new rules on the border procedure are a substantial novelty in the reform package. They demonstrate, however, why our starting point that the law is not enough can be crucial. On paper, a border procedure is a strict set of rules, which, nonetheless, embraces essential procedural guarantees. It comprises a personal interview and obliges asylum authorities to assess each case individually – as Articles 11-13 of the [Proposal for an Asylum Procedures Regulation of 2016](#) reiterate, which the package leaves intact.

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’ (Article 53(3)). Legal assistance and advice are available in line with Articles 14-17 of the 2016 Proposal. [Jens Vedsted-Hansen](#) discusses these aspects at length in his contribution.

For our purposes, a different aspect should be highlighted. Unfortunately, the guarantees in the Asylum Procedures Regulation are not always complied with by the Member States. The same applies to the Reception Conditions Directive, in relation to which the Commission endorses the state of play of the negotiation on the 2016 Proposal, which [Lieneke Slingenberg](#) reminds us of in more detail. When it comes to non-compliance, the ECtHR judgment on the [deficiencies of the Hungarian transit zones](#) is a case in point; the expedited procedures of the Greek asylum system, which (notwithstanding its designation under domestic law) mostly do not qualify as border procedures for the purposes of EU law, similarly [fall foul of essential guarantees in Directive 2013/32/EU](#). The future monitoring mechanism ([here](#), p. 5-6) may be a step in the right direction, but it is far from certain at this juncture whether it will suffice. Our collection of blogposts will come back to these structural difficulties repeatedly.

The flagrant compliance and implementation deficits concern not only the rights of migrants. The Commission insists that the border procedure – including court judgments – should be

completed within twelve weeks in regular circumstances and 20 weeks in times of crisis (Article 41 of the Amended Proposal for the Asylum Procedures Regulation; and Article 4(b) of the new [Crisis and Force Majeure Regulation](#)). Another 12 or 20 weeks are foreseen for return (Article 41a(2)). Legislative amendments are meant to support compliance with these objectives (Article 35a, 41a, 53-54), an issue which Jens Vedsted-Hansen discusses in detail.

What the Commission does not answer is how it wants to guarantee that domestic authorities and courts in the European periphery will be able to deliver. Remember that Article 31(3) of the Asylum Procedures Regulation already obliges Member States to complete the procedure within six months. State practice often fails to comply, 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 practice.

What can the EU do about this? Money to support domestic administrations is one option, which the European Council rendered more difficult when it cut the amount earmarked for migration and asylum by 28 % in its compromise on the multiannual financial framework. [Iris Goldner Lang](#) discusses in her blogpost whether the European Parliament, which appears to be unhappy with the cuts, will be able to reverse the trend when the budgetary details are finalised. Moreover, the

compliance deficit is another reminder that the agencies are crucial for the success of any reform package. They cannot guarantee full compliance single-handedly, but they are the best instrument we have to ensure fair *and* fast procedures.

3. ACCOMMODATION: 'CLOSED' OR 'CONTROLLED' CENTRES?

The Odysseus blog is a legal undertaking and there are many important subject matters in the reform package where legal expertise is essential to understand what the Commission did (not) propose. A fine example is the question of detention, which the initial public debate on the reform package focused on, within Germany at least. The Commission was accused of promoting a border procedure within '[closed centres](#)'. At first sight, the proposals indeed seem to endorse widespread detention.

The Commission insists that the screening and the border procedure do not entail permission to enter the territory (Article 41(6) of the Amended Asylum Procedures Regulation; Article 4 of the Screening Regulation). That corresponds to the legal 'fiction of non-entry', which the incoming German Presidency had proposed and which is taken up repeatedly in the domestic German debate, thereby [creating much confusion](#), since it is often misunderstood as formal rightlessness, even though [statutory](#) and [human rights guarantees](#) can be invoked by those in transit zones.

Closer inspection of the proposals, which Galina Cornelisse reflects on in-depth, indicates that the Commission opted against generalised detention. Articles 41(9)(d) and 41a(5), (6) of the [Amended Proposal for an Asylum Procedures Regulation](#) indicate clearly that detention should not be automatic; it rather requires an individualised decision subject to appeal. This corresponds to the ECJ judgment on the Hungarian transit zones, even though the ruling concerned the current legal framework. The Commission does not propose to fundamentally reverse these rules, even though it plans to facilitate detention in some respects, as [Galina Cornelisse](#) discusses. Article 8 of the [2016 Proposal for a Reception Conditions Directive](#) reiterates that asylum seekers should not be detained automatically.

The remaining tension between non-admission during the border procedures and the prohibition of automatic detention cannot be disentangled straightforwardly. Arguably, the legal notion of detention can provide some guidance. , not any ‘restriction’ of liberty, for instance in transit zones, amounts to a ‘deprivation’ or ‘detention’ Subject to stricter rules. In line with ECtHR and ECJ case law ([here](#), paras 211-249; and [here](#), paras 204-248), it has to be assessed in light of various factors when the ‘non-admission’ with the ensuing restriction of liberty turns into ‘detention’ requiring an individualised assessment in line with the Reception Conditions Directive. It can be expected that Member States will try to exploit the inherent legal uncertainty. The end result may mirror the

ambiguous language in the earlier call of the European Council in June 2018 for [‘controlled’ centres](#), which are not hermetically ‘closed.’

4. HOTSPOTS RELOADED: ANOTHER MORIA?

The fire in Moria on the Greek island of Lesbos reminded the general public of the serious administrative and humanitarian shortcomings at the external borders. It also showed that any European asylum system will have to be judged on whether it succeeds in preventing another Moria. One core challenge concerns potential ‘overload’ with protracted limbo situations, when beneficiaries of international protection do not receive a timely recognition of their status, while those without protection needs are not deported. The Commission was aware of this danger.

Several legislative propositions are meant to prevent overcrowding. Besides the time limits and legislative changes for border procedures and returns mentioned above, relocation will be crucial. Francesco Maiani discusses the merits and limitations of the rather lacklustre solidarity mechanism in detail. Ironically, the novel ‘return sponsorship’ may eventually result in relocation as well. Article 52(2) of the new [Asylum and Migration Management Regulation](#) obliges the sponsoring country to transfer to their territory those who cannot be returned within eight months; the period is reduced to four months in times of crises (Article 2(7) of the [Crisis and](#)

[Force Majeure Regulation](#)). Countries such as Hungary will scrutinise these rules carefully. After all, it could undermine the motivation of countries at the external border, which retain the administrative responsibility for ‘sponsored’ returns, to cooperate if they know that the person will be transferred elsewhere anyway.

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 practice thereafter. It proposed to officially repeal the Temporary Protection Directive 2001/51/EC and to replace it by a novel form of ‘immediate protection’ under Article 11 of the Crisis and Force Majeure Regulation. The new immediate protection status is designed in particular for those fleeing civil war and is meant to suspend asylum procedures for one year, thereby safeguarding precious administrative resources. [Meltem Ineli Cığır](#) introduces us to this genuine novelty factor.

It did not come as a great surprise that return featured prominently in the ‘pact’. The underlying rationale is straightforward. There is an undeniable implementation deficit, whose reduction could, moreover, alleviate pressure on the solidarity mechanism if less people are to be relocated. It is in the nature of return policy that the European Union cannot dictate a better outcome, since it depends on the cooperation of third states. [Madalina Bianca Moraru](#) helps us

understand better whether the Commission proposals can be expected to change much in practice.

5. 'DUBLIN IS DEAD, LONG LIVE DUBLIN!'

I recognise that the Commission had to make an effort to rhetorically move beyond 'Dublin', which has become a symbol of the structural deficiencies of the Common European Asylum System. To replace the existing Regulation (EU) No 604/2013 with different instruments bearing distinct names is a smart move. I was surprised, nonetheless, that the contents of the [Asylum and Migration Management Regulation](#) mirrors the status quo to a large extent. The infamous first entry criterion remains intact (Article 21) and is not substantially reversed by extended special rules on previous studies or on family unity for siblings (Articles 16-18, 20). The latter change had been proposed by the Commission in 2016 already ([here](#), Article 2(g)), only to be [rejected by the Member States](#). The official explanations to the seemingly new instruments are surprisingly frank: 'The current criteria for determining responsibility are essentially preserved' ([here](#), p. 17).

There is a flipside of the first entry criterion, the public debate does not usually concentrate on. [In cases of secondary movements](#), asylum seekers can submit a second application in another Member State, which is obliged to officially assume jurisdiction whenever the asylum seeker is not returned to the country responsible within six months after the confirmation

of the take back request. Germany and other northern Member States had insisted for a long time that the transfer of jurisdiction should be abolished; the debate within the Council had moved in this direction ([here](#), Article 9a). Notwithstanding the claim to the contrary in the [‘questions and answers’](#), the Commission seems to have abandoned that idea by proposing to maintain the transfer of jurisdiction with only minor changes (Articles 27(1), 35(1), (2) of the Management Regulation). Similarly, the incentives and sanctions in case as secondary movements are comparatively superficial. I explain corresponding changes in more detail in a blogpost on secondary movements.

On the whole, the Commission evades the issue of intra-European mobility. The [‘new strategy for Schengen’](#), which the Commission President promised in her state of the union address, will only be published [during 2021](#) in what might be an attempt to prevent Member States from connecting the asylum reform to the future of the Schengen area. [Jorrit Rijpma](#) will discuss corresponding changes in due course. Another important element, which one could have expected to play a greater role, is search and rescue. To be sure, the Commission proposes a specific – and stronger – solidarity mechanism after disembarkation, [recommends coordination of rescue operations](#) and urges Member States [not to criminalise private actors](#). [Violeta Moreno-Lax](#) assesses the substance of these initiatives in her blogpost.

6. SOLIDARITY: NO ILLUSIONS

It is a historic irony that the New Pact on Migration and Asylum was officially put forward on 23 September 2020, exactly 5 years and one day after the formal adoption of the [decision on the relocation of 120 thousand asylum seekers](#) from Greece and Italy. It is well known that some countries voted against that decision and refused to comply. It was widely reported in the media that the Commission follows a different path this time. Under regular circumstances, solidarity remains voluntary – and even if it becomes mandatory in times of crises in line with the levels of ‘escalation’ described in the Asylum and Migration Management Regulation, the Commission insists that Member States should always be able to choose whether to contribute by means of relocation or return.

The corresponding rules and procedures are complex (Articles 45-61 of the Management Regulation, Articles 2-3 of the Crisis and Force Majeure Regulation) and the contribution by [Francesco Maiani](#) deciphers the intricate proposals for us. Many observers will be disappointed that the Commission moved away from mandatory relocation, at least for those who are likely to receive a positive asylum decision. A continent as big and wealthy as Europe should be able to contribute more to the effective protection of refugees. One way of doing so, besides relocation, is to provide more legal pathways, in relation to which the Commission complements the existing proposal for a resettlement with a new

[recommendation on legal pathways](#), including private sponsorship schemes. [Luc Leboeuf](#) introduces us to the contents of and the politics behind these instruments.

From a purely legal perspective, all instruments of the reform package can be adopted by means of a qualified majority vote in the Council (subject to the consent of the European Parliament). Nevertheless, it seems to me that it is a question of political wisdom not to force a constitutional conflict with some Member States openly rejecting the new legislation and corresponding court judgments. I wish we lived in a different world, but the political authority of the EU institutions might quite simply not suffice to win such a constitutional conflict. Acceptance of these limitations of the contemporary political environment is the essence of why the Pact on Migration and Asylum is a classic example of *realpolitik*. [Philippe de Bruycker](#) presents us with a different perspective in his contribution on the political dynamics and the role of the EU institutions.

7. THIRD STATES: A BILL PREPARED WITHOUT THE WAITER?

On the occasion of the German presidency, it may be suitable to introduce the international readership to a German proverb: do not prepare the bill without asking the waiter (*die Rechnung nicht ohne den Wirt machen*) – or, generically: do not try to find a solution without involving those who will have to sanction or implement it. Reading the [Commission](#)

[Communication](#), one is left wondering whether that might be happening in Brussels. The success of the package depends on what Vice President Schinas aptly described as the [first floor of European asylum policy](#): strengthened partnerships with countries of origin and transit.

It is in the nature of such partnerships that the EU cannot force cooperation by means of internal legislation. It requires negotiations among equals, which, of course, will always be influenced by the sheer political, financial and economic clout of the European side. When it comes to third states, the Pact on Migration and Asylum essentially reiterates existing policies, which have been built up over the past years. Indeed, the political stalemate on internal legislative reform had always contrasted with the pronounced emphasis on externalisation, which – controversially, in the eyes of many – have yielded quite some success in terms of reducing the number of people crossing the external borders. [Paula García Andrade](#) revisits these initiatives in light of the new ‘pact’.

The Commission was eager to propose at least some new instruments for the external relations toolbox. It reminded the audience of the recent decision to employ visa policy to apply pressure (Article 25a of the [recently amended Visa Code](#)) and proposed a new mechanism to support cooperation on return, which, indirectly, provides a platform to activate development or trade policy as a bargaining chip (Article 7 of the Management Regulation). [Elspeth Guild explains](#) in greater

detail that such ‘sticks’ alone are usually insufficient to achieve meaningful cooperation. Win-win scenarios are more promising, as the Commission states itself.

One important incentive are legal pathways for economic migration. They have been promised by the EU institutions and the Member States repeatedly, even though the [track record remains poor](#). [Jean-Baptiste Farcy and Sylvie Sarolea](#) discuss to what extent the ‘Talent Partnerships’ with key partner countries, which the Commission aims at initiating later this year, will be an innovative and meaningful new tool. If not, we can expect the EU institutions to resort to financial incentives to ensure effective cooperation. The Commission is quite open ([here](#), p. 18) indicating that several billion euro have been earmarked for the coming years.

The New Pact on Migration and Asylum: What it is not and what it could have been

by *[Philippe De Bruycker](#)*

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and Coordinator of the [Odysseus Network](#)



After the failure of the [Agenda for Migration](#) 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](#) that it can be paradoxically 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 the 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 renewal of the institutions with the European elections 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”.

This process started with the famous [Tampere conclusions](#) adopted by a European summit held in 1999 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 program](#) of 2005 and the [Stockholm program](#) of 2010. Those programs were extremely detailed and paved point by point the way for the development of the policies within the next five years. They have been adopted by the European Council even if this is not required by article 68 TFEU. Due to the impossibility of the [Agenda for Migration](#) proposed by the Commission in 2015/6 to overcome the obstacle of 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 TFEU](#) is the Council of Ministers. A [draft version of the guidelines](#) has been discussed at technical level in Council working groups during the first months of 2020. It is unclear if these guidelines will be adopted by the European Council or not, but it actually does not matter as they are so general and vague, and moreover do not tackle the main issue of solidarity left to the Commission.

Instead of a five-year program providing important policy guidelines, we have 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](#). It is not easy to understand the institutional meaning of this choice. Does the Commission try to confiscate the programming of the policy without giving the occasion to the European Council 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 to adopt guidelines on migration and asylum?

What seems clear is that the European Council does not envisage to play its programmatic role in the area of Justice and Home Affairs on the basis of article 68 TFEU as its [agenda for 2020/21](#) does not foresee anything in relation with migration and asylum, except the future of Schengen in June 2021. This contrasts with the [New Strategic Agenda for the period 2019-2024](#) adopted in 2019 where the European Council considered migration policy as the first of its four main priorities under the item “Protecting Citizens and Freedom”.

This does not mean that the discussions will get immediately lost into the details of the Commission legislative proposals and the political debate completely set aside. The German presidency has indeed produced during the month of October 2020 a discussion paper where it tries to define priorities for a political understanding at the Justice and Home Affairs Council on 14 December 2020. [This has not been possible](#) and shows that there is actually a need for strategic guidelines. The question is if it would not have been better to define them at the level of the European Council on the basis of [article 68 TFEU](#), knowing that the support of the Heads of State and of Government could be needed on key issues such as solidarity between Member States.

2. NOT A DOCUMENT EXPRESSING A NEW CONSENSUS

There had been great expectations placed on the Pact on migration and asylum to overcome the failure of the 2015 [Agenda on Migration](#) to resolve the failings in the design and implementation of the EU asylum and external border control policies. Despite over 3 years of negotiations there was impossibility to adopt the proposed legislative package, in particular the [Dublin IV proposal](#). 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 Dublin III. Therefore there have been no negotiations with the Parliament that has already defined its position in the so-called Wikström report (see [here](#) on this blog). The European Commission was therefore expected to bring forth in the 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 (see [here](#) page 80).

Solidarity is therefore the most important element of the New Pact. Francesco Maiani has already explained [on this blog](#) how complex the new solidarity mechanism is. Two elements are fundamental: the solidarity mechanism is mandatory, but also flexible. The compulsory 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 even 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, for instance by providing help for the voluntary return of the migrant, for the readmission 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 finally to return irregular migrants, including failed asylum seekers. What is however 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. Member States opposed to relocation could actually do exactly the contrary by applying the same future [Regulation on asylum and migration management](#).

The 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 [Visegrád Group \(also called V4\)](#) as the Commission

eventually adopts the concept of [flexible or effective solidarity](#) in the way that they have promoted it, 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 allowing opposite readings.

The solidarity mechanism could have been organised in a different way by allowing Member States not to take part in relocation, but by obliging them to improve reception conditions in other Member States, supporting asylum procedures in another Member State or the [European Asylum Support Office \(EASO\)](#) active in 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 a policy 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 (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 the basis of principles (see below five examples). This draft to be discussed by the Member States in the Council after having consulted formally 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, would build upon what is a “common policy”. This notion is not used by accident in [articles 77-79 TFEU](#). It has been elaborated and given precise content by the legal doctrine, in particular our prominent colleague and [French Member of the Odysseus Network Henri Labayle](#) who was the first to conceptualise it in a [seminal paper](#) where he distinguished between the five elements presented below. It is useful because it provides simultaneously a comprehensive and long-term view for the development of migration and asylum policies.

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 second generation of rules (the first generation were the minimum rules adopted between 2003 and 2005). After the failure of the 2016 legislative 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” or “common policy” 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 legislative process tends to focus too quickly on the details of the envisaged provisions, rather than on the objectives of the proposal. More political than technical debates must take place at the beginning of the legislative process in the Council and Parliament to provide the technical groups or committees that will negotiate the details of the legislation with policy orientations. 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 proposes therefore to finalise the negotiations on the revision of the [Blue Card Directive](#) pending since 2016 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 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 would, for the rest, remain *mainly* a competence of Member States. Recognising this explicitly contrary to the European catechism of which a recent [report of the European Parliament](#) provides a good example, could appease to a certain extent the politicised debate on migration with some Eastern Member States which are 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 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 reform](#) allowing this agency to recruit its own border guards. Another example is the involvement of [EASO](#)’s 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 as described [here on this blog](#).

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 and the incapacity of some of them to face their EU law obligations. EU agencies 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. As [already mentioned on this blog](#), the New Pact goes even against this evolution by organising 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. 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 that it could provide a much more efficient solution.

The fourth element is common funding. The [next multiannual financial framework \(MFF\)](#) for the period 2021-2027 is 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 future [Asylum and Migration Fund \(AMF\)](#) will allocate 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 ([see figures here page 9](#)). 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 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.

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 original 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 States 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 opinion.

There is 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 on the basis of which it is possible to build progressively a common policy in the long term; 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.

Commissioner Johansson said on 23 September 2020 when presenting the New Pact that [“no one will be satisfied with it”](#). It would have been preferable for a politician to say on the contrary that everybody will be satisfied, even if it is by different elements. Let us wait and see what the future will tell us about the New Pact and whether or not it will be a lost occasion to relaunch the migration and asylum policies.

A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact

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In ongoing discussions on the reform of the CEAS, solidarity is a key theme. It stands front and center in the [New Pact on Migration and Asylum](#): after reassuring us of the “human and humane approach” taken, the opening quote 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](#)” throughout the crisis. Be that as it may, we are 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](#)”, the 2016 Dublin IV Proposal (examined [here](#)) 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”.

Before you buy the shiny new package, you are advised to consult the fine print however. Yes, the Commission proposes to abolish the Dublin III Regulation and withdraws the Dublin IV Proposal. But the [Proposal for an Asylum and Migration Management Regulation](#) (hereafter “the 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 Migration Management Proposal, it’s a hodgepodge of purely declaratory provisions (e.g. Art. 3-4), of restatements of pre-existing obligations (Art. 5), of legal bases authorizing procedures that require none (Art. 7). The one new item is a yearly monitoring exercise centered on an “European Asylum and Migration Management Strategy” (Art. 6), which 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 2015/16 crisis.

Leaving the provisions just mentioned for future commentaries – 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. While this post is longer than usual – warm thanks to the lenient editors! – do not expect an exhaustive summary, nor firm conclusions on every point.

DUBLIN, THE UNDYING

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 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.

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](#), commented [here](#), Article 20 introduces a new criterion based on prior education in a Member State.

These are welcome changes, but all that glitters is not gold. The Commission advertises “streamlined” evidentiary requirements to facilitate family reunification. These would be necessary indeed: evidentiary issues have [long undermined the application of the family criteria](#). Unfortunately, the Commission is not proposing anything new: Article 30(6) of the Migration Management Proposal corresponds in essence to Article 22(5) of the Dublin III Regulation.

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. 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. 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](#) 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 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 Migration Management Proposal, but as Daniel Thym points out in his forthcoming contribution on secondary movements, it remains in Article 40(1)(g) of the [2016 Proposal for an Asylum Procedures Regulation](#). 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 [once condemned as incompatible with effective access to status determination](#).

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](#). However, it contravenes Article 13 ECHR, which demands an effective remedy for the violation of **any** Convention right.
- 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](#)” 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 foreseen. 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](#)”? Probably not, as none of them is a game-changer.

Taken together, however, they might well aggravate current distributive imbalances. 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 States undisturbed. Apart from possible distributive impacts of the revised criteria and of the now obligations imposed on applicants, first application States will certainly be disadvantaged combination by 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.

BORDER PROCEDURES AND DUBLIN

Building on the current hotspot approach, the [Proposals for a Screening Regulation](#) and for an [Asylum Procedures Regulation](#) outline a new(ish) “pre-entry” phase. This will be examined in a forthcoming post by Lyra Jakuleviciene, but the interface with infra-EU allocation deserves mention here.

In a nutshell, persons irregularly crossing the border will 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” ([here](#), p.4). 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 **may** apply Dublin in the context of border procedures. This weakens the idea of “seamless procedures at the border” somewhat but – from the standpoint of both applicants and border States – it is better than a watertight exclusion: applicants may still benefit from “meaningful link” criteria, and border States are not “stuck with the caseload”. I would normally have qualms about giving Member States discretion in choosing whether Dublin rules apply. But as it happens, Member States who receive an asylum application already enjoy that discretion under the so-called “sovereignty clause”. ***Nota bene:*** [in exercising that discretion, Member States apply EU Law and must observe the Charter](#), and 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 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) differs from that of Article 41(3) of the Asylum Procedure Proposal (e.g. “serious grounds” vs “reasonable grounds”). 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. 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 indicate, this is unlikely to happen.

“MANDATORY” AND “FLEXIBLE” SOLIDARITY UNDER THE NEW MECHANISM

So far, the Migration Management Proposal does not look significantly different from the 2016 Dublin IV Proposal, which did not itself fundamentally alter existing rules, and which 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](#); 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 – an aspect which has [severely undermined their application](#) and further condemned them to be small scale affairs relative to the 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](#)– 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” and “what kind(s) of solidarity”, and to define commensurate redistributive targets on this basis (see [here](#), p.34 and 116).

Alas, the opportunity to elaborate a solidarity doctrine for the EU 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](#)”. As Daniel

Thym aptly observed, “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 both “compulsory” and “flexible”. It’s a complicated arrangement and I will only describe it in broad strokes, leaving the crucial dimensions of financial solidarity and operational cooperation to forthcoming posts by Iris Goldner Lang and Lilian Tsourdi.

The mechanism operates according to three “modes”. In its basic mode, it is to replace *ad hoc* solidarity initiatives following SAR disembarkations (Articles 47-49 of the 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 implementing 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](#)” will apply: each Member States 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.

If I understand correctly the fuzzy provision I have just summarized – Article 48(2) – it all boils down to “half-compulsory” solidarity: 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.

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 that 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 suggest that the benefitting State must carry out identification, screening for border procedures and a first (reduced?) 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 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 it (see Article 57(10)).
- After the transfer, applicants will be directly admitted to the asylum procedure in the State of relocation 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 run a Dublin procedure and, if necessary, transfer again the 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)!).

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 to 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 relocation or return sponsorship.
- The procedure is faster, with shorter deadlines.

It is an understatement to say that the mechanism is complex, and your faithful scribe still has much to digest. For the time being, I would make four general comments.

- First, 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 the costs (see Article 79 of the 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 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 it’s a [“big gamble”](#). Other aspects examined below – the vast margins of discretion left to the Commission, and the easy backdoor opened by the *force majeure* provisions – do not help either to create predictability.

- Second, 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 determinations (Article 50 of the 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.

- Third: 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 (see [here](#), p.9) has not made a strong impression on the minds of the drafters. The same remark applies *mutatis mutandis* to return sponsorships: whatever the benefits in terms of solidarity, one wonders if it is very cost-effective or humane to drag a person from State to 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](#) 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 engage applicants is arguably **the** key factor in the dismal performance of the Dublin system ([here](#), p.112). Why should it be any different under this solidarity mechanism?

FRAMING FORCE MAJEURE (OR INVITING DEFECTION?)

In addition to addressing “crisis” situations, the Proposal for a Migration and Asylum Crisis Regulation 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 a 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-months 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 idea is redundant: under the case-law of the ECJ, Member States may derogate from *any* rule of EU Law if confronted to *force majeure*. However, putting this black on white amounts to inviting (and legalizing) defection. The only conceivable object of rules of this kind would have been to subject *force majeure* derogations to prior authorization by the Commission – but there is nothing of the kind in the Proposal. The end result is paradoxical: while Member States are (in theory!) subject to Commission supervision when they conclude arrangements facilitating 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.

CONCLUDING COMMENTS

We should have taken Commissioner Ylva Johansson at her word when she said that [there would be no “Hoorays”](#) for the new proposals. Past the avalanche of adjectives, promises and fancy administrative monikers hurled at the 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.

On responsibility-allocation and solidarity, the basic idea is one that the Commission incessantly returns to since 2007 ([here](#), p. 10): 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](#). 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 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 ([here](#), p.107): solidarity is beefed-up but appears too unreliable and fuzzy to generate trust; there are interesting steps on “genuine links”, but otherwise no sustained attempt to positively engage applicants; administrative complexity and coercive transfers reign on.

Pragmatism, to quote again [Daniel Thym’s excellent introductory post](#), is no sin. It is even expected of the Commission. This, however, is a study in path-dependency. By defending the *status quo*, wrapping it in shiny new paper, and making limited concessions to key policy actors, the Commission may perhaps carry its proposals through. However, without substantial corrections, the “new” Pact is unlikely to save the CEAS or even to prevent new Morias.

FURTHER READING

ODYSSEUS BLOG

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 Blog of 20 December 2017](#)

Maarten den Heijer, 'Corrective allocation or effective solidarity? The Slovak Presidency non-paper on the revision of the Dublin system', [EU Immigration and Asylum Law Blog of 10 March 2017](#).

Phillippe De Bruycker, Evangelia (Lilian) Tsourdi, 'The Bratislava Declaration on migration: European irresponsibility instead of solidarity', [EU Immigration and Asylum Law Blog of 27 September 2016](#).

Constantin Hruschka, 'Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission', [EU immigration and Asylum Law Blog of 17 May 2016](#).

Evelien Brouwer, Conny Rijken, Ralph Severijns, 'Sharing responsibility: A proposal for a European Asylum System based on solidarity', [EU Immigration and Asylum Law Blog of 17 February 2016](#).

Hillel Rapoport, 'Refugee quotas: allowing EU Member States to choose between physical and financial solidarity', [EU Immigration and Asylum Law Blog of 22 January 2016](#).

FROM TAMPERE 20 TO TAMPERE 2.0.

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](#)), p. 103-118.

OTHERS

Sergio Carrera, [Whose pact? The cognitive dimensions of the New EU Pact on Migration and Asylum, CEPS Policy Insights, N 2020/22 September 2020](#).

EU ACTS

Commission Communication on a New Pact on Migration and Asylum, [COM\(2020\) 609](#) of 23 September 2020.

Commission Proposal for a Regulation introducing a screening of third country nationals at the external borders, [COM\(2020\) 612](#) of 23 September 2020.

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](#) of 23 September 2020.

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.

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.

The Pact and detention: an empty promise of ‘certainty, clarity and decent conditions’

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When presenting the [new Pact on Migration and Asylum](#), 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.’ Particularly when it comes to detention and accommodation 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, or the [vague legal framework](#) governing the situation in the hotspots. And the conditions

that prevail in some of Europe's [immigration detention centres](#), or in other places where people are either [deprived of their liberty](#) or where their freedom of movement is [restricted](#), are a far cry from any possible interpretation of the term decency. Thus, proposals for new policies that aim to enhance certainty, clarity and decent conditions in this area are long overdue.

In this post 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, I investigate these through the lens of fundamental rights compliance. We will see that the Commission 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.

1. 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, now the majority of instruments that form part of the proposed common framework regulating asylum and migration policy contain provisions on detention. Here I give an 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 both the [new instruments](#) presented in September and the earlier proposals for a [recast of the Return Directive](#) and for a [recast of the Asylum Reception Conditions Directive](#), as the Commission foresees the adoption of these latter instruments as part of the Pact.

SCREENING

In the first place, the Commission proposes ‘new migration management tools’ at the external border 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, 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. To what extent the screening procedure is a [redcoration of existing practices](#) has been discussed by Lyra Jakulevičienė in this blog.

For our purposes it is important to highlight that the [Proposal for a Screening Regulation](#) is opaque with regard to the question whether screening at the external border requires detention. Thus, it ‘leaves the determination in which situations the screening requires detention and the modalities thereof [...] to national law.’ In Recital 12 of the Proposal, 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’. Article 3 of the Proposal therefore obliges Member States to make sure that during the screening, persons shall not be authorised to enter the territory of a Member State (an obligation that – logically – does not apply when it concerns third-country nationals found within the territory of the Member States who have irregularly crossed an external border, but who may also be referred to the screening procedure). In its [Staff Working Document](#), the Commission writes that ‘during the screening, migrants would be **held** by competent national authorities.’

ASYLUM BORDER PROCEDURE

On the basis of the screening, the third-country nationals will be referred to the suitable procedure, which can be asylum, refusal of entry or return. If persons are channelled in the asylum procedure, their asylum applications will be assessed either in a normal procedure or in a border procedure, which is discussed in more detail in the [blogpost by Jens Vedsted-Hansen](#). 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.’ 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 [Asylum Procedures Directive](#). The new Article 41(6) in [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’. 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. Specifically with regard to the location, the Commission [writes](#) that ‘the border procedure 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.’

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 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(1)(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.

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 entries and unauthorised movements.’ The return border procedure is detailed in same legislative instrument (Procedures Regulation) as the asylum border procedure and as such replaces the return border procedure included in the 2018 [proposal for a recast Return Directive](#). It

is discussed in more detail by Madalina Moraru in this blog. Once again, the legislative instrument is not explicit to what extent such procedures involve restrictions on freedom of movement or deprive returnees of their personal liberty: Article 41a in the Amended Proposal for an Asylum Procedures Regulation 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 detainees; more specifically it fails to address the question under which conditions these procedures involve deprivations of liberty. In the [Staff Working document](#), it writes in para 5.1.3. 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.”

With regard to the grounds for detention, the proposed Article 41a of the proposed 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. The relevant provisions in the Return Directive regarding procedural and other guarantees for detainees are applicable.

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. 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.” Moreover, Member States are obliged to establish a maximum period of detention of at least three months, a change that the Commission [justifies](#) by referring at ineffectiveness of return policies. Changes that have been proposed with regard to the risk of absconding and the [mandatory denial of a period of voluntary return](#) also have implications on the right to liberty, but for reasons of scope these will not be fleshed out here, also because they have been addressed by Madalina Moraru and me in a [previous blog post](#).

DETENTION IN 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](#) replacing the Dublin Regulation. Whereas detention on the basis of Article 28 of the [current Dublin Regulation](#) is only permissible if there is a [significant risk of absconding](#), 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.

FREEDOM OF MOVEMENT AND DETENTION IN 'REGULAR' ASYLUM PROCEDURES

The Commission [Proposal for the recast Reception Conditions Directive](#) introduces changes regarding the legal framework regulating both freedom of movement and detention during the asylum procedure. Just as in the [current Reception Conditions Directive](#), 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** (“shall decide”) Member States to **assign aspecific place of residence** if this is necessary for reasons of public interest or public order, for the swift processing and effective monitoring the application, for the swift processing and effective monitoring of transfer procedures or in order to effectively prevent the applicant from absconding.

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. 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.”

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: 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. All the requirements for lawful detention and applicable guarantees as laid down in the current Reception Conditions Directive remain unchanged. This means inter alia that the length of the detention must be proportionate and that 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.

DEROGATION IN TIMES OF CRISIS

The [Proposal for a Migration and Asylum Crisis Regulation](#) 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. The preamble of the 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 proposed Crisis Regulation 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.

Also significant in the context of crisis management is the [Migration Preparedness and Crisis Blueprint](#), which is not a legislative instrument but a recommendation by the Commission on an EU mechanism for ‘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. The Blueprint thus 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.

In the toolbox for the ***crisis stage***, provided in the [Annex to the Recommendation](#), several measures to be taken at external borders are provided. 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.” 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.” 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.” 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](#), and further developed in the [Regulation on the European Border and Coast Guard](#).

2. FUNDAMENTAL RIGHTS COMPLIANCE

With regard to all proposed measures, the Commission reflects on 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.” 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.” 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).” It is striking however, that in the Staff Working document, the relatively brief Section 5.5. (“A fairer and more effective system to reinforce migrants and asylum seekers’ rights”) unapologetically presents measures that do not even come close to reinforcing rights, but instead restrict them. 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.”

CONTAINMENT AT EXTERNAL BORDERS AND DE FACTO DETENTION

When it comes to compliance with the right to personal liberty, perhaps the most striking characteristic of the Pact is the implicit blurring of the lines 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](#). 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. 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 the potential for 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. Thus, containment of applicants for asylum in the Rösztke transit area was deemed to constitute detention by the Court of Justice in **FMS** and **Commission v Hungary**, whereas such containment under almost comparable circumstances in **Ilias and Ahmed** was not qualified as such by the Grand Chamber of the ECtHR. [Elsewhere](#) I have argued that 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. It is also worth underlining that in 2013, the Commission was of the opinion that border procedures could [“be used only in exceptional circumstances, since they imply detention.”](#)

In this blog I will not address in depth the legal intricacies of how both the ECtHR and the CJEU have qualified a stay at the border or in the transit zone, an issue that is delved out in detail, including the way in which such containment relates to the 1951 Refugee Convention, in our legal study underlying the [European implementation assessment of border procedures in the EU](#). For now it suffices to highlight that in **FMS**, the CJEU defined detention 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.” The possibility to leave this area will not call into question the assessment of a situation as detention, if this is

either not a legal possibility or results in forfeiting the right to asylum, which was recently affirmed by the Court in [Commission v Hungary](#).

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](#).' 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. 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](#), 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](#). 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 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](#).

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 augment [existing problems in this field](#), and 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 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 at the border or in transit zones raise particular problems and it is not clear how the Commission envisages addressing these.

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.” This statement seems rather incongruous when we consider that the “more efficient, seamless and harmonised migration management system” as proposed in the Pact largely replicates the modus operandi as currently employed at the hotspots; albeit without introducing clear measures to prevent [well-documented violations of human rights](#). 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 do now at all external borders. Civil society has rightly argued that the Pact “risks to foster the model of large hosting centers, especially in countries tasked with controlling the external borders of the European Union”. The dangers that accommodation in these types of centers pose for the physical and mental health of migrants are [well documented](#), 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 relates to detention, except from gratuitous statements in the [Staff Working Document](#), such as “irregular migrants in a return border procedure would not be subject to detention as a rule”. 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.”](#) With regard to Italy, the CPT has [reported](#) in 2017 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.” How such 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 foreseen in the Crisis Regulation. Moreover, how it envisages to improve and monitor the living conditions in the hotspots remains unclear. The [situation in ‘Moria 2.0’](#) does not provide much reason to be hopeful in this regard either.

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 mirrors the [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). 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.

CONCLUSIONS

If the Commission genuinely wishes to set up a “system to meet the scale of the challenge”, more sustained reflection is needed on the way in which 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 honestly 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. 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 disappointing few – 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 are [“still trapped under conditions highly similar to those of detention.”](#)

In this respect it is conspicuous that the Pact contains relatively a lot of reflection on monitoring compliance with fundamental

rights by the EU, agencies and even Member States themselves, but surprisingly few instruments that are traditionally the most pertinent when it comes to fundamental rights protection: judicial remedies. In our legal study for [European Parliamentary Research Service](#), a number of procedural guarantees are put forward to provide adequate protection for individuals in a situation where the lines between restrictions on freedom of movement and deprivation of liberty are blurred ([here](#), pp. 128-131). Thus, 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. Seeing that the rule of law and the protection of individual rights in the EU largely depends on a “[decentralised judicial architecture](#)”, 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.

FURTHER READING

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Re-decoration of existing practices? Proposed screening procedures at the EU external borders

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The New [Pact on Migration and Asylum](#) 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 (hereafter [Proposal for a Screening Regulation](#)). 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 realistically to implement are such provisions 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 EU Member States at the borders, it is evident that identity, registration and security checks, as well as preliminary vulnerability assessments are happening anyway on the basis of [Schengen Borders Code](#) and the national legislation. While the Schengen Borders Code does not provide for any specific obligations concerning medical check 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. Thus it is no longer new.

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 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 excluding those with legitimate claims for protection due to too short interviews, absence of legal advice, lack of written record of the proceedings and other setbacks ([Australian Human Rights Commission](#)). 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, which have failed to produce any tangible results according to [Maiani](#). Will the pre-entry screening in the EU result in a different outcome?

2. ASYLUM SEEKERS NO LONGER A PRIVILEGED GROUP OF MIGRANTS IN EUROPE?

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**. 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 UN Convention Relating to the Status of Refugees](#) and recognition of asylum seekers in the ECtHR jurisprudence as particularly vulnerable category of migrants in need of special protection ([M.S.S. v Belgium and Greece](#); [Tarakhel v Switzerland \[GC\]](#); [A.S. v Switzerland](#)).

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 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 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 screening of persons authorised entry under this derogation by an individual decision (Recital 14), but then includes them into screening under Art. 3(2). This relationship would be more clear if the proposal would specifically exclude from screening those persons who are manifestly in need of

international protection as per international obligations of the Member States (e.g. nationalities of 50% or so for recognition for international protection), while conducting screening for all others where such needs are not so clear.

3. EVALUATING THE PROPOSED MEASURES IN TERMS OF LEGAL PROBLEMS

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

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](#) confirms these **three outcomes of the screening** (recital 40): a)

channelling of applicant to the appropriate asylum or b) return procedure; c) refusal of entry.

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 ([Explanatory Memorandum](#)), 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 the Proposal for Asylum Procedures Regulation 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%) (Recital 40b of the Amended Proposal for [Asylum Procedures Regulation 2020](#)). Would the asylum authorities need another 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](#). For instance, since the end of 2015, Germany operates a cluster procedure in “[arrival centres](#)”, 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 proposal 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 the international organizations and the 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 the international, European and national legal frameworks. The short time limits

of such fast-track procedures 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](#) 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. The [EASO report on border procedures](#) confirms the trend that under 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 (p. 20). 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 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 ([M.K. and Others v. Poland](#); [M.A. and Others v. Lithuania](#)). 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](#) as concerns the treatment of third country nationals within their jurisdiction.

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). 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 risk 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.

EXPLOITATION OF SECURITY INFORMATION NEEDS TO COMPLY WITH 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 is based on the Amended Proposal for [Asylum Procedures Regulation 2020](#): 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 rejecting asylum applications on security grounds may be problematic with regard to Art. 19 of the EU Charter on 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 ([Chahal v. the United Kingdom](#), [Saadi v. Italy](#), [X v. Sweden](#), [M.K. and Others v. Poland](#)), thus security risk information could only be used to specially deal with a person but not for the merits of the claim.

PREVENTION OF ABSCONDING WITHOUT DETENTION? MISSION
(IM)POSSIBLE?

Thirdly, 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 (Art. 4 and 8(1)(b) of the proposal, Article 41(6) of the Amended Proposal for the [Asylum Procedures Regulation 2020](#)). Though [Thym](#) indicates that the Commission opted against generalised detention and without it being

automatic, the proposal leaves detention to the national authorities, which **may spark extensive detention** of most of the applicants preventing their onwards movements into territory. The measures envisaged do not shed a light as to how they could prevent absconding without extensive resort to detention. 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 individual approach to it in international and the EU law, as further explored in the forthcoming blogpost on detention by [Galina Cornelisse](#).

4. IMPLEMENTATION PRACTICALITIES OF PROPOSED MEASURES

According to the [Proposal for a Screening Regulation](#) the **collection of the 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 competencies of the authorities, availability of additional

medical, legal, interpretation and other staff, numbers of arriving persons 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 caseworkers 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 the law (p. 4). [Another learning 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 play much of the sense for making procedures faster for vulnerable individuals.

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 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 all like to avoid would be creating more [Moria camps](#) with complex new problems at European borders. The proposal has ample potential for that.

Thirdly, the operation of the screening process at the border would require boosting accommodation conditions and the presence of staff, including of medical, legal, trained and qualified staff to deal with minors. The availability of doctors at the border areas has proved to be problematic in case of Greek hotspots where the authorities had to rely instead on military ones ([FRA, 2019](#)). In times of the pandemic, the lack of doctors is very evident particularly in some countries and the feasibility to attract them to 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 the 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](#) - 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 [incoming German Presidency](#) that the future Asylum Agency and Frontex could possibly have a mandate to conduct the pre-screening independently or in support to the 'frontline' Member 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.

CONCLUDING COMMENTS

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 as concerns the outcomes that could undermine the rights of migrants and protection seekers. The Proposal is evidently setting up some theoretical concepts and wishes, but its practical implementation remains in doubt. Moreover, the hotspots experience is likely not to be sufficiently taken into account 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 risks 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, 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. The pre-entry screening seems to set the basis for operation of these procedures by re-decorating some existing practices, but without addressing the

core issues at stake. **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.**

Even if nothing is wrong in collecting the information as early as possible on third country nationals entering the EU, 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 2016, the [proposal for recast Return Directive](#) and other relevant instruments.

FURTHER READING

ODYSSEUS BLOG

- Daniel Thym, [European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the ‘New’ Pact on Migration and Asylum](#), September 2020.
- Ulrike Brandl and Philip Czech, [A human right to seek refuge at Europe’s external borders: The ECtHR adjusts its case law in M.K. vs Poland](#), September 2020.
- **Francesco Maiani**, [Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?](#), *February 2016*.

EU ACTS

- Commission Communication on a New Pact on Migration and Asylum, [COM\(2020\) 609](#) of 23 September 2020.
- Commission Proposal for a Regulation introducing a screening of third country nationals at the external borders, [COM\(2020\) 612](#) of 23 September 2020.
- 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.

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- ***M.K. and Others v. Poland***, Application Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020.
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OTHERS

- [ECRE, Border procedures: not a panacea. Policy Note No. 21, 2019.](#)

Border Procedure: Efficient Examination or Restricted Access to Protection?

by [Jens Vedsted-Hansen](#)

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As one of the novelties in the [New Pact on Migration and Asylum](#) and its accompanying legislative package, the European Commission has proposed to establish a ‘seamless procedure’ at external borders that will be applicable to all non-EU citizens crossing the borders without authorisation. In its entirety, the border procedure will comprise three elements: pre-entry screening, an asylum procedure and a ‘swift return procedure’ where applicable. The overall aim is explained as being to ‘close the gaps between external border controls and asylum and return procedures’ (p. 4, section 2.1).

The *pre-entry screening* will be established under a separate [Proposal for a Screening Regulation](#) that was presented by the Commission on 23 September 2020 as part of the legislative

package linked to 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](#), simultaneously launched in order to change the 2016 [Proposal for an Asylum Procedure Regulation](#).

While this blogpost shall focus on the latter two proposals that must be seen in conjunction, these procedural devices should be considered in the light of the proposed pre-entry screening. This screening will necessarily interact with the asylum and return procedures at external borders, as described by Lyra Jakuleviciene in her [contribution](#) to the series. It should be stressed from the outset that ‘closing the gap’ by way of clarifying the need to issue a return decision immediately after a decision rejecting an application for asylum, or even in the same decision, in order to secure quick return of asylum seekers upon rejection, is in and of itself clearly a useful step, as already proposed by the Commission in the 2018 [Proposal for a Recast Return Directive](#).

1. CLOSING THE GAP: MANAGEMENT OF MIXED MIGRATION FLOWS

One of the overriding objectives of the EU Pact is to create operational instruments for tackling the migration challenges that result from the 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 coordination and solidarity mechanisms’ ([here](#), p. 3, section 2). This has been elaborated on 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’. According to the Commission, it is now important to develop an effective process allowing for *better management of mixed migration flow* sand, 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 access the appropriate procedure on either asylum or return, arguably ‘enhancing the synergies between external border controls, asylum and return procedures’ (p. 1).

The underlying assumption seems to be that the protection needs of third-country nationals can be identified already upon their arrival at the EU external border so that asylum seekers can be ‘swiftly’ allocated to the relevant 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 EU Pact of the screening and examination exercise 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 procedure. As argued [elsewhere](#), the border procedure(s) might even end up *de facto* gradually merging with the pre-entry screening procedure. This expectation seems to be supported by parts of the reasoning behind the proposed border procedure, as shall be illustrated in the following.

2. 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](#). According to Article 41(2), 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 procedure in the cases listed in Article 40(1).

According to Article 40 of the 2016 [Proposal for an Asylum Procedure Regulation](#), the accelerated examination procedure will be mandatory. By contrast, allocation to the border procedure of such accelerated examinations is supposed to be optional as the main rule under Article 41(2) of the amended proposal. Importantly, however, Article 41(3), taken together with Article 40(1), stipulates that the 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.

The latter provision refers to Article 40(1)(i) of the amended proposal which lays down a new acceleration ground in addition to those included in the 2016 [Proposal for an Asylum Procedure Regulation](#). Notably, this *additional acceleration ground* is subject to significant amplification in the new [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% (recital 14 and Article 4 on the asylum crisis management procedure). 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’ included in the 2016 proposal as an acceleration ground, shall be further discussed below in section 3.

As another novelty in the amended proposal, the obligation to examine these three types of cases in a border procedure may be dispensed with for nationals 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](#). 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 (Article 41(4) of the amended proposal). This clearly reflects the interlinkage between the asylum border procedure and the management of the EU's external borders.

3. ACCELERATED EXAMINATION OF ASYLUM APPLICATIONS

The 2016 [Proposal for an Asylum Procedure Regulation](#) implied the introduction of accelerated examination 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. The proposed *EU common list* of such countries includes Albania, Bosnia and Herzegovina, Northern Macedonia, Kosovo, Montenegro, Serbia and Turkey (Article 48 and [Annex 1](#)) among which 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 reactions to the attempted military *coup d'état* two days after the proposal had been presented in July 2016.

Against this background it is somewhat surprising that the Commission has not updated or qualified the reasoning of the 2016 proposal (recital 62) which even offered a more positive description of the human rights conditions in Turkey than the

2015 proposal ([Explanatory Memorandum](#) p. 5). 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 expected to become subject to debate in connection with the negotiations of the legislative package accompanying the EU Pact.

Importantly, the [Amended Proposal for an Asylum Procedure Regulation](#) 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’ (Article 40(1)(i)).

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. The proposed exceptions further call into question the very idea of the new acceleration

ground, the need for which does not appear evident in the light of the already existing and proposed grounds for accelerated examination that are based on essentially similar considerations (Article 31(8)(a)-(j) of the 2013 [Recast Asylum Procedures Directive](#) and Article 40(1)(a)-(h) of the 2016 [Proposal for an Asylum Procedure Regulation](#)).

The Explanatory Memorandum of the [Amended Proposal for an Asylum Procedure Regulation](#) 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’ (pp. 13-14). 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 (p. 9).

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 (Explanatory Memorandum p. 4). While this objective of lawmaking is understandable as such, the question remains whether it really necessitates the insertion of the new ground for acceleration of the examination procedure. Basing this on the recognition rate 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 damage to these substantive rules due to the quality of decisions is not likely to be minimised if accelerated examination must take place as a mandatory part of the asylum border procedure.

4. 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 Article 36 of the 2016 [Proposal for an Asylum Procedure Regulation](#) which lays down the criteria for decisions on admissibility. According to this provision, an

asylum application shall be rejected as inadmissible on 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.

If an application is rejected as inadmissible in accordance with these criteria, it shall not be examined on its merits, according to Article 36(2). 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.

Among these inadmissibility grounds we shall focus on the 'safe third country' rule proposed in Article 36(1)(b) since this is often considered the most problematic inadmissibility ground, 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 in substance of their protection needs. According to Article 36, such rejection will be mandatory, and decisions to that effect may be taken in the border procedure under Article 41 of the [Amended Proposal for an Asylum Procedure Regulation](#).

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 Article 38 of the 2013 [Recast 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. 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)).

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 abolish the 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, insofar as the reference to 'substantive standards' may be supposed to have potential legal bearing in terms 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 would seem questionable. One could imagine future scenarios in which a flexible standard for assessing the 'sufficiency' of protection in a third country could be helpful for the purpose of rejecting applications as inadmissible and returning asylum seekers to that country without examining their cases 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 (Articles 46 and 50), do not seem to mitigate that concern.

The effects of the amended inadmissibility criteria will depend entirely on the *possibility to rebut the presumption of safety* and the assumed *individual connection* to the 'safe third country' in question. To the extent that admissibility decisions will be made in a border procedure that is closely connected

to, if not *de facto* merging with, the pre-entry screening as discussed above, this may become rather difficult in practice.

5. APPEAL AND SUSPENSIVE EFFECT

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’ or a ‘safe country of origin’ – 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 blogpost, it should be highlighted that they may raise concern as regards certain cases that will be decided in the 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* (Article 54(3)(a), cf. Articles 40(1) and 41). 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. 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.

6. BORDER PROCEDURES: FICTIONS AND REALITIES

As pointed out by [Lyra Jakuleviciene in her post](#), 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, she argues that the proposed pre-entry screening 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.

Indeed, both the 2013 [Recast Asylum Procedures Directive](#) (recitals 25, 26, 28, 29 and Articles 6 and 9) and the 2016 [Proposal for an Asylum Procedure Regulation](#) (recitals 12, 17, 22, 27 and Article 9) 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 Code](#). While this right will

in principle remain under the [Amended Proposal for an Asylum Procedure Regulation](#), some of the procedural devices introduced by this proposal 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 effectiveness 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 published by the European Parliament](#), 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 has been described as the multiplication of ‘anomalous zones’ for migration management ([Giuseppe Campesi](#)) that may ultimately become closed centres or ‘border camps’ amounting at least to *de facto* detention. It is therefore to be hoped that the revision of the EU rules on asylum procedures will take proper account of existing evidence on the realities of the border procedure.

REFERENCES AND FURTHER READING

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The New Pact and EU Agencies: an ambivalent approach towards administrative integration

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The '[New Pact on Migration and Asylum](#)', 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 in 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 or the [border procedure](#), 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. This means, that alongside institutionalised administrative cooperation through EU agencies, the Pact emphasizes bilateral and multilateral transnational co-operation between Member States, as portrayed by the new concept of [return sponsorships](#). This could potentially impact the effectiveness of administrative cooperation and migrants' fundamental rights protection.

This post, 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), and [EASO](#) (used as a shorthand for the EU's European Asylum Support Office) undertake in these fields. Next, I explain which legal instruments are to regulate their mandate according to the Pact, and whether the [Commission Communication](#) 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.

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 co-operation 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 in order 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 Information, Discussion and Exchange on Asylum). While its aim was facilitating coordination of practice, results were limited and the [Commission lamented its ineffectiveness](#). 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](#)'. 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. FRONTEX was initially set up in [2004](#), and its legal mandate was amended consecutively in [2007](#), [2011](#), [2016](#), and most recently in [November 2019](#). EASO was set up in [2010](#) and its legal mandate continues to remain unaltered to date; 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](#), with their staff and experts deployed in fields such as border control, returns and the processing of asylum claims. This means that agency employees 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 cooperation. Reference is made [to monitoring-like](#), as well as to functions which have the [potential to steer policy implementation](#).

One example of a monitoring-like function is the ‘[vulnerability assessment](#)’ that FRONTEX undertakes. 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.

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.

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. Consecutive amendments to this legal instrument mean that it is 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. Currently, a [2010](#) Regulation underpins its functioning. As I have [analysed elsewhere](#), 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](#). 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](#). In the meantime, the Commission released in [2018](#) an amended proposal containing only targeted amendments reinforcing the operational tasks of the EUAA. 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 ([New Pact on Migration and Asylum](#), pp. 3, 10).

I find this approach problematic. EASO, and its successor the EUAA, play an increasingly pivotal role in the implementation of the EU asylum policy, and in implementing intra-EU solidarity. These previous proposals, part of the 2015-2016 [European Agenda on Migration](#) package, correlate with an approach to responsibility-sharing and solidarity which is now expected to be overhauled. This was the approach promulgated by the so-called [Dublin IV proposal](#), analysed in this blog by [Francesco Maiani](#) and by [Constantin Hruschka](#). Therefore, the co-legislators have been assigned the formidable task of consolidating themselves the 2016 initial Commission proposal, the 2017 EP and Council partial

compromise, and the 2018 amended Commission proposal, with the entire package new logic!

This is a challenging task. Different package elements are [analysed in this blog series in detail](#), and critically outlined in the introductory contribution of [Daniel Thym](#): suffice to say that their complexity is immense. What is more, it had been impossible to conclude negotiations on the previous 2016 proposal because of politically salient issues. For example, Member States at the external borders were unwilling to close negotiations on envisaged monitoring-like functions of the agency, before they had concrete guarantees on enhanced solidarity. These salient issues remain pending, complicating further the wishes of the Commission for a speedy adoption of the new Regulation.

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.

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. I already mentioned that the document calls 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' (p. 6). This is quite a bold statement which seems to recognise EU agencies' increased role in implementation and, even, in monitoring. FRONTEX's so-called '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' (p. 12). These assessments allow to 'target the Agency's operational support to the Member States to best effect' (p. 12). 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 is under negotiation; 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’ (p.6). A seminal future challenge will be [the inherent underlying tension](#) between the expanding operational and supervision mandates of EU agencies. 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’ ([here](#), p. 8). This is linked with the deployment of the agency’s standing corps (p. 8). 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. Achieving this level of operational staff is recognised by the Commission as ‘essential for the necessary capability to react quickly and sufficiently’ (p. 12). 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 (p. 20). It goes as far as to say that FRONTEX’s ‘enhanced scope of action should now be used to make cooperation with partners operational’ (p. 21). In what concerns the Western Balkans FRONTEX is to ‘to work together with national border guards on the territory of a partner country’ (p. 21). 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 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 (p. 21).

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 blog post. Instead, I will draw characteristic examples to illustrate my points.

I. 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](#) is an illustrative example of unsatisfactory embedding EU agencies' existing roles and current administrative realities. The intricacies of the procedure itself will be analysed in this blog series by a forthcoming post of Jens Vedsted Hansen. 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' ([Explanatory memorandum](#), p. 3). The pre-entry phase includes screening regulated by [a different instrument](#) analysed in this blog series by [Lyra Jakuleviciene](#). 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' ([Explanatory memorandum](#), p. 4). If channelled to an asylum border procedure and found not to be in need 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, neither 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](#) in Greece. [Greek national law in 2016](#) introduced an accelerated border asylum procedure, addressing also the situation at hotspots. 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](#). 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. During the first half of 2019, EASO conducted [2,955 interviews in the fast-track border procedure](#), 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 political agreements already reached on most elements of the EUAA ([Explanatory memorandum](#), p. 6). 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 (p. 12). This of course could include assistance in processing applications through joint implementation patterns, an element that is expected to be included in the new enhanced mandate of the EUAA. Thereafter, the proposal refers in the Explanatory Memorandum to EASO's material, as part of its quality initiatives, on operational standards and indicators for asylum procedures (p. 8). A recital also refers to EASO's guidance note, as part of the material to be taken into account into ascertaining which applicants fall under the border procedure (Recital 39a).

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 remit 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 (see [here](#) and [here](#)) to scrutinize potential violations of applicants' procedural rights in Greece, due to EASO involvement. These complaints reveal the procedural complexities and need for a broader rethink of EU procedural law and the establishment of [the requisite accountability arrangements](#). Similar observations regarding lack of reflection on EU agencies' involvement can be made about the new screening procedure, as poignantly observed by [Lyra Jakuleviciene](#) in this blog.

II. 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](#). Through a return sponsorship a Member State commits to support another Member State which faces 'migratory pressure' in carrying out the necessary activities to return irregularly staying third-country nationals (Rec. 27). While the individuals are present on its territory, the benefitting Member State remains responsible for carrying out the return. However, if return has not taken place after 8 months (4 months [in](#)

[situations of crisis](#)), the sponsoring Member State becomes responsible for transferring the migrants in an irregular situation and should relocate them to its territory (Art. 55, para. 2).

The instrument recognises that return sponsorship is part of the common EU system of returns, which also includes operational support through FRONTEX (Rec. 27). 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 of return, such as charter or scheduled flights or other means of transport to the third country of return (Art. 55, para. 4 a-d).

In the Explanatory Memorandum, 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)’ (p. 2, p. 19). 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 'benefiting 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, among other, a fundamental rights officer, an individual complaints mechanism, and fundamental rights monitors. This framework has been put to 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 highlights. But the complete absence of these novel human rights mechanisms in an environment of transnational administrative co-operation which dilutes accountability and liability will be even worse. Monitoring foreseen by the Commission as part of the [Asylum and Migration Management Regulation](#) (art. 6) 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.

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 namely endorse the *status quo* in what concerns the role of EU agencies. When it comes to EASO's mandate, the Commission's approach of leaving the co-legislators to consolidate themselves a 2017 partial agreement on a 2016 proposal with the entire new Pact logic on solidarity and integrated processing seems likely to lead to yet another impasse. This means EASO's mandate will continue to be out of tune with the administrative reality on the ground.

Unlike the Pact Communication, the Pact legal instruments do not even 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 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. 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.

FURTHER READING

RELEVANT WORKS BY THE AUTHOR

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RELEVANT PACT LEGAL AND POLICY DOCUMENTS

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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](#) of 23 September 2020.

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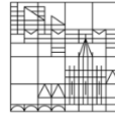
Secondary Movements: Overcoming the Lack of Trust among the Member States?

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Trust is an essential prerequisite for a functioning area of freedom, security and justice – as the [Court of Justice coined it so well](#): ‘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.’ Our theme is not the controversial case law on fundamental rights, which judges dealt with when emphasising the relevance of mutual trust, but the more generic question of how countries in northern and southern Europe interact when asylum seekers take advantage of the border-free Schengen area to relocate themselves autonomously.

That phenomenon is usually referred to as ‘secondary movements’, even though the Commission evades the term in the [‘pact’](#), which nevertheless referred to the issue indirectly in the title of the [accompanying press release](#) with its call for a ‘balance between responsibility and solidarity.’ When it comes to policy debates among the Member States in the Council, enhanced rules on relocation (solidarity) and the prevention of secondary movements (responsibility) are two sides of the same coin.

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 complain about having to shoulder the ‘burden’ without adequate solidarity, politicians further north often decry the alleged incapacity of their 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 southern and eastern shores of the Mediterranean. In relation with the second narrative, German or Dutch politicians, by contrast, will highlight statistical data: throughout the past five years Germany received [more asylum applications](#) than Italy, even though the Italian data for the latter include people who later moved elsewhere. Similarly, the numbers for the Netherlands have been between one-third and half of the figures for Greece.

Germany made roughly 27 thousand [take-back requests under the Dublin III Regulation](#) towards Italy, Spain and Greece in 2019, of which about 3500 or less than 15% resulted in an actual transfer.

This blogpost discusses those elements of the [Commission proposals on the reform of EU asylum policy](#) which address the phenomenon of secondary movements. In doing so, it complements the discussion of solidarity measures in the [contribution by Francesco Maiani](#). The [initial criticism of laxness on secondary movements](#) by the deputy chairman of Angela Merkel's CDU/CSU parliamentary group in the German Bundestag with a responsibility for migration policy, Torsten Frei, shows exemplarily how relevant these rules can be for the policy debate. To assess the draft legislation, it is useful to start with more generic comments.

DRIVING FORCES BEHIND 'SECONDARY MOVEMENTS'

A compromise among the Member States is the main hurdle for any reform of EU asylum policy. Without it, no new legislation will be adopted. The focus on political negotiations should not detract us from other challenges, such as the inquiry whether the proposals can function in practice. As explained in the [introductory blogpost](#), multiple aspects of the reform package require more than statutory change. Secondary movements are one area amongst others in relation to which changing the laws does not guarantee success on the

ground for the simple reason that Member States and individuals might not comply with statutory obligations ([here](#), p. 103-118).

Social sciences 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](#), 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'. Multiple 'push' and 'pull' factors overlap and their relative weight always differs depending on the circumstances. Any assessment is made more complex by the comparatively low level of information on the part of most asylum seekers, which ethnographic research has repeatedly unveiled, thus [rendering symbols](#) and [stories relevant](#) that are often not controlled by the EU and the Member States.

Notwithstanding these uncertainties, common features define the sociological analysis. Refugees and migrants generally have a [low level of knowledge about the specificities of asylum laws or the intricacies of supranational legislation](#). Statutory details of domestic or supranational asylum legislation, which define the policy debate, will influence decision-making only to a limited extent only. While the [level of social benefits](#) can be a factor amongst others, other elements are more important: besides questions of physical safety (which,

fortunately, all Member States guarantee (as a matter of principle), the [economic prospect](#), including perceived labour market success, and [general living conditions](#) are significant. Moreover, [ethnic and family networks](#) are a core factor determining where people want to go.

The [length of procedures](#) can similarly influence decisions, not least when it comes to the respect for an obligation to leave a country. The longer procedures last, the more likely individuals will have taken roots in a country. Against this background, the administrative inefficiency of the take back procedure under the Dublin III Regulation is one element amongst others, even though the abovementioned factors are certainly more relevant in terms of influencing the behaviour of applicants.

IMPLICATIONS FOR THE REFORM DEBATE

The essential lesson we can draw from the driving forces behind secondary movements is that the 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 will work better in practice – and we desperately need a better functioning regime given the dismal performance of the Dublin system.

From the point of view of economic rational choice theory, individual 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. This either/or-logic is a false dichotomy: positive and negative incentives can be combined. Doing so will not only facilitate compliance (which is in the interest of everyone), but may facilitate political agreement if different positions coalesce, also among the EU institutions.

Reliable statistics are an important objective to strive for. It is widely known that EU asylum statistics count applications, not persons. That can inflate numbers as a result of double counting and does not provide reliable information about how many individuals are residing in a country at any point in time (or have moved elsewhere). Of course, migration statistics will never be perfect, since authorities will not always track people reliably, but better data can help to rationalise the debate.

The Commission aims at bridging the information gap by [upgrading](#) its [2016 Proposal for the Eurodac Regulation](#). 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. This initiative will most likely be politically rather uncontroversial – notwithstanding [concerns](#)

[over data protection](#). The bone of contention will not be the database, but the solidarity mechanism as well as carrots and sticks preventing secondary movements.

FAMILY LIFE: RECOGNISING AN ESSENTIAL MOTIVATION

In light of the driving forces discussed above, an extended definition of ‘family members’ including siblings and families formed in third states appears as a crucial move, which, moreover, can be considered to respond to the normatively most compelling reason why asylum seekers should be allowed to choose the place of residence (Article 2(g) of the [Proposal for an Asylum and Migration Management Regulation](#)). The effects are evident: countries with a residual population of refugees would have to assume responsibility if the legislature recognised what social scientists call [‘chain migration’](#) along family lines. That move had been proposed by the Commission in 2016 already ([here](#), Article 2(g)), but it was [rejected by the Member States](#). By contrast, extended jurisdiction based on previous stays or studies (Articles 19(4) and 20) will be less controversial.

It seems to me that the significance of the extended family criterion is crucial. Firstly, maintenance of the status quo might quite simply not prevent secondary movements along broader family networks. It is, in other words, a pragmatic recognition of driving forces to change existing rules. Secondly, the initial

rejection of the amendment, amongst others by Austrian and [German politicians](#), could possibly be mitigated in the political negotiations. There is ample room for compromise: responsibility for siblings could be counted towards the solidarity quota or it might be accepted politically in return for other changes, for instance the re-introduction of a variant of stable jurisdiction discussed below.

‘OTHER CARROTS’: INCENTIVISING COMPLIANCE

While an extended definition of ‘family member’ arguably constitutes the single most relevant incentive, the Commission adds further novelties. In the context of relocation under the [solidarity mechanism described by Francesco Maiani](#), Member States ‘shall’ take into account ‘meaningful links’ when determining which people to relocate (Articles 57(3)(1) and 49(2) of the [Asylum and Migration Management Regulation](#)). The proposal does not define the notion of ‘meaningful link’, which, however, can be expected to mirror the original proposal of the European Parliament to base the decision ‘in particular on family, cultural or social ties, language skills or other meaningful links which would facilitate his or her integration into that other Member State’ (Article 24b in conjunction with Article 19(2) of the [LIBE Committee’s Report on the Proposal for a Dublin IV Regulation](#)).

It should be noted that the practical relevance of the ‘meaningful link’ criterion depends on whether the legislature

extends the definition of ‘family member’ and broadens jurisdiction based on previous stays and studies. In practice, the rules on relocation and, thus, the ‘meaningful link’ criterion applies only to those who are not covered by *leges speciales* on asylum jurisdiction. Siblings, for instance, would be transferred to other Member States on the basis of the wide definition of family life already, which takes priority over solidarity-based relocation (Article 57(3)(3) of the Asylum and Migration Management Regulation). The latter could be used, for instance, to consider language skills or, controversially, religious affiliation. It will certainly not prevent secondary movements in itself, but it takes up driving forces why people should be assigned to a specific state.

Another positive incentive is legal onward movement for beneficiaries of international protection with long-term residence status, which the Commission wants to permit after 3 instead of 5 years (Article 71 of the Asylum and Migration Management Regulation).^[1] In line with existing rules, the three-year period would be calculated from the date of the asylum application, even though [half of the Member States use the statutory option](#) of counting only half of that period (Article 4(2)(3) of the Long-Term Residents Directive as amended by [Directive 2011/51/EU](#)). Moreover, long-term residents need to be economically self-sufficient, i.e. onward movement would only be allowed to those who do not depend on social benefits (Article 5(1)(a) of [Directive 2003/109/EC](#)). The freedom to live and work elsewhere in Europe would be

subject to a number of statutory caveats, which the destination country may prescribe, such as labour market tests (Articles 14-17 of Directive 2003/109/EC). As a result, the amendment could be expected to concern comparatively few people.

It would be possible to broaden the opportunities of mobility for economic purposes during the legislative process. The legislature could consider, for instance, to amend the Blue Card Directive or the Seasonal Workers Directive, which, at present, do not cover beneficiaries of international protection. It could also introduce new rules on labour mobility specifically for refugees. Doing so would not result in ‘free choice’ and could be subject to predefined criteria, such as a work contract with economic self-sufficiency – as explained in an annual report of the German Expert Council on Integration and Migration, of which I am the vice chairperson ([here](#), p. 41-45).

STREAMLINED PROCEDURES

At present, the Dublin system often results in lengthy and ineffective procedures, which, moreover, often fail in practice. German statistics show that the initial designation of asylum jurisdiction by the authorities takes up to four months, followed by another five months [domestic courts currently need to decide on the suspensive effect of appeals](#). Thus, asylum seekers are legally obliged to return to the state responsible almost one year after having arrived in Germany.

Against that background, it is apparent why the Commission wants to streamline procedures: the takeback procedure is turned into a simple notification subject to much shorter time limits (Article 31), the scope of the Regulation is extended to beneficiaries of international protection and those who had been relocated (Article 26(1)(c), (d)) and legal remedies are considerably curtailed, including a decision on suspensive effect within one month (Article 33(3)(1)). In future, only those challenging the transfer decision on grounds of family links or the real risk of inhumane or degrading treatment are given a legal remedy (Article 33(1)) – in line with the 2016 reform proposals ([here](#), Article 28(4), (5)).

The latter amendment effectively returns to the status quo ante of the Dublin II Regulation, which had similarly provided for legal remedies with suspensive effects under restrictive conditions only. It is to be expected that the ECJ would accept this legislative about-turn for the simple reason that the [case law extending legal remedies](#) was based on the contents of the Dublin III Regulation. If the latter is reversed, the case law can be expected to return to the [judicial status quo ante](#). Article 13 of the ECHR does not prevent that restriction, since it applies only to those with an arguable claim that another human right was violated ([here](#), para 288) – a condition the Proposal complies with, since the Commission continuously foresees a remedy in relation to human rights matters under Articles 4 and 8 of the Charter. Article 47 of the Charter does not require

further protection when the legislature from limits the scope of statutory rights ([here](#), paras 74-84).

‘STICKS’: SANCTIONING DISRESPECT FOR EU RULES

In line with our earlier observation that positive and negative sanctions can be combined, the Commission reiterates some of the sanctions which had featured in its 2016 Proposal for a Dublin IV Regulation. Those moving elsewhere will be subject to an accelerated asylum procedure (Article 40(1)(g) of the [2016 Proposal for an Asylum Procedures Regulation](#) read in conjunction with Article 9(1) of the [Asylum and Migration Management Regulation](#)). Moreover, it suggests introducing a preclusion period for submitting relevant information (Article 10(2)). The additional express obligation not to engage in secondary movements and to comply with transfer decisions (Article 9(4)(a), (5) of the [Asylum and Migration Management Regulation](#)) cannot be expected to change much in practice.

The most significant sanction is the reduction of social benefits in line with the ongoing negotiations on [Article 17a of the Reception Conditions Directive](#). The Commission proposes to introduce, however, a double caveat limiting the scope of the sanction *ratione materiae*. Firstly, the reduction is to be effective once a transfer decision has been notified to the individual; it will no longer apply automatically whenever someone files a second asylum application in the case of secondary movements. Secondly, the general scheme of the

draft legislation indicates that the reduction of social benefits will come to an end, once the jurisdiction is transferred to the second Member State in line with the comments in the next section.

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, including the prospect of labour market success. These broader pull factors, such as the general economic outlook, cannot be influenced by secondary legislation. Moreover, I have explained elsewhere that the Commission is in a regulatory dilemma when harmonising the social rights during the asylum procedure and after recognition, which draft legislation orientates at the level of support for citizens that varies greatly among the Member States ([here](#), p. 1561-62).

CONTINUATION OF THE STATUS QUO: TRANSFER OF JURISDICTION

The most surprising novelty of the Pact on Migration and Asylum is the absence of 'stable' or even 'permanent' asylum jurisdiction. Instead, the Commission retains the individual right to a second asylum procedure (Articles 27(1) and 35(1), (2) of the [Asylum and Migration Management Regulation](#)). 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. It also proposes to extend the six-month period whenever asylum seekers 'abscond', which, in line with ECJ case law, does not cover 'simple' scenarios of non-transfer when the authorities know where asylum seekers are living ([here](#), paras 52-65). It seems that in cases of absconding the take back option endures indefinitely.

This move effectively reiterates the legislative status quo under the Dublin III Regulation that allows for double (and threefold) asylum applications in cases of secondary movements. That move is a departure from the [2016 Proposal on a Dublin IV Regulation](#), 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 both the European Parliament and negotiations in the Council ([here](#), Article 9a) had supported that change.

There is, however, one scenario in relation to which the Commission wants to introduce permanent asylum jurisdiction: beneficiaries of international protection. In contrast to the Dublin III Regulation, they are to be covered by the take back obligation under the new Asylum and Migration

Management Regulation (Art. 26(1)(c)), thus extending its scope *rationale personae*. What is more, the Commission generally excluded beneficiaries of international protection from the cessation rule under Article 27(1)(2). The practical effects of this rule would depend on the length of asylum procedures. It would not cover those whose application was rejected and complementary humanitarian statuses under domestic law, such as the recently reintroduced [Italian 'special protection'](#). If they moved on, they would still benefit from the transfer of jurisdiction described above.

The question of permanence will feature prominently in the political debate. The German Presidency invited the Member States to comment on this aspect in an informal working paper in the aftermath of the meeting of home affairs ministers on 8 October 2020: 'In this context, it is also necessary to discuss ways to prevent unauthorised movements, such as stable responsibilities and unbureaucratic transfers, prevention of multiple applications, and in principle granting reception benefits only in the Member State responsible' (Council doc. WK 10621/2020 INIT).

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](#) – 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. Instead, we might be confronted with much of the same as before, albeit under changed circumstances: a bit more solidarity and slightly less secondary movements, which, nonetheless, result in a transfer of jurisdiction to states further north. That may not be the reset button some many had hoped for, but it could be a realistic assessment of what can reasonably be achieved at this juncture.

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 saying it's a perfect proposal.'](#) She was certainly correct, as the initial reaction of southern states to the solidarity mechanism and northern states to the phenomenon of secondary movement indicated. However, she might be equally right that the proposal is 'balanced' in terms of Member States interests and that they might eventually say: 'let's work on this.'

Let's assume the proposals were adopted without major modification: would the situation be satisfactory in the medium run? I doubt that the cleavages between northern and southern states would be overcome. On the one hand, the

solidarity mechanism depends on a [quasi-permanent negotiation of state contributions](#), which could facilitate the legislative procedure but at the cost of continued disputes among Member States about respective solidarity contributions. On the other hand, the new rules on secondary movements cannot be expected to be a game changer. Irregular movements would persist, including the transfer of jurisdiction.

This could result in a vicious circle with continued reciprocal accusations about the lack of solidarity and the persistence of secondary movements. Instead of mutual trust, reticence among Member States would be enhanced. The end result may be convergence on the lowest common denominator: prevent refugees from entering Europe in the first place to avoid poisonous debates about solidarity and secondary movements.

For those who do not want such an outcome, the lesson for the policy debate stands out: overcome the false dichotomy between either more solidarity or less secondary movements and between either positive incentives or negative sanctions to prevent the latter. Try to optimise compliance by designing rules that might work reasonably well in practice. This would 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.

FURTHER READING

ODYSSEUS BLOG

Evelien Brouwer, 'Migration flows and the reintroduction of internal border controls: assessing necessity and proportionality', [EU Immigration and Asylum Law Blog of 12 November 2015](#).

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What a difference two decades make?

The shift from temporary to immediate protection in the new European Pact on Asylum and Migration

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The European 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](#) (hereinafter Proposal for a Migration and Asylum Crisis Regulation) as part of the [new European Pact on Asylum and Migration](#) on 23 September 2020. The

Proposed Regulation seeks to repeal the [Temporary Protection Directive 2001/55/EC](#) and aims at introducing immediate protection instead. 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. Motivation behind 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 which remains, to this date, [unimplemented](#). 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. Nevertheless, will these changes really increase the likelihood of implementation of the immediate protection status and make a difference in practice? This blog post intends to find an answer to the said question by reviewing the newly proposed immediate protection framework and comparing it with the temporary protection status.

1. ACTIVATION/TRIGGER MECHANISM

The Temporary Protection Directive was adopted and entered into force in 2001 following the refugee crisis in Kosovo. 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 (for a comprehensive analysis of the Directive see [here](#)). 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” (Art. 2(d)). For the Directive to be implemented, the Council, upon the proposal of the Commission, should adopt a decision by a qualified majority should (Art. 5).

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 (Art. 10(3)). The Commission should adopt an implementing act triggering the granting of immediate protection status with the assistance of committees of representatives from EU countries (Art. 11(2); Art. 8 of [Regulation \(EU\) No 182/2011](#)). However, if there are duly justified imperative grounds of urgency the Commission can adopt an implementing act without submitting it to the committee first. (Article 11(2); Article 8 of [Regulation \(EU\) No 182/2011](#)). This means, if the situation of crisis is so dire that makes the granting of immediate protection status absolutely urgent and necessary then the Commission does not have to

follow the [examination procedure](#) 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 shows how relevant they are in practice. Under which circumstances can the Commission trigger these mechanisms? Article 1(2)(a) of the Proposal defines 'a situation of crisis' and as I interpret this definition four conditions need to be fulfilled for a situation of crisis to exist:

1. an imminent or actual mass influx situation should exist. (unlike the Temporary Protection Directive, the Proposed Regulation does not define the term 'mass influx')
2. 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
3. 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
4. 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 CEAS or the Common Framework as set out in the [proposed Asylum and Migration Management](#)

[Regulation](#) 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, 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 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. 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.

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. 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 Temporary Protection Directive’s activation mechanism 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 [here](#) and [here](#) that the absence of clear objective indicators of a mass influx, Temporary Protection Directive’s complex and lengthy activation mechanism 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. (See [here](#) for a 2019 thesis confirming some of these arguments). Similar reasons are cited in the [Study on the Temporary Protection Directive by Beirens et al.](#), 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 no longer responds to Member States' current reality and needs to be repealed in the [Explanatory Memorandum of the Proposal for a Migration and Asylum Crisis Regulation](#). 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 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.

2. ELIGIBILITY CRITERIA FOR RECEIVING PROTECTION

Who can be granted immediate protection? Article 10 of the new Proposal 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 of being subject to bombings, attacks and armed confrontations in areas that are inhabited or frequented by civilians could be granted the immediate protection. The Commission has the authority to designate the specific country of origin, or a part of a specific country of origin of displaced group which will 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 will be possible. This is unlike the Temporary Protection Directive which clearly notes exclusion decision should follow an individual assessment in line with the principle of proportionality (Art. 28 of the Temporary Protection Directive).

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 (See article 2(c) of the Temporary Protection Directive; [Skordas](#)) 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](#) and [CJEU's Elgafaji judgment](#). 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 persons fleeing political persecution, systematic violations of their human rights, oppressive regimes etc. For example, in theory while persons fleeing [Aleppo](#), [Raqqa](#) 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.

3. 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](#). 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.

Rights of immediate protection status holders are drafted differently compared to those of temporary protection beneficiaries. While 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 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.

4. ACCESS TO INTERNATIONAL PROTECTION PROCEDURES & 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 (Art. 4 of the Temporary Protection Directive). Whereas, immediate protection can be granted for maximum for one year although the Commission has the authority to decide how long immediate protection will continue (Art. 10 of the Proposal for a Migration and Asylum Crisis Regulation). This means, the Commission can designate a certain period less than a year during which processing of international protection applications can be suspended and immediate protection will be granted to persons instead.

5. CONCLUSION

Implementation of immediate protection introduced by the Proposal for a Migration and Asylum Crisis Regulation and temporary protection are tied to an activation/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, 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 established protection framework. Broadening the personal scope of immediate protection can enable the proposed framework to more effectively deal 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 large number of displaced persons in mass influx situations to giving 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 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.](#) 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 wants. Hence, only time will tell whether the narrowed down scope of immediate protection would be enough to address this particular concern. In light of the fact the Commission has not proposed activating the Temporary Protection Directive 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.

FURTHER READING

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Beirens, S. Maas, S. Petronella & M. Van der Velden, M. (2016). [Study on the temporary protection directive](#): Final report. European Commission.

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A New Common European Approach to Search and Rescue? Entrenching Proactive Containment

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THE EU (NON-)RESCUE PARADIGM

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' (p. 1, New Pact), avoiding the kind of piecemeal *ad hoc*-ism that may degenerate in [Moria-like](#)

[fiascos](#) (pp. 3 and 13, New Pact). This requires a ‘comprehensive approach’ (cf. [Moreno-Lax and Papastavridis](#)) that recognises ‘collective responsibilities ... and tackles the implementation gap’ of the relevant standards (p. 3, New Pact), while ensuring solidarity (p. 5, New Pact), including in the maritime domain (p. 6, New Pact). 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 border management’ and as ‘a shared responsibility’ of both the Union and its Member States (p. 13, New Pact).

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 ‘dangerous attempts to cross the Mediterranean continue to bring great risk and fuelling criminal networks’ (p. 13, New Pact). Accordingly, the measures proposed to develop the purported ‘common European approach to search and rescue’ (heading, section 4.3) centre on ‘ensuring effective migration management’ (p. 14, New Pact). 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 (pp. 13-14, New Pact). These measures may, as an add-on, '**contribute** to saving lives at sea' (p. 13, New Pact), but this is not the priority. The priority, again, is to curb 'dangerous journeys and irregular crossings' in partnership with third countries and the prevention of the facilitation of unauthorised arrivals (p. 14 and sections 5 and 6, New Pact).

This entrenches a two-pronged model of [proactive containment](#) that prioritises the fight against irregular migration above all else (see also the blogposts by [Guild](#) and [García Andrade](#) in this series) based on two components: on the one hand, enlisting countries of origin and transit as deputised (extraterritorial) enforcers of Schengen controls and, on the other hand, countering the facilitation of irregular movement through the criminalisation of smugglers, traffickers, and even of [not-for-profit organisations](#), except in certain circumstances discussed below. In my view, what the **common European approach to search and rescue** there by amounts to is the official endorsement and formal entrenchment of the [rescue-through-interdiction/rescue-without-protection paradigm](#) that has developed in practice since Frontex launched its [first maritime \(border surveillance\) operation](#) back in 2006.

In its latest stages of formation, this model has been characterised by an '[interdiction by omission](#)' strategy based on the [negation of rescue](#), including through outright [abandonment at sea](#) of survivors, the [withdrawal of naval assets](#) from Frontex and EUNAVFORMED operations, or the [reduction of operational areas](#) covered by maritime missions to avoid contact with potential 'boat migrants', as well as by the [use of drones](#) and [information-sharing capabilities](#) to allow [third-country interceptions](#) of potential shipwrecks. Port closures and the [criminalization of 'solidarity rescues'](#) undertaken by civil society organizations are also representative of this trend. The overarching goal, in the words of the EEAS, is to '[save lives by reducing crossings](#)', so as 'to better **contain** the growing flows of illegal migration' across the Mediterranean, in line with the [Presidency Conclusions of June 2015](#) (§3). 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 irregular crossings. With this in mind, the Commission has proposed two soft-law instruments to deliver its vision: a [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](#) ('SAR Recommendation') and the [Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence](#) ('Criminalisation Guidance'), 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 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 crystalized. 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 will allow for some conclusions on the implications that ensue.

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 (e.g. [Lampedusa tragedy](#) of 2013) which led to the launch of the Italian ***Mare Nostrum Operation*** in 2014, withdrawn one year after and replaced with FRONTEX-coordinated border control (rather than rescue) missions ***Triton, Triton+*** and ***Themis***. Gaps in SAR capacity were met with increased death rates at sea, earning the Mediterranean the title of '[deadliest frontier](#)' worldwide—the Commission refers to [IOM data](#) counting over 20,000 fatalities since 2014 (Recital 3, [SAR Recommendation](#)). SAR NGOs emerged as a result to try fill those gaps in SAR provision. Although their presence was initially welcomed and their cooperation with Italian, Maltese and Greek coastguards run smoothly for a period of time, this changed in 2017 when the Italian government signed its infamous [MoU with Libya](#) in February 2017, to jointly fight irregular migration across the Central Mediterranean route, followed by the controversial [Code of Conduct](#) for NGOs involved in migrants' rescue operations at sea in July 2017, which among other things required them '***not to obstruct Search and Rescue operations by official Coast Guard vessels, including the Libyan Coast Guard***' (§9). This led to the [criminalisation of the IUVENTA crew](#) and the impoundment of their vessel in August 2017, after ***Jugend Rettet refused to sign the Code***, due to several clauses being considered in breach of international law. 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, which may amount to atrocity crimes, as indicated by the [ICC Prosecutor](#) in her investigation.

The [wave of criminalisation of SAR organisations](#) and the delegitimisation of maritime arrivals was reinforced once Salvini became Italy's Interior Minister in 2018, when he adopted a special security decree implementing a ['closed ports' policy](#) banning SAR NGOs from entering Italian ports and disembarking survivors—regardless of Italy's obligations under EU and international law. 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, would have been agreed in intergovernmental and typically secret negotiations brokered by the Commission (sometimes with Council input). The unsubstantiated belief that rescue creates a ['pull factor'](#), which 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. 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.

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, aiming for a structural, Europeanised solution that would make the system more stable and predictable (as [analysed elsewhere in this blog](#)). The outcome, however, was meagre and failed to bring the scheme within the EU 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 legitimatising 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 multiple [other organisations](#), while UNHCR continued to consider [Libya an unsafe place for disembarkation](#). EU support and persistent Member States' engagement with the Libyan Coastguard have been normalised as a result. The [EU Trust Fund for Africa](#) is a direct mechanism buttressing the externalisation of SAR and the containment of maritime arrivals of seaborne refugees and other forced migrants ensuing from the Malta approach (the misuse of which has been [denounced](#) at the European Court of Auditors and the European Parliament).

THE COMMON EUROPEAN APPROACH TO SEARCH AND RESCUE

Building on the Malta approach and to avoid [a repeat of the closed ports incidents](#), the Commission now proposes 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. The novelty lies in the solidarity relocations proposed in the [Migration Management Regulation](#) discussed by [Maiani](#) in this series. But there is very little on the bread and butter of SAR as such that has been provided in the New Pact. The focus, instead, as already stated, has been on ‘migration management’ (paras 1 and 2(b), [SAR Recommendation](#)).

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’ (Recital 1, [SAR Recommendation](#)), 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’ (p. 13, New Pact). 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’ (p. 13, New Pact), omitting the fact that

Frontex has no specific mandate to engage in proactive SAR and has, in the very recent past, been confronted with allegations of failure to respond to distress calls, if not directly [contributing to push-backs](#) and [ignoring 'instructions](#) to move...outside *Triton's* operational area' for the purpose of rendering assistance to migrant boats to avoid coming into contact with them and triggering rescue obligations in their regard.

On the contrary, the SAR Recommendation appears to rely on the increased 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 (Recitals 4-5, [SAR Recommendation](#)), but without calling on them for additional efforts, despite a reference to the explicit request by the European Parliament to that effect (Recital 6, [SAR Recommendation](#)) 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' (Recital 10, [SAR Recommendation](#)). No additional assets or resources are requested or organised. The only provision made is for an Interdisciplinary Contact Group of relevant stakeholders, including Frontex, SAR NGOs, academics, and international organisations, (Recital 16, [SAR Recommendation](#)) to develop best practices, exchange information and reinforce cooperation between flag and

coastal Member States (Recitals 15-16 and paras. 1 and 2, [SAR Recommendation](#)).

POLICING HUMANITARIANISM

At the same time, the SAR Recommendation contains 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’ (Recital 9, [SAR Recommendation](#)). It is unclear whether the necessary implication is that rescue should not be performed if it risks jeopardising ‘effective migration management’ as interpreted by the Commission (p. 14, New Pact and para. 1, [SAR Recommendation](#)), which laments (in Recital 13, [SAR Recommendation](#)) that ‘continued disembarkations ... have direct consequences on [Member States’] migration management systems and place increased and immediate pressure on [them]’.

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 (p. 14, New Pact). Several measures, which in themselves constitute forms of [criminalisation of humanitarianism](#) in the broad sense, are

proposed in the SAR Recommendation for this purpose. On the premise that SAR NGOs may conduct ‘consecutive rescue operations before disembarking [survivors]’ (Recital 8, [SAR Recommendation](#)) and act on their own motion, 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 (Recital 11, [SAR Recommendation](#)), the Commission feels this requires special rules of control, even though this behaviour is, in reality, [in perfect conformity](#) with international maritime conventions and the law of the sea.

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 (Recital 12, [SAR Recommendation](#)), 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’ (Recital 12, [SAR Recommendation](#)). There are, however, no instances of any SAR NGO vessel having failed to comply with registration and safety of navigation rules in the past. It is also telling that the same level of scrutiny does not apply to the Libyan Coastguard and similar actors with which the coastal Member States and the EU routinely cooperate. And no attention is paid to the fact that oftentimes the complexity of rescues is compounded by a [refusal to allow disembarkation](#) at safe ports on the EU side.

In addition, the rules on safety of navigation and rescue capacity for the performance of SAR duties are primarily addressed to the States party to the [Search and Rescue Convention](#). They concern foremost State-run rescue services rather than private vessels, which, if States complied with their rescue duties effectively and in good faith, would only sporadically need to intervene in SAR incidents—rendering SAR NGOs obsolete and their activity unnecessary on the grand scale. The proposal by the Commission to turn the scheme upside-down and ask for the enforcement of rules originally designed for States party’s fleets on NGO vessels, which have only stepped in to remedy the gap left by the questionable disengagement of Member States from effective SAR at sea, is cynical, to say the least. It amounts to a kind of reversed stoppel argument that is used to obstruct their intervention. Not only are States not being required to observe their SAR obligations, as codified in the [SAR Convention](#), but they are encouraged to instead somehow ‘transfer’ those obligations to the NGO sector 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 (Recitals 14, 15, and 16, [SAR Recommendation](#)) 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’ (para. 2, [SAR Recommendation](#)). To that end, the framework should specifically aim to provide ‘appropriate information as regards the operations and the administrative structure’ of SAR NGOs (Recital 15, [SAR Recommendation](#)), hence Europeanising policing practices that restrict rather than facilitate rescue activities.

CRIMINALISING SOLIDARITY

The proposed common European approach to search and rescue, therefore, encloses a paradox: on the one hand, it relies on the enhanced SAR capacity represented by private vessels operated by NGOs in the Mediterranean, while, on the other hand, it raises suspicion of their undertakings, which it attempts to control, police, and ultimately suppress to the maximum extent (*cf.* [Starita](#)). This is particularly evident from the manner in which the Commission [Guidance](#) against the criminalisation of humanitarian assistance [has been framed](#).

Despite criticism by the 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), 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' (p. 3, [Criminalisation Guidance](#)), the response by the Commission has been lukewarm. 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' (§ 4.(i), [Criminalisation Guidance](#)), the [Guidance](#) fails to provide examples of what exactly should be understood as 'humanitarian assistance' or at which point precisely should it be considered as being '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' (§ 4.(ii), [Criminalisation Guidance](#)), which leaves ample margin for speculation.

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' (p. 7, [Criminalisation Guidance](#)), 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 to protection from ill-treatment or against **refoulement**. Conversely, due to the prohibition on any State claiming 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 international treaties, can validly be established to deliver orders with legal effect to foreign ships (Art 89 UNCLOS). Freedom of navigation and the rule of exclusive flag-state jurisdiction support this interpretation (Arts 90 and 92(1) UNCLOS). 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’ (SOLAS, Annex, Ch. V, Reg. 34-1). Such level of discretion is essential to respond promptly and adequately to changing circumstances. And, as regards the content of any SAR instructions by rescue coordinating 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 (Arts 2(3) and 87(1) UNCLOS). In such situations, shipmasters have what has been called a [‘right to obey international law’](#).

Nonetheless, instead of clarifying the specific conduct to be punished and the conditions under which it should be prosecuted—as would have been expected for compliance with the principle of legality of offences under Article 49 of the [Charter of Fundamental Rights](#)—the final assessment, in the Commission’s view, pertains to the judicial authorities of the Member States. They—instead of the EU legislator—are the

ones who will ‘have to strike the right balance between the different interests and values at play’ (p. 6, [Criminalisation Guidance](#))—as if the (customary international legal) duty to rescue or the absolute principle of *non-refoulement* admitted such a balancing against, presumably, the migration management interests of the Union and the Member States. The only policy recommendation made by the Commission is just to ‘*invite*’ Member States ‘to use the possibility provided for in Article 1(2) of the [Facilitation Directive](#)’ of exonerating humanitarian assistance from the scope of criminalisation (p. 8, [Criminalisation Guidance](#)). This means that a matter of EU legality (and its compatibility with international norms) has been left unresolved and relegated to a mere issue of domestic implementation and policy preference that may ultimately have to be resolved by Member State Courts ‘on a case-by-case basis’ (§ 4.(iii), [Criminalisation Guidance](#)). As a result, the practices of policing and criminalisation of SAR NGOs witnessed since 2017 may continue unabated. 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](#), can and will foreseeably [continue](#) under the terms of the [Criminalisation Guidance](#).

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 [Sea Borders Regulation](#), 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’ (p. 14, New Pact). 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. 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 States’ own [extraterritorial obligations vis-à-vis third-country nationals](#), 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](#).

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 proposal for [Migration Management Regulation](#) (MMR). As explained by [Maiani](#), the system can work in ‘basic’ mode, ‘pressure’ mode, or ‘crisis’ mode, the details of which he has discussed at length. In its basic variant, designed to replace the current *ad hoc* solutions (Arts 47-49 [MMR](#)), the Commission assesses, in its yearly Migration Management Report (Art 6(4) [MMR](#)), whether a Member State is faced with ‘recurring [maritime] arrivals’ following rescue operations (Art 47(1) [MMR](#)) and determines its solidarity needs, in terms of relocations and other contributions potentially taking the form of return sponsorships or capacity-building measures (Art 45 [MMR](#)). The other Member States are then ‘invited’ to notify the ‘contributions they intend to make’ (Art 47(3)-(4) [MMR](#)). If offers are sufficient, the Commission adopts a ‘solidarity pool’ (Arts 48(1) and 49 [MMR](#)). If not, it will convene a ‘Solidarity Forum’ (Arts 46 and 47(5) [MMR](#)) and ask Member States to adjust their pledges. If the offer still falls ‘significantly short’ of the needs, the Commission will adopt an implementing act (Art 48 [MMR](#)) identifying relocation targets for each Member State according to a distribution key, weighing total population and total GDP (Art 54 [MMR](#)). 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 (p. 19, [MMR](#) Memorandum). 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 (p. 19, [MMR](#) Memorandum). If these, too, become insufficient, then the ‘pressure’ or ‘crisis’ mode of the solidarity system may be activated (Arts 49(3) and 50-53 [MMR](#)).

The relocation scheme can also be triggered by a ‘request for solidarity support’ (Art 49(1) [MMR](#)) from the Member State faced with repeated maritime entries. 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’ (Art 49(1) [MMR](#))—which may replicate the ‘ship-by-ship’ formulas of the present. It is then for the Commission, alongside FRONTEX and EASO, ‘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 (Art 49(2) [MMR](#)).

From this brief overview the overly complex nature of the system proposed becomes quite visible and a number of shortcomings can already be detected. First of all, it is unclear

what happens if Member States fail to engage with the SAR Solidarity Response Plan (Art 47(4) and Annex I [MMR](#)), 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 disembarkations are withheld. The system depends on constant negotiation and relies on an amount of good faith and mutual trust between the Member States that has yet to materialize. 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 quotas of contributing Member States in certain situations (Art 52(5) [MMR](#)), 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 Visegrád States regarding the [2015 relocation scheme](#) cannot be discarded. 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.

LIMITLESS DEFECTION POSSIBILITIES

The situation is exacerbated by the new rules on *force majeure*, contained in the [crisis and force majeure Regulation](#) (CFMR), which the Commission 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’ (Art 1(2) [CFMR](#)), *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’ (Recital 7 [CFMR](#)) and it alludes to the COVID-19 pandemic and lessons to be learnt from it (pp. 4 and 9-11, [CFMR](#) Memorandum). But rather than condemning the [violations witnessed throughout this period](#)—vaguely referring to the [unlawful suspension of the right to asylum](#) by the Greek authorities in March 2020 as a ‘political crisis’ (p. 9, [CFMR](#) Memorandum), 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*. What will happen if a majority of Member States unilaterally declare 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 (Art 3(4) [CFMR](#)) and exempt Member States from Dublin transfers for an unspecified amount of time, since there is no deadline applicable to the length of the *force majeure* situation (Art 7(2) [CFMR](#)). This can paralyse the system and lead to a legalised form of fragmentation, which could lead to a *de facto* de-harmonization of the legal and policy framework as we know it, unwalking the steps towards a *common* European system in this field (see further [De Bruycker](#)).

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 benefitting 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 in any way. Although they will be able to oppose a relocation decision (on the same [limited basis](#) as they could [challenge a Dublin transfer](#)), it is unclear the degree to which extended family links, support networks and other relevant connections will be taken in consideration, considering the 'swiftness' with which the pre-screening and relocation procedures are supposed to take place. The 'meaningful links' that need to be factored into relocation decisions (Art 49(2) [MMR](#)) have not been defined in the proposed Regulation (*cf.* Art 2 [MMR](#)), beyond the allusion to 'diploma[s] or qualification[s] issued by an educational institution established by a Member State' (Recital 50, [MMR](#)) and the '**targeted** extensions of the family definition' (p. 24, [MMR](#) Memorandum). The fact that some relocations (or return sponsorships) will, therefore, be arranged against their will entrench, rather than reduce, possibilities for supposed abuses by individual beneficiaries and boost the much-despised secondary movements of protection seekers within the Schengen area (discussed by [Thym](#)). Another issue the Commission fails to address is the potential incompatibility of these arrangements with Article 3 of the [1951 Refugee Convention](#), which forbids discrimination amongst refugees. This system, however, singles out maritime rescuees on the basis of their mode of arrival to the potential country of refuge,

putting them at a potential disadvantage on grounds unrelated to their protection needs.

There are also significant hidden costs for benefitting Member States, who will need to undertake substantial processing of SAR arrivals *before* relocation can be pursued, including for [pre-entry screening](#) purposes, entailing health and security checks (Arts 6(6), 9 and 11, [pre-entry screening proposal](#)), which may exclude applicants from relocation (Art 57(2) [MMR](#) and p. 12, [MMR](#) Memorandum); for the registration of asylum applications (Arts 10 and 14(6), [pre-entry screening proposal](#)); 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 (Art 57(3) [MMR](#)); and regarding the [border procedure](#), if persons fall within its remit (Art 41, [revised Asylum Procedures Regulation proposal](#)), since this disqualifies them from relocation too (Art 45(1)(a) [MMR](#)).

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 models (Arts 4-6 and 7-9 [CFMR](#)) is uncertain. Also, and most importantly, there are no guarantees against defection on the part of fellow Member States. In cases of non-compliance, the benefitting

Member State will in fact be 'stuck' with the persons concerned.

CONCLUDING REMARKS: 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. This, I fear, will create more problems than will solve.

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]' (p. 20, New Pact), 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' (p. 20, New Pact). Rescue will thereby be further [securitised](#) and configured as a form of '[sovereign capture](#)' which becomes undistinguishable from interdiction, 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. [Pull-backs, detention and repression](#) by

partner States will thus become further [normalised](#) as legitimised means within the ‘targeted migrant smuggling partnerships’ the EU is to conclude with third countries (p. 16, New Pact), 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. The combination of pre-entry screening arrangements, border procedures, and complex solidarity relocations embeds rather than overhauls the [failed hotspot approach](#). 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) will be disfigured and betrayed. So, in the final assessment, I need to concur with [Commissioner Johansson](#) and conclude that ‘no one will be satisfied’ with the New Pact—at least, no one should.

FURTHER READING

Eleonora Frasca, Luigi Gatta, 'The Malta Declaration on search & rescue, disembarkation and relocation: Much Ado about Nothing', [EU Immigration and Asylum Law Blog of 3 March 2020](#).

Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein and Brian Opeskin, '[Securitization of Search and Rescue at Sea: The Response to "Boat Migration" in the Mediterranean and Offshore Australia](#)', (2018) 67(2) *International and Comparative Law Quarterly* 315.

Francesco Maiani, "'Regional Disembarkation Platforms" and "Controlled Centres": Lifting The Drawbridge, Reaching out Across The Mediterranean, or Going Nowhere?', [EU Immigration and Asylum Law Blog of 18 September 2018](#).

Violeta Moreno-Lax, '[Protection at Sea and the Denial of Asylum](#)', in Costello, Foster, and McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford: OUP, 2021).

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(3) *German Law Journal* 385.

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EU ACTS

Commission Communication on a New Pact on Migration and Asylum, [COM\(2020\) 609](#) of 23 September 2020.

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](#) of 23 September 2020.

Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, [C\(2020\) 6470](#) of 23 September 2020.

Commission 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](#) of 23 September 2020.

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.

Commission Proposal for a Regulation introducing a screening of third country nationals at the external borders, [COM\(2020\) 612](#) of 23 September 2020.

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.

The new design of the EU's return system under the Pact on Asylum and Migration

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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 scheduled for 2021. These proposals aim to increase 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. Some of these proposals are likely to increase solidarity among the Member States, and achieve more effective returns that also observe fundamental rights - such as a more humane return border procedure compared to the procedure included in the [2018 Recast Return Directive](#) proposal of the European Commission. Nevertheless, the increased links between asylum and return policies, the extension of the scope of application of the return border procedure coupled with the limitation of procedural guarantees risk to weaken the right to asylum, the principle of *non-refoulement* and diminish the role of courts in favour of an executive dominated migration management system.

Against this background, this post examines:

- 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 new EU system of returns.

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 (Art. 80 TFEU). During this period, reform discussions have taken a turn towards returns as the preferred solution to deal with (future) migration crisis (see also Jessica Schulz [post](#)). The ‘fight against irregular migration’ seems to have become a key objective of the CEAS, overshadowing the international obligation of the Member States to protect refugees (see the [Council June 2019 Conclusions](#)). Prioritising returns appears to gather more consensus among Member States than the implementation of the international obligation to protect refugees (see [2018 Home Affairs Council meeting](#)). Building on this consensus, the European Commission has made effective returns a key driving force for the new reform of the CEAS as proposed by the Pact on Asylum and Migration. This approach is novel to the solutions proposed, so far, by the European Commission to reform the EU’s return system. Up until March 2017, the Commission’s solution for returns’ inefficiencies 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](#) and [2017](#)). This Directive was already widely considered a [normative example](#) on returns for

legal orders around the globe. It was thus thought that, unlike the CEAS instruments, there was no need for reforming it. The Commission's approach changed in 2018, when it tabled with urgency a [proposal](#) amending the Return Directive. The Commission did not conduct an impact assessment, nor an updated evaluation of the Directive implementation, nevertheless both a substitute [impact assessment](#) and an [evaluation of domestic implementation](#) were done by the European Parliament (for a commentary of the proposal see *Galina Cornelisse* and *Madalina Moraru* [post](#)). The 2018 Recast Return Directive proposal 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*; *Screening Regulation*; *amended Asylum Procedures Regulation*; *amended Eurodac*; *Regulation addressing situations of crisis and force majeure*. 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 (see [Paula García Andrade blog](#)). 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 (see [Lilian Tsourdi chapter](#)).

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); changes in the migration flows, 'as the arrival of third-country nationals with clear international protection needs in 2015-2016 [which] 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%](#)) (see [amended Asylum Procedure Regulation proposal](#), pp.10-11).

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 (see pp. 41 and 88 of the [Commission Staff Working Document](#)). These causes overlap to a certain extent with the shortcomings identified by this [book](#). The recent

jurisprudence of the CJEU confirms the still persistent deficient transposition of the [Return Directive](#), 10 years since the entry into force of this instrument (see CJEU [Zaizoune II](#) on Spain; and [JZ](#) on Netherlands). Member States' practices still diverge on: who should be returned (see *Galina Cornelisse's* [chapter](#)); how the return should take place (see chapters in Part III of this [book](#)); and where to return safely (see the 2019 [EPC Report on non-refoulement gaps in the EU return and readmission system](#)). It remains to be seen whether the answer to the above challenges is the Pact's increased procedural harmonisation and links between asylum and return policies. This new play-out may result, first, in ever more complicated return procedures which Member States may struggle to implement in very diverse national legal systems and, second, weakening of the [right to asylum](#). Nevertheless, the increased nexus between returns and asylum policies is likely to be maintained as it has, so far, succeeded to move forward the long stalled discussions on the CEAS reform.

THE PACT'S RE-DESIGN OF THE EU'S RETURN SYSTEM

Five main pillars define the changes the Pact proposes to introduce to the EU's current return system.

1. 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' (see p. 1). 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.' 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.

2. 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 (amended [Asylum Procedure Regulation](#) proposal, p. 3). 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’. 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’ ([Commission Staff Working Document](#), p.5). The Pact thus proposes to link asylum and return procedures in three main ways.

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’ (see Art. 35a of the [Asylum Procedure Regulation](#)). This combined administrative procedure endorses a procedural model which

appears to be followed by a [minority](#) of Member States. The rationale behind this policy approach is that multiple hearings are merely delaying or even jeopardising effective returns (see governments' observations in [Gnandi](#)). While the CJEU found this compressed model permissible under the Return Directive ([Gnandi](#)), its implementation has been found to fall short of good administration obligations, rights of defence and *non-refoulement* guarantees (see more in *Valeria Ilareva* and *Serge Slama's* [chapters](#)). Among the reasons for this deficient play-out of the combined 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' ([2020 EP Study](#), p.30). 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, Art. 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 European Parliament Study above, 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 Arts. 10 and 15 Qualification Directive). In [Mukarubega](#) and [Boudjlida](#) 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.

Second, the [Asylum Procedure Regulation](#) merges the appeal procedure for asylum and return decisions within the border procedure within one single procedure. While this policy approach can have a positive effect on the right to asylum since third-country nationals may receive sooner a decision on their asylum claim and thus avoid prolonged situations of legal uncertainty (see [B.A.C. v Greece](#)), it can also negatively impact the right to asylum. 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 (see Arts. 53 and 54 of [Asylum Procedure Regulation](#)). 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 (see *Papapanagiotou-Leza* and *Stergios Kofinis* [chapter](#)). 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 (see *Alessia di Pascale* [chapter](#)). 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 (see the Greek and German chapters [here](#)). 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.

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 ([2017 EMN Report on Effective Returns](#)). Both the 2018 Recast Return Directive and the amended Asylum Procedure Regulation proposals should better address the shortcomings identified by the [FRA Opinion](#) and the [European Parliament Study](#) in the implementation of a merged asylum and return procedure. Notably, this procedure 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’ (FRA Opinion – 1/2019, p.32).

3. 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](#). The Pact’s version is a compromise between the 2018 Proposal to [Recast the Return Directive](#), which followed restrictive domestic border systems (e.g. by Sweden and Germany, see

[2020 European Parliament Study](#), pp 43-45), and the current regular border procedure provided by the [Return Directive](#).

The Pact introduces a streamlined border procedure which is based on two pillars: [screening procedure](#) and a two-phased [border procedure](#), which have been described in more detail by *Lyra Jakuleviciene* and *Jens Vedsted-Hansen* in their posts to this series, [here](#) and [here](#). 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 (see Article 41a of the [Asylum Procedure Regulation](#) proposal), 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 (see Art. 41a(5) of the [Asylum Procedure Regulation](#) proposal). 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 these changes, the return border procedures 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 European Commission's 2018 proposal to recast the Return Directive. For instance, voluntary return will be mandatory (Art. 41a [Asylum Procedure Regulation](#)). Return decisions have to provide full justification based on individual assessment instead of the brief format provided by Art. 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 (see Art. 53 of the [Common Procedure Regulation](#)). 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 (see Art 53(7)(a) [Asylum Procedure Regulation](#)). 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 decision (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 (see Sylvie Sarolea [chapter](#), and the CJEU judgments in [LM, B](#)).

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 guarantees in cases of 'irregular crossings' in border areas. Under current Art. 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 (Art. 4(4)), this does not always happen in practice ([2020 European Parliament Study](#), pp 43-45).

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. The gaps between the effectiveness of complaint mechanisms on paper and practice have been eloquently shown in relation to the current border procedures (see *Moraru and Nica* on [Romania](#)).

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 [1]). 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 decisions-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 outmost importance as clearly shown in this [book](#).

4. A NEW FORM OF SOLIDARITY: RETURN SPONSORSHIP AND RELOCATION OF RETURNEES

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 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 (Art. 45(1)(b) of the [Regulation on Asylum and Migration Management](#)). The return solidary scheme implies logistical, financial and counselling help provided by the supporting Member State (see [Art. 55](#)). If such efforts prove to be unsuccessful after 8 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 of 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 ([Art 52\(3\)](#)). Although the Regulation encourages the mutual recognition of return decisions by the Member State under [Directive 2001/40/EC](#), 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 (on Dublin system shortcomings, see *Francesco Maiani's* [blog](#)).

The return sponsorship builds on bilateral forms of return solidarity already followed by some of the Member States (e.g. Belgium and France, according to the [Director of Operations at the Fedasil in Belgium](#)). The Pact thus replaces 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. 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 ([FMS and others](#), see *Jacek Bialas chapter on Poland*), 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 (*Elspeth Guild blog*). Given that third countries will face sanctions for lack of cooperation on readmission (The [Recast Visa Code](#) proposal, Article 25(a)), it is likely that returns will be accepted even in the absence of any connection between the third country and the returnee.

5. THE PROMOTION OF ASSISTED VOLUNTARY RETURN PROGRAMMES: CHALLENGES FOR VOLUNTARINESS AND NON-REFOULEMENT

The Pact refers to Assisted Voluntary Return as the preferred mode of return, and will dedicate to it an entire [Strategy](#) in its 2021 programme. 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](#) case shows that Assisted Voluntary Return programmes implemented by Member States with the help of International Organisation for Migration are sometimes neither ‘voluntary’, nor humane. The future Strategy on Assisted Voluntary Return programmes should prohibit

Member States from requiring waivers of legal responsibility to be signed by returnees, and should require 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 (for a list of these judicial standards, see *Jean-Baptiste Farcy's* [chapter](#)).

CONCLUSION: TAKING COURTS' CASELAW MORE SERIOUSLY

While the Pact does remedy some of shortcomings of the 2018 Recast Return Directive proposal's 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*; 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](#). 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*. 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 (e.g. Addis, [LM](#), [B](#)).

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 (see the [Report of the UN Special Rapporteur on the human rights of migrants](#)).

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, Fundamental Rights Agency 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 facing increasing political pressures when giving effect to fundamental rights in asylum and return cases (see the [paper](#) of Judge *Serge Bodart* see the Separate Opinion of Judge Albuquerque in [MA and others v Lithuania](#)).

[1] Szulecka, 'The undermined role of (national) case law in shaping the practice of admitting asylum seekers in Poland' in *European Journal of Legal Studies' Special Issue Migrants and Law. What European Courts Say*, edited by Veronica Federico, Madalina Moraru and Paola Pannia (forthcoming in 2021).

FURTHER READING

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Negotiating with Third Countries under the New Pact: Carrots and Sticks?

By *[Elspeth Guild](#)*

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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. The image has two faces, one inwardly facing, how is the EU's record perceived within the EU itself and the other outwardly facing, how is the EU's record in this area perceived by states around the world. In this blog I will only examine the external dimension, how the international community views the EU's policies, legislation and action on borders, migration and asylum. The new Pact on Migration and Asylum (2020) promotes greater cooperation

with partner countries to achieve EU borders, migration and asylum objectives. The assumption is that states outside the EU are willing partners to achieve EU goals in this area. However, as I will discuss here, this rosy picture is not entirely justified. The EU finds itself face to face with a conundrum: the greater EU and Member State exercise of coercion in border, migration and asylum policies, the harder it is for the EU to find countries willing to partner with it to achieve the EU's border management objectives.

The EU's action (or inaction) in this area is by no means a secret. 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. This attention has been sustained in the international media, from the New York Times to Al Jazeera or the South China Morning Post (to name only a few of the English language outlets with an international reach). Rarely are the images positive regarding the reception of asylum seekers or migrants at EU external borders or border control operations. Instead, almost without exception they focus on the horrors – the [Moria refugee camp in flames](#), the Presidents of the Commission, Council and Parliament at the Greek Turkish border encouraging border guards to prevent people who resemble the [popular image](#) of [a refugee](#) or [refugee policy in general](#).

Many international and regional organisations with human rights mandates frequently issue press releases deploring the EU's actions in the field. For example, the UN's Office of the Commissioner for Human Rights has frequently criticised EU border and migration management on the grounds [of failure to respect human rights](#). The UN High Commission for Refugees is equally [a regular critic of EU actions which negatively impact refugees](#). Even UN organisations which do not have a central human rights mandate, such as the [International Labour Office](#), have criticised EU policies on border management.

Regionally, the [Council of Europe's Special Representative on Migration and Refugees](#) has also kept a close watch on EU developments, not always favourable. The Heads of Government of all the South American states [unanimously condemned the EU's expulsion policy](#) as designed in the Return Directive. Similarly, international non-governmental organisations such as [Amnesty International](#), [Human Rights Watch](#) or [the Open Society Institute](#) are regular and often fierce critics of EU policies in this area.

At the UN, the procedure towards the negotiation of the Marrakesh Compact for Safe, Orderly and Regular Migration adopted in December 2018, provided an opportunity for states to express their views on borders, migration and the treatment of foreigners generally. The first year was devoted exclusively to stock-taking which permitted a wide ranging debate on the

subject. Having participated as an academic observer in a number of the open sessions for representatives of states at the [UN in Geneva](#), I was taken aback by the strength of criticism which delegates from many countries in different regions of the world expressed regarding the EU and its border policies.

Notwithstanding this rather sustained and negative reception for EU policies around border management, migration and asylum, the new Pact reveals continuity regarding the EU's approach to cooperation with third countries. The focus, as I will develop below, remains directed towards what third countries should do to improve the attainment of EU objectives with little attention to the interests of third countries (other than financing).

THE EU'S EXTERNAL REPUTATION IN BORDERS, MIGRATION AND ASYLUM

As if the 2015-16 arrivals and their extensive mediatisation were not enough, the continuous loss of life through unsuccessful attempts to cross 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. Additionally, the criminalisation of NGO rescue

workers in particular in Italy including the highly mediatised 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. 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.

The plight of refugees and migrants seeking to arrive in Europe but blocked by national and EU-funded border guards 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. While this is small in comparison with the cases which the Court receives on length of criminal and civil procedures, [the border, migration and asylum cases](#) tend to be highly sensitive for member States. 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 refugees. From the perspective of the regional and international 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). The various instances have yet to determine these complaints.

The EU itself drew world attention to its battle against the arrival of persons suspected of seeking to enter the EU irregularly 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](#)) or to stop the arrival of persons entering the EU irregularly

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. Compared with Frontex's global figures on entry of third country nationals into the EU in 2019 which exceeded 61.5 million entries, the figures of irregular entry by sea [are statistically insignificant](#). Yet, the [EU's military operation in the Mediterranean](#) rumbles on (most recently prolonged to 30 November 2020 ([Council Document 9688/20](#))) though its website indicates an increasing number of military assets which are no longer deployed.

In the face of so much international attention which is paid by media and international and regional institutions to the treatment of refugees and migrants seeking to enter the EU, most of it ranging from fairly to extremely negative, it is not surprising that [the Pact itself indicates that cooperation in border management is sensitive for partners](#).

FINDING WILLING PARTNERS?

The Commission's New Pact on Migration and Asylum (COM 609(2020)) reflects 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

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' (p. 17). The problem with this formulation is that it 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. This statement gives the impression that the EU does not have sufficient regard to the duty of countries outside the EU to protect the interests of their citizens.

The Pact fails to take a rounded international relations or diplomacy 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 the world, these are images of their citizens suffering degradation and humiliation by EU and Member State actors and actions. The more mediatised 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 [1] (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.

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](#), analysed [here](#). 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. I criticised this linkage at the time 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. 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.

INTERNATIONAL RELATIONS AND EU BORDERS, MIGRATION AND ASYLUM POLICY

The international relations weakness of the Pact is, no doubt, a reflection of the marginalisation, even at the current time, of foreign policy, international relations and diplomacy in the EU. This is not least the result of the late arrival of the competence 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 contrast 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 an agency, the European External Action Agency, 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.

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. The exception will be those states with totalitarian regimes which do not listen to their citizens.

[1] The EU avoids using the term ‘expulsion’ which is standard language to describe the removal of an alien from a state’s territory, used in international human rights conventions such as the International Convention on the Protection of All Migrant Workers and their Families 1990 (UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html> (visited 4 November 2020)) or Protocol 7 European Convention on Human Rights (Council of Europe, *Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984, ETS 117, available at: <https://www.refworld.org/docid/3ae6b3654.html> (visited 4 November 2020)). Instead the EU uses the word ‘return’ which is unknown in international law but which it has defined in Article 3 Directive 2008/115 as “return’ means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:

- his or her country of origin, or

- a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or
- another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;”

cf. European Union: Council of the European Union, *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*, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, available at: <https://www.refworld.org/docid/496c641098.html> (visited 4 November 2020). For the sake of clarity to readers who may not be familiar with EU definitions, I have chosen to use the internationally recognised term.

EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?

by [Paula García Andrade](#)

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The [New Pact on Migration and Asylum](#) presented by the European Commission on 23rd September 2020 assigns a prominent place to cooperation with third countries of origin and transit of migrations flows. As an essential element of any coherent and efficient immigration 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 ([here](#), p. 2), 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](#). 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 these aims to be achieved under 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.

Still those familiar with the international agenda of the EU on migration will have the impression that they have ‘heard this song before’. This post 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 on the

tools to be used. Therefore, after evaluating the allegedly new Commission's orientations, the focus will be put on the instruments foreseen for the design and implementation of this international cooperation, by analysing what is new, what is missing and what is in excess within the 'toolbox' of this external dimension.

A NEW PARADIGM FOR COOPERATION WITH PARTNER COUNTRIES?

According to the [Commission's press release](#), the Pact presents "a change of paradigm in cooperation with non-EU countries", cooperation that will be centred on comprehensive, balanced and tailor-made migration partnerships, mutually beneficial for the parties involved. 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](#). The idea was particularly 'officialised' at the [Global Approach to Migration \(GAM\)](#) adopted in 2005, 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” ([here](#), p. 17), in which not only EU interests but also those of partner countries are taken into account, already appeared at the adoption of the revised [Global Approach to Migration and Mobility](#) (GAMM) in 2011, which also added the external dimension of asylum.

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, are innovative aspects in the EU approach ([see Guild’s contribution to this collection](#)). 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 (see contribution by Moraru). It was the (already) “[New Partnership Framework on Migration](#)”, adopted in the summer of 2016 under the [European Agenda on Migration](#), that 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](#) (art. 25a) which introduced a concrete mechanism to implement negative conditionality between a

third country's cooperation on readmission and the issuance conditions for Schengen visas to its nationals. That mechanism was considered unfair to EU partners' citizens and prejudicial to good international relations (see Guild's analysis [here](#)), while it could also lead to a violation of the visa facilitation agreement the EU might have concluded with that country. In this regard, the New Pact and its legislative package consolidates this controversial conditionality principle by extending it to the identification of "any measure" that could improve the readmission cooperation of that country's authorities ([art. 7 Proposal for an Asylum and Migration Management Regulation](#)).

The New Pact also explicitly insists on the traditional "root causes of migration" approach, by which development cooperation is used to reduce migration from countries of origin (see Chetail's chapter [here](#)). 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" ([here](#), p. 20). 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 (see [here](#), p. 178 ff). 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.

EU funding – hopefully from the [Asylum and Migration Fund](#) and [Internal Security Fund](#) and thus unrelated to development cooperation - will also be essential to achieve the goal of strengthening migration governance and management in partner countries through capacity building actions ([here](#), p. 20-21). The latter includes border management, search and rescue capacities, or well-managed asylum and reception systems, for which the operational support of EU home affairs agencies is explicitly emphasized in the Pact (see [Tsourdi’s contribution](#) to this collection). The novelty here might lie in the provisions on external action foreseen at the [already existing proposal for a European Agency for Asylum Regulation](#), in which cooperation with third countries appears to be more structured and strengthened - including coordination of information exchange, operational activities, coordination of resettlement actions and implementation of international agreements on asylum -, mirroring thus the [quite developed external action of the European Border and Coast Guard Agency](#). For the rest, the Pact is not very specific on the actions through which the Union will improve refugee protection worldwide and support host countries, apart from providing funding and mobilising national efforts on resettlement.

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 and omissions the New Pact contains regarding the toolbox for cooperation with third countries, including also what, in my view, should have been left outside the Pact.

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 ([here](#), p. 23). The proposed new instrument appears as a EU policy framework to cooperate with third countries through coordination and funding in better matching labour and skills needs in EU Member States, as well as supporting mobility schemes for work or training and capacity building in fields such as labour market, skills intelligence, vocational education, integration of returning migrants and

diaspora mobilisation. The Commission's proposal is inspired from the so-called [Global Skills Partnerships](#). These instruments, foreseen in the [UN Global Compact for Safe, Orderly and Regular Migration](#), are 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, whose contours are explored in detail by Sarolea and Farcy in this blog, are also presented as "part of the EU's toolbox for engaging partner countries strategically on migration" ([here](#), p. 23), and thus an incentive for control-oriented cooperation. According to the Commission, a strong engagement of Member States will be needed, 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 in the text whether these instruments will provide for real schemes for the admission of labour migrants. Unfortunately, only a timid intervention of the Union is offered here and in the rest of 'legal pathways' that the Commission is suggesting (such as the [recommendation](#) on resettlement commitments). This evidences, once again, a certain lack of will in honouring the Treaty objectives to make the most of EU 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 ([here](#), p. 16). As these elements are already being part of the EU external action on migration, together with the operational 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.

WHAT IS MISSING?

Firstly, certainty on the toolbox and the instruments it contains 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, such as Mobility Partnerships ([MPs](#)) and Common Agendas on Migration and Mobility ([CAMM](#)), the emblematic instruments of the GAMM. Apart from implementing existing ones, will these general and comprehensive policy frameworks

for migration cooperation continue to be offered to new 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 with partner countries? Without having accurate replies to these questions, I would rather bet on the abandonment of MPs and CAMMs as general policy frameworks of cooperation given that the Union has been departing from the GAMM in the past years.

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, in order to address legal migration issues avoiding the complications inherent to the exercise of Union external competences in this field is to be highlighted ([here](#), p. 185 ff), in addition to their traditional importance for integration purposes by providing a reinforced status of rights for migrants coming from associated countries. More recently, Association Councils have also been used as tools for formalising migration dialogues with partner countries (see [here](#), p. 28-30) or developing cooperation on specific migration-related fields, such as [social security coordination](#). In spite of the importance they may have for migration purposes, the Pact does not mention these 'global' international agreements.

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 ([here](#), p. 16). In spite of the advantages for migration cooperation that the mobilisation of all the arsenal of EU external action may have, it is at least debatable, in my view ([here](#), p. 182 ff, and [here](#)), 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 lead rather 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.

Soft law is still present too. Non-legally binding instruments are preserved – implicitly as usually - 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 (eg. MPs) or as a way to achieve – a quite otherwise difficult - consensus at the international level (eg. UN Global Compacts). It is however

worrisome to find an explicit reference to soft law precisely on readmission cooperation, (the New Pact refers both to “EU agreements and arrangements”, [here](#), p. 21, the latter exemplified in the [*Joint Way Forward on migration issues with Afghanistan*](#) and some other informal EU [readmission arrangements](#)), in which legal safeguards, democratic accountability and monitoring seem all the more necessary (see [Ott](#)). 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 high-level conference the Commission will organise with Member States and key EU stakeholders for their launching. To this effect, it should be recalled that 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.

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 the [Proposal for an Asylum and Migration Management Regulation](#), includes cooperation with relevant third countries as its first component. However, contrary to the Commission’s position,

the orientation and objectives presented in the Pact 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 MS competences](#) is so evident. To this effect, the Commission’s New Pact highlights that the EU and its Member States shall act united and calls for an effective and systematic coordination between both levels of action ([here](#), p. 18). The Pact does not specify however – just as the Stockholm Programme ten years ago, which also insisted on this duty and even asked the Commission for a report - the ways and means by which this coordination should take place. It will be 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.

FURTHER READING

ODYSSEUS BLOG

[Majd Achour](#) and [Thomas Spijkerboer](#), “The Libyan litigation about the 2017 Memorandum of Understanding between Italy and Libya”, [EU Immigration and Asylum Law Blog of 2 June 2020](#).

Elspeth Guild, “Amending the Visa Code: Collective Punishment of Visa Nationals?”, [EU Immigration and Asylum Law Blog of 10 May 2019](#).

Mauro Gatti, “EU States’ Exit from the Global Compact on Migration: A Breach of Loyalty”, [EU Immigration and Asylum Law Blog of 14 December 2018](#).

Mauro Gatti, “Too Much Unity in the European Union’s External Migration Policy?”, [EU Immigration and Asylum Law Blog of 20 July 2018](#).

Paula García Andrade, “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, [EU Immigration and Asylum Law Blog of 17 January 2018](#).

FROM TAMPERE 20 TO TAMPERE 2.0.

Elspeth Guild, 'The Global Approach and Partnership 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* ([EPC, 2019](#)), p. 49-60.

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RELEVANT WORKS BY THE AUTHOR

Paula García Andrade, "The EU Accession to the Geneva Convention Relating to the Status of Refugees: Legal Feasibility and Added Value", *Spanish Yearbook of International Law* 23, 2019, pp. 193-211, available [here](#).

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Mobilities: Intersecting Policy Universes, Brill/Nijhoff, 2018, pp. 299-325.

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Paula García Andrade and Iván Martín, EU cooperation with third countries in the field of migration, Study for the LIBE Committee, European Parliament. Nº. PE 536.469, Brussels, October 2015, available [here](#).

RELEVANT LEGAL AND POLICY DOCUMENTS

Commission Communication on a New Pact on Migration and Asylum, [COM\(2020\) 609](#) of 23 September 2020.

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](#) of 23 September 2020.

Commission Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, [C\(2020\) 6467](#) of 23 September 2020.

Financial Implications of the New Pact on Migration and Asylum: Will the Next MFF Cover the Costs?

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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

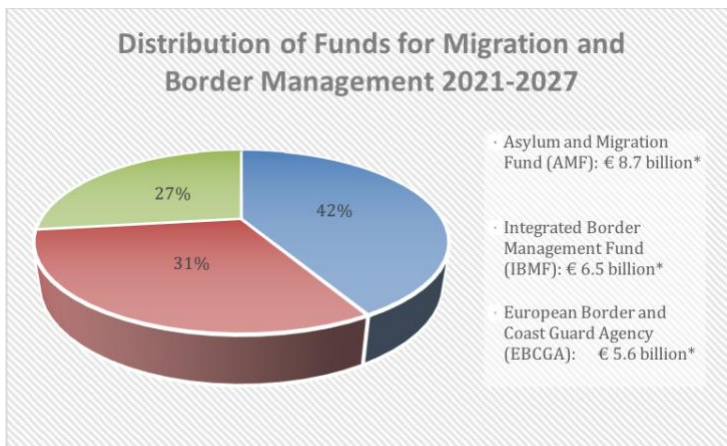
new legislative proposals. The aim of this blog post is to look at the financial implications of the Migration Pact and to examine whether the ambitions of the new Pact are reflected in the 2021-2027 MFF. The text will try to respond to two questions. Firstly, it will examine whether the Migration Pact generates new costs for the EU and its Member States and whether these costs have been calculated into the MFF. Secondly, it will consider whether the creation of additional costs by the Migration Pact could interfere with its successful adoption and implementation.

The timing of the Commission's proposal of the Pact coincided with the final phase of extremely difficult negotiations on the adoption of the next MFF for the period 2021-2027. The agreement among Member States on the next 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 next MFF would amount to € 1,074.3 billion with an additional € 750 billion for the Recovery Fund (all the amounts in the text are provided in 2018 prices). Out of that amount, the conclusions allot a total of € 22.7 billion to Heading 4 titled 'Migration and Border Management'. Out of this amount, € 8.7 billion has been dedicated to the Asylum and Migration Fund (AMF), € 5.5 billion to the Integrated Border Management Fund (IBMF) and € 5.1 billion to the reinforced European Border and Coast Guard Agency (EBCGA).

In addition, the external dimension of migration will be an important component of the Neighbourhood, Development and International Cooperation Instrument (NDICI), whose financial envelope would amount to € 70.8 billion, as specified in the Conclusions. 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 the funds important for the financing of EU migration and asylum policies. First, the IBMF received an additional € 1 billion and now amounts to €6.5 billion. Second, the 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.

On 16 December 2020, the [European Parliament gave its consent](#) to the regulation on the 2021-2027 MFF, which was then [unanimously adopted by the Council](#) and came into force on 1 January 2021. As opposed to the settled future of the 2021-2027 MFF, the future of the 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 its financial implications are among the reasons behind the uncertain prospects of the new Pact, as they could

impact both on the negotiations preceding its adoption and on its successful implementation.



*COMMITMENTS, in 2018 prices

2. BACKGROUND: EU MIGRATION AND ASYLUM POLICIES IN THE MULTIANNUAL FINANCIAL FRAMEWORKS

Generally, the asylum, migration and border control budget had traditionally 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. This was 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 with the 2021-2027 MFF. The previous experience of insufficient funding during the 2015/16 refugee crisis, which led to the reshuffling of funds and significant use of contingency margins and flexibility instruments, was 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 and asylum management 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 Pact.

Second, the amount of € 22.7 billion, which has been agreed for migration and border management in the 2021-2027 MFF, represents a significant increase in comparison to the 2014-2020 € 10 billion budget spent on migration and asylum. However, at the same time it also amounts 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 to 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 PACT

This blog post will focus on three legislative proposals contained in the Pact (for an overview and analysis of the main points of the Pact, see Daniel Thym's post [here](#) and for an insightful critique of its wasted potentials, see Philippe de Bruycker's post [here](#)): the Proposal for a Regulation introducing screening of third-country nationals at the external borders ([Screening Proposal](#)), the Amended proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU ([Amended Asylum Procedures Proposal](#)) and the Proposal for a Regulation on asylum and migration management ([Management Proposal](#)).

Based on the explanatory memoranda of all the Commission's legislative proposals contained in the Pact, all expenses resulting from the Pact "can be covered by the resources available to the Member States under the new MFF". Consequently, no additional financial or human resources are requested based on the wording of the legislative proposals. However – as will be shown in the proceeding analysis – this neither means that the EU budget is intended to cover all the costs Member States will have based on the Proposals, nor that it will actually be able to do so, for four reasons. First, a number of EU projects not only in the area of migration and asylum, but also in other EU policy areas, such as environmental law, social policy or data protection, have to be borne, at least partly, by Member States. Second, 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 25% of the costs from their own resources. Thirdly, only 40% of the AMF and of the BMVI budget (called 'thematic facility') is flexible – meaning that it can be used for tasks not initially planned – whereas the remaining 60% is allocated to Member States' predetermined national programmes. Finally, financial implications of the Migration Pact could neither be taken into consideration in the Commission's proposal of the next 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 – meaning the flexible part of the AMF and 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.

3.1 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 refer them to the appropriate procedure. 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. 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.

Point 4 of the Explanatory Memorandum of the Screening Proposal estimates that the financial resources necessary for

its implementation is € 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 Proposal could not be included in the Commission’s proposal of the next MFF, as it was drafted in 2018, much before the Screening Proposal was put forward. 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 (for a detailed analysis of screening procedures, see the post by Lyra Jakulevičienė [here](#)). Identity, registration and security checks, as well as preliminary vulnerability assessments – as the mandatory elements of the screening exercise – 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 pandemic-free times. Nevertheless, it is questionable to what degree Member States will be able to gain 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 debriefing 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 their absconding, Member States will have to create sizable facilities where third-country nationals will be accommodated during the screening and border procedures.

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, personnel 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. Namely, the relevant EU funding instrument for the tasks encompassed by the Screening Proposal – as well as for other activities related to border management – is the

BMVI, which is part of IBMF. 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 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. 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 (see Art. 11 of the IBMF Proposal). In most cases, the Union co-financing rate will not exceed 75% of the total expenditure of a project. 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 value, which are defined by the Commission in its work programmes. Full 100% funding may be granted for operating support and emergency assistance. Consequently,

with the adoption of the Screening Proposal, Member States – primarily frontline ones – will face a number of financial uncertainties associated to 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.

3.2 FINANCIAL IMPLICATIONS OF BORDER PROCEDURES

Once the screening procedure is over, third-country nationals are channelled into asylum, or return procedures (for an analysis of border procedures, see the posts by [Jens Vedsted-Hansen here](#) and by Francesco Maiani [here](#)). Border procedures, which are stipulated by the Amended Asylum Procedures Directive, bring a fundamental procedural change to EU asylum law. 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“. Consequently, border procedures are conceptualised as a novel, pre-entry step, whereby asylum applications would be assessed without authorising 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 'Dublin' procedure for determining which Member State is responsible for examining the asylum application, the intention behind the Amended Asylum Procedures Proposal obviously is 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 (unless the asylum applicant belongs to one of the categories where border procedures are compulsory). 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 the territory.

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 for the completion of the border procedure, 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 usually resort to detention during the 12-week period and, consequently, may have to make significant investments in setting up the adequate infrastructure for that

purpose. Additionally, the whole border procedure will – in line with its name – take place at the external borders, thus requiring the setting up of necessary facilities. 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”. Consequently, the implementation of border procedures will be a highly costly and demanding activity, which will fall on frontline Member States. Insufficient investment in border procedures will result in poor implementation of the Pact and, possibly, 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 for the problems that might arise. 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. However – as in the case of the financial support for screening from BMVI – it remains to be seen whether the AMF will contain sufficient funds for 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 and enables flexibility for the actions which have not been initially planned. According to the Explanatory Memorandum, it is expected that the resources contained in the AMF will be sufficient. Only time can tell whether this presumption is accurate. 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”.

Additionally, the Union co-financing rate from the AMF will in most cases not exceed 75% of the total expenditure of the project. 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. Full 100% funding could be granted for operational support and for emergency assistance. 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.

3.3 FINANCIAL INCENTIVES FOR SOLIDARITY

Over the past decade, solidarity has been one of the most 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. 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 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. Solidarity contributions consist of relocations of asylum seekers who are not subject to border procedures, relocations of beneficiaries of international protection, ‘return sponsorships’ of illegally staying third-country nationals and capacity-building and operational support affecting the benefitting Member State. 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). 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.

This post will not analyse whether solidarity arrangements set by the Management Proposal respond to the actual needs of the most affected, frontline Member States (for this, see [here](#) Francesco Maiani's post). The aim of the following paragraphs is to examine to what extent 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 the Commission's direct management or, depending on the situation, through shared management, i.e. jointly by the Commission and individual Member States, by topping up national programmes. The AMF foresees relocations as one of the possible uses of the thematic facility. However, it does not envisage a special financial envelope which would be allocated exclusively for relocations. 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 receive a € 10 000 contribution for each relocation of asylum seekers, beneficiaries of international protection and illegally staying third-country nationals subject to return sponsorship, whereas the contribution is increased to € 12 000 for unaccompanied minors. The same allocations apply in case

of resettlements to the EU from third countries. This approach, whereby a legal act (in this case, the AMF Regulation) is amended by adopting a completely different act (Management Proposal), 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 trilogues, 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 its implementation for the period 2021-2027 will amount to € 1 113 500 million, which should cover total costs of all relocations. 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. The lump sums of € 10 000 and € 12 000 are also considerable, but they will most likely not be sufficient to pay for the costs of integrating a refugee, which opens up the question whether more money should be allocated for this purpose. Additionally, it is questionable whether these amounts will create a sufficient incentive for Member States to opt for more relocations.

The experience from the two Relocation Decisions, adopted in the midst of the 2015/2016 refugee influx, is not promising (see [here](#) and [here](#)). Both Decisions stipulated that the

Member State of relocation would receive a lump sum of € 6 000 for each relocation. After the expiry of the two-year implementation period of the Decisions, the results were disappointing. Out of 98 256 relocations, [only 34 705](#) third-country nationals were relocated (21 999 from Greece and 12 706 from Italy). 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. 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 PACT

The implementation of the 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 relocation 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 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. It is difficult to predict whether this is accurate, especially for border 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 Pact will surely play a major role in future negotiations.

Additionally, the complexity and deficiency of the rules proposed by the Pact create an additional risk in terms of the link between the financial impacts of the Pact and its successful implementation. The rules set by the 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 capacitated and equipped. 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 would react to such violations and whether it is going to try to compensate for deficiencies of the procedures by being reluctant to start infringement proceedings against the most 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 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.

This blog post is further elaborated under the same title in the my paper in the forthcoming book by Springer titled ["The Future of Legal Europe: Will We Trust in It?"](#) (eds.G. Barrett, J-P. Rageade & D. Wallis). I am grateful to Mr. Guy Stessens, Deputy Director at the Council of the EU, and Mr. Jeroen Lenaers, MEP, as well as to other interviewees from the European Commission, the Council and the European Parliament, who preferred to stay

anonymous. I am also thankful to Prof. Daniel Thym and Prof. Philippe de Bruycker for their valuable comments and to Marco Paron Trivellato for his practical help. The usual disclaimer applies.

FURTHER READING

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Political Compromise on a Recast Asylum Reception Conditions Directive: Dignity Without Autonomy?

by [Lieneke Slingenberg](#)

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In 2016, as part of the [European Agenda on Migration](#), the European Commission published a [proposal for a recast of the Asylum Reception Conditions Directive](#). This proposal aimed to further harmonise reception conditions in the EU; 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’](#). Subsequently, the presidency presented some amendments to the compromise text, on the basis of which negotiations had to be reopened. The proposal has, to date, not yet been adopted. See also [here](#).

In its 2020 [New Pact on Migration and Asylum](#), the European Commission indicates that it supports the political agreement reached and urges for adoption ‘as soon as possible’. From the [‘roadmap’](#), it appears that this should happen in the second quarter of 2021. At present, however, this seems unlikely given that Member States at the external border, in particular, [insist on treating all CEAS legislation as a package](#).

In this blogpost I will discuss the most important changes laid down in the Commission proposal and the [provisional compromise text](#), published in October 2020 and the [further proposed amendments by the Council](#) (referred to together as ‘the proposals’), as compared to the current [Asylum Reception Conditions Directive 2013/33/EU](#), against the background of relevant CJEU case law. The first section will discuss a few issues where the proposals provide for more clarity in the obligations for Member States and decrease Member States’ discretion. The second section deals with the relevant concept of a ‘dignified standard of treatment’. The third section discusses a few proposals that do not limit Member States’ discretion, but considerably limit applicants’ autonomy. I will not pay much attention to the detention of asylum seekers, as

this has been dealt with already in the [blogpost of Galina Cornelisse](#).

1. MORE CLARITY, LESS DISCRETION?

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](#) 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](#)), a recast was adopted in 2013. In its 2016 proposal, the Commission observes again that 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’. The proposal aims, therefore, once again to further harmonise the reception conditions in the EU. In this section I will list a few examples of where the proposals meet this objective by providing more clarity and reducing Member States’ discretion.

SCOPE

The provision on scope, Article 3 of the Directive, 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](#). 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, it is now clear that from the moment an applicant expresses a wish to apply for international protection, (s)he falls under the scope of the 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](#) (see CJEU 25 June 2020, case C-36/20 PPU ([VL](#))).

In this light, it is hard to understand the Commission’s remarks in the explanatory memorandum to the new [Proposal for a Screening Regulation](#) (see on this proposal the [blogpost of Lyra Jakulevičienė](#)). 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’*, according to the Commission. This also seems to follow from Article 9(2) and (3) of the Proposal for a Screening Regulation that oblige Member States to identify special reception needs and provide adequate support. This is an obligation that already follows

from the 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 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 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.

DEFINITION OF ABSCONDING

Another issue on which the new proposals provide more clarity is the issue of absconding. As Galina Cornelisse writes in her [blog on detention](#), this concept is important as it is used in the proposal for the Asylum Reception Conditions Directive as a new ground for restricting applicants' freedom of movement (Article 7) and as a new ground of detention (Article 8). Until now, EU law does not contain a definition of this concept, even though it is already a relevant concept in for example the [Dublin III Regulation \(EU\) No 604/2013](#). 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](#), 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](#) (19 March 2019, case C-163-17), this will not be part of the EU definition if the compromise text on this is adopted. Possibly 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*.

DEFINITION OF MATERIAL RECEPTION CONDITIONS

The Commission proposes to add ‘other 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’. This is an important addition to the provisions that Member States need to ensure for applicants and is in line with the judgment of the ECtHR in the case of [M.S.S. v. Belgium and Greece](#) (21 January 2011, no. 30696/09), in which it refers to the applicants’ most basic needs as ‘food, *hygiene* and a place to live’.

ACCESS TO EMPLOYMENT

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 limits the discretion of Member States a bit further by stipulating 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, applicants who are subject to a Dublin transfer decision are 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 ([K.S. and others](#), 14 January 2021, Cases C-322/19 and C-385/19). Interestingly, the Court of Justice did not only base its 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.

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.

Other provisions on specific vulnerable groups have also been clarified. For example, 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, see [here](#)). 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](#).

REDUCTION AND WITHDRAWAL OF RECEPTION CONDITIONS

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. Just as in the [2008 proposal](#) for a recast of this first Directive, the Commission proposes in its 2016 proposal to delete the possibility to entirely *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'. This limits Member States' discretion significantly. Based on case law of the CJEU, however, even 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 ([Haqbin](#), case C-233/18).

In addition to withdrawing material reception conditions in case of violent behaviour, 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. The accompanying document to the compromise text shows that this is based on the council position, while the European parliament had strong reservations. 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.

2. THE UNCLEAR BUT RELEVANT 'DIGNIFIED STANDARD OF LIVING'

The Commission refers in three provisions of its proposal to a 'dignified standard of living'. Member States should ensure a dignified standard of living in cases where they do not provide the regular material reception conditions. The regular material reception conditions need to ensure 'an adequate standard of living, which guarantees their subsistence and protects their physical and mental health' (Article 16(2)). Member States can deviate from this standard, 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](#) (12 November 2019, case C-233/18), 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. The Court of

Justice, therefore, uses a lower threshold than the one necessary to reach the minimum level of severity under Article 3 ECHR, as interpreted by the European Court of Human Rights (see for example [N.H. and others v. France](#), 2 July 2020, nos. 28820/13, 75547/13 and 13114/15). This raises the question whether it is possible at all to make a distinction between the EU legal concept of a dignified standard of living and an adequate standard of living. It follows that the possibility to deny all material reception conditions to applicants who are not in the Member State that is responsible under the Dublin Regulation, as laid down in the proposals, is not in conformity with the Charter. The same is true for the possibility to withdraw material reception conditions in case 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, as laid down in the compromise text (see above).

3. LESS AUTONOMY FOR APPLICANTS

Most of the proposals discussed in section 1 result not only in more clarity and less discretion for Member States, but also in a (small) increase in rights for applicants for international protection. Other proposals do not necessarily limit Member States' discretion or increase applicants' rights, but, to the contrary, limit applicants' autonomy. This section will discuss a few examples of such proposals.

RESIDENCE RESTRICTIONS

The proposals provide in different ways for further limitations on applicants' possibilities to choose a place of residence. First of all, the proposals introduce sanctions for applicants who are present in a Member State other than the one in which the applicant is required to be present. See on this also Daniel Thym's [blog on secondary movements](#). On the basis of the Commission proposal, such applicants would not be entitled to schooling and education for minors, access to the labour market, and general material reception conditions. They should be provided, however, with a dignified standard of living (see above) and 'suitable educational activities' for minors. The compromise text limits these possibilities a bit by not excluding such an applicant from the provision on schooling and education for minors and by stipulating that the applicant will only be excluded from access to the labour market and material reception conditions from the moment s/he has been notified of a decision to transfer him or her to the Member State responsible in accordance with the Dublin Regulation.

The proposals do not only provide for punishments for applicants who are subject to a Dublin transfer, but also allow Member States to impose different kind of residence restrictions on other applicants. As compared to the current Asylum Reception Conditions Directive 2013/33/EU, the proposals have much more emphasis on restrictions on

freedom of movement. 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 kind of residence restrictions that increase in the degree of severity:

Art.	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))
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"> - Losing the entitlement to material reception conditions (Article 7(1)) - Reduction or withdrawal of the daily expenses allowance or reduction of other material reception conditions (Article 19(2)(a)) - Detention, provided there is still a risk of absconding ((Article 8(3) (c))

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', use general and broad conditions, and two of them allow Member States to act without an administrative decision, this is clear example of an issue on which Member States still have a lot of discretion, while applicants' autonomy is limited. This is further strengthened by the proposal to define a risk of absconding, which is one of the conditions for imposing the most far-reaching residence restrictions, as not requiring any intention on the side of an applicant (see above).

DAILY EXPENSES ALLOWANCE

The Commission proposes to retain the current obligation for Member States, to provide all applicants, in addition to housing, food and clothing, with a daily expenses allowance (Article 2(g) of Asylum Reception Conditions Directive 2013/33/EU). The European Parliament agreed with this proposal ‘in order to ensure a minimum autonomy to the applicants’. The Council, however, wished 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](#) that this definition does not specify the starting moment for providing the monetary amount, nor the exact part that it should constitute. Hence, this is another example of an increase in Member States’ discretion, at the expense of applicants’ autonomy.

NEW GROUND FOR REDUCTION AND WITHDRAWAL: NON-COMPLIANCE WITH INTEGRATION MEASURES

A final example is a new ground for reducing benefits. Material reception conditions can be reduced 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.

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, this will have a considerable impact for both Member States and applicants.

Overall, Member States will have more positive obligations under the new recast Asylum Reception Conditions Directive to provide applicants with reception conditions, including personal hygiene products, to provide applicants with equal treatment as nationals as regards some working conditions and social security benefits, and safeguard applicants' special

needs. This means that applicants' standard of living will be better ensured. On the other hand, Member States will have more possibilities (or even obligations) to interfere with applicants' lives and limit their autonomy, by determining their place of residence, withholding a daily expenses allowance, subjecting applicants to integration measures and exclude them from the labour market. Applicants' [freedom, especially in a negative sense](#), will, therefore, not increase, or even diminish, if the proposals are adopted.

The proposals are not completely in line with CJEU case law, some of which 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 were 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 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.

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Legal Pathways to Protection: Towards a Common and Comprehensive Approach?

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The [New Pact on Migration and Asylum](#) includes a full section calling for further international cooperation with third countries to address migrant and refugee movements to Europe. This section lays the emphasis on the development of “legal pathways to protection” in Europe, amongst other international cooperation priorities presented elsewhere in this blog series (Guild [here](#) as well as Moreno-Lax and Moraru forthcoming). The New Pact is accompanied by a [Commission recommendation](#) (hereafter “the accompanying recommendation”) that specifies EU actions to be taken in the years to come, from the development of resettlement

programmes at EU level and the adoption of a Union-wide resettlement framework, to the promotion of community sponsorship programmes at the domestic level.

In both the New Pact and the accompanying recommendation, “legal pathways to protection” is used as an umbrella term. It refers to the resettlement of refugees under a global initiative run by the UNHCR ([here](#), para. 9). It also refers to other humanitarian admission schemes developed at the domestic level, including protected entry procedures – e.g., humanitarian visas – and private/community sponsorship programmes – e.g., the “humanitarian corridors” set up by faith-based organisations in Italy (described by Bianchini [here](#)). Unlike legal pathways resulting from labour mobility schemes, which are aimed primarily at meeting EU labour market needs (to be discussed by Sarolea and Farçy as part of this blog series), the “legal pathways to protection” are being developed to guarantee access to safety for those fleeing persecution and other forms of serious human rights violations.

This blogpost highlights how the New Pact and the accompanying recommendation contribute to the development of a common and comprehensive approach to legal pathways to protection, beyond resettlement. It argues that there is “soft” harmonisation at play, and seeks to identify the main driving policy logics and tensions behind the

harmonisation process, including how they are likely to impact forthcoming developments in the field.

1. BETWEEN EXECUTIVE DISCRETION AND MOUNTING INCENTIVES

Policy discussions on legal pathways to protection for refugees are far from new and can be traced back to longstanding global debates on “burden sharing” and “responsibility sharing”, i.e., how to fairly allocate the responsibility to protect refugees among the international community. Recurring episodes of migrants drowning in the Mediterranean Sea led to [mounting calls from civil society organisations](#) to establish safe routes to protection for those fleeing persecution and other serious human rights violations. These calls would also be echoed at EU level, by the [European Parliament](#) and the [Task Force Mediterranean](#), a group of experts appointed by the Commission and at the request of the Council to identify policy solutions for preventing the death of migrants en route to Europe.

EU involvement was once limited to providing financial support to domestic initiatives for resettlement.^[1] But the 2015 refugee “crisis” triggered additional developments such as the [European Agenda on Migration](#), which called for the development of a common approach to resettlement. Two EU resettlement programmes were established as a result. The [first programme](#) was to distribute 20,000 refugees among the

member states based on a distribution key. Following its completion, it was quickly followed by the [next programme](#), which sought the resettlement of 50,000 refugees. Its implementation by the member states is still ongoing.

The EU resettlement programmes are *ad hoc* and not intended for replication as such. Furthermore, the participation of the member states remains voluntary. In seeking to put forth a broad regulatory framework that would allow the systematisation of *ad hoc* initiatives, the Commission proposed the adoption of a regulation establishing a [Union Resettlement Framework \(URF\)](#). The aim of the resettlement framework is to guide the development and implementation of future EU programmes. It sets up an institutional procedure to establish annual resettlement plans and provides the operational procedure, as well as eligibility criteria, guiding the implementation of future EU resettlement programmes. It does not impose resettlement obligations on the member states.

Discussions on the adoption of the common resettlement framework are ongoing. But these developments should not obscure the fact that amidst heightened political and social divisions on how best to address migration and refugee movements to Europe, member states have been reluctant to accept any kind of legally binding commitments on the matter. Some member states are, in principle, opposed to any scheme that would require them to welcome additional refugees, as

illustrated by their stark refusal to implement the legally binding decisions of the EU Council to relocate a number of asylum seekers from member states located at the EU's external borders ([CJEU, C-643/15 and C-647/15](#)). Most remain cautious about ceding domestic control over developments in the field. They stress the discretionary prerogatives of their executives, as illustrated by the opposition to litigation attempts of asylum seekers who had sought to obtain humanitarian visas ([CJEU, C-638/16 PPU](#) and [ECtHR, *M.N. v. Belgium*](#)).

Executive discretion thus remains the dominant policy approach. But external incentives to develop legal pathways to protection in Europe have also intensified at the global level. The UN Global Compact on Refugee led to the establishment of the Global Refugee Forum to encourage the engagement of the international community in UNHCR-run resettlement programmes as a means of easing the pressure on host countries ([pts. 17-19](#)). During the first meeting of this annual Forum in late 2019, EU member states pledged to resettle 29,500 refugees for the period 2020-2021 ([EU Commission, Press release of 18 December 2019](#)).

Moreover, in its ruling in *N.D. and N.T. v. Spain*, the ECtHR referred to the Spanish procedure, which allows refugees to apply for legal access whilst *in* Morocco, to support its conclusion that the immediate expulsion measures adopted against a group of migrants at the Spanish-Moroccan border in

Melilla did not amount to a collective expulsion. This could act as an indirect incentive for states to compensate for stricter border controls by offering refugees a possibility to obtain legal access to protection (*N.D. and N.T. v. Spain* at para. 212; on the somewhat confusing reference to legal pathways in the ruling, see Thym [here](#); for critical analyses of the ruling, see also Hruschka [here](#) and Markard [here](#); see also *M.K. v. Poland* at para. 203).

2. BEYOND RESETTLEMENT

The main novelty of the New Pact is to expand the search for a common approach beyond resettlement to include legal pathways to protection more broadly, with a particular focus on community sponsorship programmes. The New Pact does not seek only to consolidate the developments that followed calls by the 2015 European Agenda on Migration for a common approach to resettlement. It also lends additional EU support for the development of domestic humanitarian admission programmes, setting out the new and additional objective of establishing a “European model of community sponsorship” ([here](#), p. 23).

In the area of resettlement, the New Pact calls for a swift adoption of the Union Resettlement Framework Regulation and the formalisation of the resettlement pledges made by the member states during the Global Refugee Forum, which may also be read as an attempt to bring these developments within

the scope of an EU-wide framework ([here](#), p. 22). The accompanying recommendation reminds the member states of the EU tools at their disposal to support the implementation of their resettlement pledges: funding from the AMIF and the upcoming AMF ([here](#), recital 17), operational support from the European Asylum Support Office (EASO) (recital 22 and point 6), and horizontal exchange of expertise and dialogue through the Resettlement and Humanitarian Admission Network (recital 19). Moreover, the New Pact calls on member states to make additional pledges from 2022 onwards “to confirm EU’s global lead on resettlement”, which seems like a call for establishing a common EU position ahead of the upcoming Global Refugee Forum ([here](#), p. 22).

In relation to humanitarian admission programmes other than resettlement, the New Pact lays the emphasis on the promotion of horizontal dialogue among member states, namely, through the involvement of the EASO (recital 29; for a broader analysis of the role of EU agencies in deepening the harmonisation process under the New Pact, see Tsourdi [here](#)). The announced EU involvement remains limited to steering the Europeanisation [2] of domestic practices through a bottom-up approach that promotes horizontal dialogue among member states. But it can be seen as one of the first steps towards a more comprehensive EU approach to legal pathways that goes beyond resettlement and includes other humanitarian admission schemes.

The resulting institutional and legal design of EU involvement in legal pathways to protection may qualify as “soft” harmonisation: it rests on soft legal provisions enacted through Commission recommendations, which are accompanied with tools supporting their practical implementation, such as funding, operational support, and a forum promoting horizontal dialogue. There are no legally binding obligations, and reliance on “hard” legal provisions is limited to the setting up of the overall institutional and operational framework on resettlement.

The soft nature of the harmonisation process is meant to reconcile the development of a common approach with the member states’ opposition to legally binding commitments towards refugees physically located outside of their territories. Despite its soft nature, however, the EU harmonisation process is not inconsequential for actual member state practices, for any attempt at developing a common policy is also bound to shape the very content of that policy in multiple direct and indirect ways. This raises the question of determining the shape of future European involvement in the field. The next section addresses that question and seeks to identify the various policy objectives behind the development of a common approach to legal pathways to protection, as *prescribed* by the New Pact’s provisions.

3. MULTIPLYING POLICY OBJECTIVES IN AN INCREASINGLY COMPLEX POLICY ENVIRONMENT

The New Pact establishes a direct connection between legal pathways to protection and the deepening of international cooperation with third countries to improve the management of migration movements to Europe ([New Pact](#), p. 17). The common approach to legal pathways, therefore, envisions a close connection with the [Global Approach to Migration and Mobility \(GAMM\)](#), which remains the overarching policy framework for the EU's external action on migration.

The GAMM is guided by the broad, and somewhat elusive, quest for a “comprehensive/global approach” to EU migration governance. Its implementation requires juggling acts involving multiple policy considerations, including fundamental rights and border control. The overall result is a complex policy field guided by objectives that are not inherently opposed to one another but generate tensions upon their implementation (see, among others, Crépeau [here](#) and the discussions that followed the adoption of the EU Migration Partnership Framework under the GAMM, summarised and analysed by Bauloz [here](#)).

These tensions have also affected the policy dynamics behind the harmonisation of legal pathways to protection. Previous EU efforts to develop a common approach on resettlement have led some observers to warn against developing a

common approach centred around border control considerations, which ultimately undermine the primarily humanitarian nature of existing resettlement programmes (Bamberg, [here](#); Carrera and Cortinovia, [here](#); Tissier-Raffin, [here](#)). These concerns resurfaced following the resettlement of refugees from Turkey as part of the so-called “EU-Turkey deal”, which has often been criticised for having the overall effect of impairing refugees’ rights (Ziebritzki, [here](#)).

Moreover, the New Pact calls for the development and implementation of legal pathways to protection in ways that also improve integration outcomes for refugees. This justifies the new focus on community sponsorship programmes, which added value in supporting the integration of the beneficiaries is being praised and emphasised repeatedly (New Pact, p. 23 and accompanying recommendation, recitals 26-29 and para. 22). There are also specific recommendations for the member states, which are invited to take necessary measures to facilitate access to education and the labour market (paras 20 and 21), and to develop their labour mobility schemes in complementary ways, which may also benefit those in need of international protection (para. 21).

The emphasis of the New Pact on integration is aimed at supporting a more sophisticated and comprehensive policy that gives due consideration to refugees’ life prospects in Europe by involving stakeholders from the private sector and the civil society. But it is also likely to generate additional

complexities in the implementation of legal pathways that will require delicate balancing acts: how to prevent the preferential treatment of some religious or ethnic groups, at the expenses of others with similar or higher protection needs? Should priority be given to the refugees with the best integration prospects on the EU labour market, or to the most traumatised ones? etc

Such complexities are likely to affect the selection of the refugees who will benefit from legal pathways. The New Pact remains silent on this issue. But earlier developments, including the Union Resettlement Framework proposal and AMIF provisions that set out the conditions under which member states can benefit from EU resettlement funds, show a paramount policy focus at EU level on the needs of “vulnerable” refugees for protection.

The focus on “vulnerable” refugees is in line with the UNHCR’s approach to resettlement ([UNHCR Resettlement Handbook](#)). It may have proven useful to guide the implementation of humanitarian aid programmes, in that it directs the attention to the most disadvantaged who need additional care. As a result, those in charge of implementing policies on the ground may benefit from the substantial leeway that allows to tailor humanitarian responses to realities on the ground. It remains to be seen, however, how such an approach could be transposed to a policy field that rests on increasingly complex policy dynamics that accrue from overlapping and sometimes

partially competing objectives. The wide margin of appreciation left to the member states means that in the end, much will depend on the actual practices at domestic level.

CONCLUSION: “IMPLEMENTATION UNCERTAINTIES”

The New Pact seeks to develop a common approach to legal pathways to protection that goes beyond resettlement and includes other humanitarian admission schemes, in particular community sponsorship programmes. It does so at a time of great reluctance on the part of member states to make any legally binding commitments. The overall result is a sophisticated but complex policy framework, which relies on soft harmonisation tools to contribute to the development of comprehensive forms of EU migration governance.

The multiple policy objectives at play are likely to generate tensions during the implementation stage. In other areas of EU migration policy, such tensions are channelled through the legal system, including via judicial interpretation. But the strong opposition of member states to legally binding commitments has so far kept the courts at bay ([Carlier and Crépeau, 2017](#)). It is thus likely that these tensions will be resolved in the informal spheres that characterises the actions of the executive bodies, raising “implementation uncertainties”, to paraphrase the introductory post in this blog series on the “legislative uncertainty” resulting from the New Pact (Thym, [here](#)).

For researchers in law, this implies a need to develop a broader methodological and theoretical framework that goes beyond the study of legal norms in their positivist sense and to incorporate an analysis of the actual practices of the authorities in charge, including how they operationalise the relatively blurred notions – e.g., the requirement to address the specific protection needs of “vulnerable” migrants – that guide their actions on the ground.

[1] Nowadays, such financial support is guaranteed by the Asylum, Migration and Integration Fund (AMIF) that succeeded the ERF for the period 2014-2020 ([Regulation EU 516/2014](#), article 17). The Asylum and Migration Fund (AMF), which will cover the period 2021-2027, will ensure continuous EU financial support for the involvement of member states in resettlement ([COM, 2018, 471](#)). For more on the financial framework supporting the objectives of the New Pact, see Goldner Lang, forthcoming.

[2] “Europeanisation” is understood here as the horizontal convergence between the policies of EU member states, resulting from a bottom-up policy dialogue between the member states (on the horizontal understanding of “Europeanisation” see [Guiraudon, 2010](#)).

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Legal migration in the “New Pact”: modesty or unease in the Berlaymont?

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Creating legal avenues to the European Union 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 the 3 million first residence permits issued by the Member States in 2019 were not delivered for the purpose of 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](#) and [2004/38/EC](#) set out the conditions of family reunification, the admission of students and researchers is now spelt out in the recast [Directive \(EU\) 2016/801](#).

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. As a result, it should not come as a surprise that the recent “fitness check” concluded that “the current legal migration framework had a limited impact vis-à-vis the overall migration challenges that Europe is facing” ([here](#), p. 105).

Given the limited added value of EU directives on labour migration, it wasn't unreasonable to expect a new look, or even a “fresh start”, on this issue. While the European Commission timidly tries to design new schemes, it fails to convince (1). Unlike other issues addressed in the “New Pact”, no legislative proposal is 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 migrants is justified by demographic considerations (an ageing and shrinking population in many Member States) and labour market needs. As the current pandemic [highlighted](#), third-country workers are overrepresented in a number of key sectors (agriculture, health care, domestic workers ...). More importantly, 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 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](#), yet since 2005 achievements have been limited, thus undermining the reputation and the credibility of the EU – as underlined by Elspeth Guild in a [previous blogpost](#).

On the domestic scene, the Commission intends to give yet another push to the reform of the [Blue Card Directive](#) 2009/50/EC. However, 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 (for a commentary of the proposal, see [here](#) and [here](#)). As the Commission does acknowledge ([here](#), p. 25), national schemes tailored to domestic needs offer greater flexibility. It seems to be willing, therefore, to abandon its earlier demand for the exclusivity of the Blue Card – a move that might facilitate the adoption of the proposal in the near future.

Other measures put forward in the Communication include a revision of the [Long-Term Residents Directive](#) 2003/109/EC - currently [under-used](#) compared to national schemes - and a

review (thus not a revision) of the [Single Permit Directive 2011/98/EU](#). The Commission states that such a review would explore ways to clarify the scope of the Directive, including admission for low and medium skilled workers. Here, the Commission 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. In a year (Q4 2021), 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](#). The core idea, which was already mentioned in the 2015 [European Agenda on Migration](#), is 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. Finally, a few years after the public consultation undertaken as part of the fitness check on the legal migration acquis, the Commission launched another [consultation on attracting skills and talent](#), which was open for comments until 30 December 2020.

For our purposes, it is also relevant to point out what is NOT included in the communication. The idea of an immigration code, advocated for by the [European Commission](#) and [academics](#) alike a few years ago, has disappeared for instance. The new pact is also silent on the admission of non-seasonal low and medium skilled workers as well as self-employed or entrepreneur migrants, although this is [arguably](#) an important

gap in the European legislation as the [European Parliament acknowledged](#). Thus, the ambition is not to extend the personal scope of the EU labour migration policy – irrespective of actual needs – but to attract and retain larger numbers of skilled and talented workers. Finally, the facilitation of intra-EU mobility is not touched upon either, with the exception of long-term residents and highly skilled workers if the reform of the Blue Card Directive is eventually adopted. The mobility of third-country nationals thus remains subject to [strict conditions](#).

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 migration policy is impaired by [both legal and political obstacles](#). 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. As a consequence, Member States can limit the application of secondary EU legislation by setting a cap to the number of labour migrants admitted on their territory. [Another consequence](#) of that provision is that the EU's external action is dependent on Member States' willingness to act. 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 projects on labour migration. Nevertheless, the Commission states that "the EU as a strong track record in labour mobility schemes" ([here](#), p. 23).

The exclusive competence of Member States to set volumes of admission for labour migrants 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*](#), Member States have tried to limit the reach of the EU's intervention in this politically sensitive field. Although the European 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 attempted reform of the Blue Card Directive shows, 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 different from one country to another and labour policies are mostly national. For instance, while Estonia wish 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 migration 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" ([here](#), p. 1), the paradigm of the EU labour migration 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 stop seeing labour immigration only as a solution to current socio-economic problems in destination countries. In the future, the EU and its Member States should move towards a more [hybrid system](#), according to which labour migrants are selected in light of different criteria (language, age, past experiences in the destination country, professional experience,...) and not only based on immediate employers' needs.

To conclude, in the field of legal migration, and labour immigration in particular, not much is to be expected in the months to come since the European Commission – aware of its limited powers – refrained from making new pledges. 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 first and the most difficult obstacle to overcome.

Integration in the New Pact: A difficult compromise between a limited EU competence and a successful policy

by Ulrike Brandl

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Integration in European Union migration policy is a topic characterised by the divergence between the lack of legislative competence of the EU and the essential importance of comprehensive and targeted integration measures for a successful migration policy. That is why the efforts for a recast of the 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 23rd September 2020 contains a separate

chapter on “[Supporting integration for more inclusive societies](#)”. This chapter enumerates a number of recommendations for Member States to promote integration. As a next step, the new [Action plan on Integration and Inclusion 2021-2027](#) – already announced in the Pact and preceded by an open consultation with stakeholders – was published by the Commission on 24th November 2020. The Action Plan is a comprehensive document which stresses key principles and values regarding integration and inclusion and also focusses on actions in main sectoral areas like education and vocational training, employment and skills, health and housing.

The 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 another reason. 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.

This blogpost intends to give an overview of the content of the Pact and the Action Plan on Integration and to highlight several critical issues. These are the unstructured reference to the rights of migrants which have to be guaranteed 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 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. This approach could lead to the effect that the measures are not target-oriented enough.

1. GENESIS OF EU EFFORTS TO PROMOTE INTEGRATION

The Action Plan 2021-2027 is the successor of the [Action Plan 2016](#). The promotion of integration measures however started much earlier. Already in 2004, the Council had adopted the [EU Common Basic Principles for Immigrant Integration Policy](#). These principles enumerated 11 short-worded basics for the development of future integration measures. They were reaffirmed by the Justice and Home Affairs Council in 2014. In

2011, the European Commission set out a [European Agenda for the integration of third-country nationals](#).

The Union also established a [European Network on Migration \(EMN\)](#) in 2008 by [Council Decision 2008/381/EC](#) (amended by [Regulation \(EU\) No 516/2014](#) in April 2014). Regulation (EU) No 516/2014 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 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](#). This partnership was established with the aim to foster the integration of refugees into the labour market.

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 adopted 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 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 over concluded and on-going integration projects is available [here](#).

The 2016 Action Plan is characterised by a variety of aims, by reference to a variety of areas where support is needed and also by highlighting some 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.

2. 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 also 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 [\[1\]](#) were legally resident in the EU in 2019.

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 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 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 also set up concrete measures to foster inclusion. The areas covered are broader than previous ones, they comprise social inclusion, employment, education,

health, equality, culture and sport. The text however mainly enumerates the field 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 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 13th November 2020 and the group contributed to the preparation of the Action Plan 2021-2027.

3. 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. They however do not define the notions integration and inclusion. The Action Plan talks about the European way of life and also 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 .

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.[\[2\]](#)

The Action Plan starts with a promotion 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.

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 Commission in 2017 refers to social rights for people across Europe but it is not specifically designed to improve access of migrants to social rights.

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 person 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.

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.

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 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](#). The budget for integration

is included in the [renewed Asylum, Migration and Integration Fund, the amount is € 9.882 billion.](#)

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.

4. 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. Art. 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 Art. 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).

5. 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). 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 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. 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 24th November 2020.

6. 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.

[1] Source of statistics in this paragraph: Eurostat. UK figures not included.

[2] See [Adam, I./Thym, D., Integration](#), in: From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration, De Bruycker P./De Somer M./De Brouwer, J.-L. (eds.).

Let's not forget about Schengen

by [Jorrit J. Rijpma](#)

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In 2011, the closure of the French-Italian border by France in response to the arrival of Tunisian migrants who had been given an Italian temporary residence, was but a glimpse of things to come. In 2015, the 'refugee crisis' led one Member State after the other to reinstate checks at its internal border. Many of these checks have remained in place until this very day, despite clear time limits laid down [in secondary law](#), with Member States invoking both the situation at the external borders and so-called 'secondary movements' of asylum applicants as justification.

The absence of border controls in Europe remains closely linked to common rules on migration and asylum, many of which find their origin in the Schengen flanking measures. The [New Pact on Migration and Asylum](#) has hailed the Schengen area as one of the most important successes in European integration, but given the continued disruption of borderless travel, exacerbated by the COVID-19 pandemic, one would have expected a ‘comprehensive’ approach to have included concrete proposals for the governance of the Schengen area. Yet, the Commission merely announced a Strategy on the Future of Schengen, to be presented in the first half of 2021.

This contribution will argue that although the exclusion of Schengen from the Pact may be justifiable, it does not mean there is no need for a deeper reflection on the future of Schengen. It will briefly discuss the limited innovations the Pact does introduce. Finally, it will identify three priorities for the new Strategy: reinstatement of borderless travel in Europe, compliance with the Schengen rules, and the long overdue enlargement of the Schengen area.

1. REASONS FOR THE EXCLUSION OF ‘SCHENGEN’ FROM THE PACT

The Pact does not fully ignore the management of the external borders. To the contrary, the proposals on asylum and return will, when adopted, have a profound impact on the work of border guards and migration and asylum authorities working

at the external borders. These are of course the [proposed screening](#) and [border procedures](#). The electronic border architecture will be further boosted with the expansion of the [EURODAC](#) system from asylum database to fully fledged migration management tool.

However, the Commission does not put forward proposals for better enforcement and correct implementation of the Schengen rules. This omission may well be in line with the overall pragmatic approach taken by the Commission. As it currently stands, the Pact contains enough hard nuts to crack, as the failure to reach agreement on the main points by the German presidency would seem to confirm. Especially at a time of crisis, in which border controls and closures are playing a prominent role, a discussion on the power over borders may detract from other pressing questions.

One should also recall that Schengen cooperation extends beyond migration and asylum, into the realm of criminal justice and police cooperation. Over the past five years, it was not only the refugee crisis that led to the proliferation of internal border controls, but also (the threat of) terrorist violence that on more than one occasion had [European leaders openly call Schengen into question](#). A [proposal dating back to 2017](#) to extend the possibilities for Member States to reintroduce internal border checks based on security concerns, has been blocked in the Council for years due to diverging views of the Member States on the need to balance

security with ensuring free travel across borders. Given that context, it may have been a wise decision to disconnect the security discourse from the otherwise already politicized discussion on migration and asylum.

Finally, the integrated management of the external borders, core to the Schengen *acquis*, is one of the few policy fields in the Area of Freedom, Security and Justice in which important progress had already been made before the presentation of the Pact. In the aftermath of the refugee crisis, important legislation was adopted, most notably the [twice reinforced mandate of Frontex](#), the [European Border and Coast Guard Agency](#), new IT systems for border management, such as [the Entry-Exit system](#), and [their interoperability](#). The Pact can therefore simply limit itself to a call for speedy implementation of these measures.

2. INTEGRATED BORDER MANAGEMENT

EXTERNAL BORDERS

The most relevant part for the Schengen cooperation of the Pact is part 4 on Integrated Border Management. The all too familiar call for a reinforcement of the external borders, included 1 January 2021 as the target date for the first deployment of the standing corps, which in light of recent developments and recruitment woes was [a little too optimistic](#). Interoperability of large IT systems in the AFSJ should be fully functional by the end of 2023.

The section on integrated border management then continues [with a paragraph on Search and Rescue \(SAR\)](#), which quite frankly seems a little out of context. Despite emphasizing the responsibility of the Member States, the Pact calls for a more integrated and European approach, with greater operational and technical support by Frontex. Although SAR is indeed listed in the long list of elements that make up European integrated border management, the EU's competence remains limited to SAR operations arising in the context of maritime border control operations.

INTERNAL BORDERS

Most relevant for our purposes is section 4.4 of the Pact on the well-functioning of the Schengen area. With a sense of understatement, the Commission points out that the longer controls at the internal border continue, 'the more questions are raised about their temporary nature, and their proportionality'. Suffice to say that the maximum period for reinstatement under the [Schengen Borders Code Regulation \(EU\) 2016/399](#) is two years, and only under the exceptional circumstances of serious deficiencies in the management of the external borders leading to a danger to public policy and public security.

The Commission announced that it will present initiatives for a 'stronger and more complete Schengen', but is remarkably succinct on what such proposals could entail. There is mention

of a ‘fresh way forward’ on the Schengen Borders Code, which seems to imply the withdrawal of the Commission’s 2017 proposal to extend the possibility to reintroduce internal border controls based on public security concerns. The Strategy should also cover proposals to improve the Schengen evaluation mechanism, which was reformed in 2011 as part of the [Schengen governance package](#). Again, this is a bit of a repackaging exercise, as the mechanism was already due to be evaluated on the basis of [Article 22 of the Schengen Evaluation Regulation](#) itself, following the completion of the first multiannual programme (2014-19). The suggestion to give preference to controls in the territory over the reinstatement of border controls, making full use of new technology, [is also not new](#).

What is perhaps interesting, however, is the reference to ‘less intrusive controls’, implying that controls themselves could be less problematic where they interfere less with cross-border movement, for instance through the use of cameras or targeted controls.

The one real innovation presented by the Pact is the introduction of a Schengen Forum, involving the relevant national authorities such as Ministries of Interior and (border) police at national and regional level in order to stimulate more concrete cooperation and more trust. Although building trust between national authorities and operational cooperation has from the very outset been part and parcel of integration in the

justice and home affairs, the reintroduction of an intergovernmental governance element in the Schengen cooperation can hardly be described as a step forward. Bringing the Member States back into the picture seems to be logical and even defensible in times of crisis, even if it ignores the legal reality of a post-Amsterdam legal framework, and the establishment of Frontex for exactly that task.

The Forum is also to be the setting for a yearly discussion at political level to allow national Ministers, Members of the European Parliament and other stakeholders to bring political momentum to this process. It is unclear what the added value of this Forum would be to the work of the Justice and Home Affairs Council and the European Parliament's LIBE Committee. It merely heralds the return of intergovernmentalism in the AFSJ and bringing back national politics into fields that had been put at arm's length of the Member States for good reason.

The precise role of the Forum remains undefined. A first online meeting of the Schengen Forum took place on 30 November 2020. The fact that Commission President Von der Leyen, Vice-President Schinas, as well as Commissioner Johansson addressed the Forum seems to say something about its perceived significance. However, other [than a press release](#) listing the topics for debate, no official documents have been made publicly available. Despite the involvement of the

European Parliament, this does not augur well for the transparency and accountability of the Forum.

3. THREE PRIORITIES FOR A NEW STRATEGY FOR SCHENGEN

A new Strategy for the future of Schengen would need to address three pressing issues.

REINSTATING BORDERLESS TRAVEL

The first issue to address is ending the quasi-permanent reintroduction of controls at parts of the internal borders and reinstating borderless travel in the Schengen area as provided for in Article 3(2) TEU, Article 67(2) TFEU and the provisions of Protocol (No 19) on the Schengen acquis.

This is clearly a very sensitive issue. Member States may have legitimate concerns for public policy or internal security, and more recently public health. Moreover, there is a fundamental assumption underpinning the Member States' actions that despite clear rules on the reintroduction of checks, they ultimately retain full power over their borders.

This concerns not merely the internal borders. In fact, it is well accepted as regards the external borders and explains that [the European 'entry ban'](#) introduced to block non-essential travel from outside Schengen, is in reality a coordinated approach to

the public health exception in the entry conditions of the Schengen Borders Code. At the internal borders, one would expect this to be less the case, given the existence of secondary legislation on the matter. But it does, nonetheless, explain the Commission's reluctance to enforce the provisions of the Schengen Borders Code on the reintroduction of *internal* border checks. Only more recently, it has started to address questions to individual Member States, but only in the context of COVID-19 related controls.

A strategy cannot of course change the division of powers between the EU and its Member States as laid down in the Treaties. However, in an ideal world, and perhaps discussions in the Schengen Forum may contribute to this, the EU and its Member States come to a common understanding on how to balance the Member States' responsibilities over their internal security, including their borders, with their participation in the Schengen area. If COVID-19 is here to stay then we can also expect more frequent reintroductions of controls to enforce health measures, especially if the plans for a vaccine certificate materialize.

Ultimately, and this may be sooner rather than later, the CJEU will need to provide guidance. The Court has already held that Member States [do not have carte blanche to invoke internal security to do as they please](#) and that matters of national security [require a particularly high level of seriousness](#). The legal uncertainty as a result of the current situation is already

the subject of a [preliminary reference](#) by the Austrian *Landesverwaltungsgericht* Steiermark.

When it comes to police controls as an alternative means for reinstated checks at the internal borders, the Commission would do well to codify the Court's case law, as well as further specify, what is allowed in border areas and in the Member States' territories under the guise of [police](#) and [identity checks](#). If such controls are indeed to become more prevalent, safeguards must be put in place at EU level to ensure that they do not become even more intrusive in terms of profiling and the collection of personal data.

SCHENGEN GOVERNANCE

The second point relates to a possible revision of the Schengen Evaluation Mechanism and is most closely related to Schengen governance. In the wake of the Franco-Italian affair, a regulation was adopted to recast the intergovernmental Schengen evaluation mechanism, still based on a decision of the Schengen Executive Committee and largely a Member State-driven process. Although the new mechanism is said to have significantly improved the evaluation of Schengen standards, especially in the field of external border management, both an external evaluation [commissioned by the European Parliament](#) and the [Commission itself conclude](#) there is room for improvement. Key concerns have been the slow follow-up to Commission reports adopted in response to

evaluation reports adopted under comitology. Although the lack of transparency of the process did not emerge as a particular concern from the reports, there seems to be a disturbing lack of peer pressure. Any revision should therefore seek to balance the interest of public security, requiring a degree of confidentiality, with the need for scrutiny, in particular by the European Parliament and national parliaments. One way to improve this could be to allow the European Parliament to appoint a member of the evaluation teams, who could also ensure a more targeted information flow to its members.

A notable shortcoming of the system is the lack of fundamental rights scrutiny. The added value for this seems undisputed, and any revision of the mechanism should rightly include it. Evaluation visits, including the questionnaires used, should take on board the input of relevant EU and Member State actors, such as the Fundamental Rights Agency and national ombudsmen. These are often best informed of fundamental rights concerns in the application of the Schengen *acquis* at Member State level.

In addition to the Schengen Evaluation Mechanism, Frontex carries out a yearly Vulnerability Assessment on the adequacy and preparedness of Member States' border management systems. Although the two mechanisms are meant to be complimentary and work in synergy, the exact relationship between the two remains legally undefined and practically

underdeveloped. The deficiencies identified under either mechanism are meant to result in national plans for improvement, involving the active support of Frontex. However, in the absence of a satisfactory follow-up, both procedures could ultimately result in a Council Recommendation to reinstate internal border controls for a maximum period of two years.

The proposed [Regulation for a European Asylum Agency](#) provides for an equivalent of the Frontex Vulnerability Assessment Mechanism, focussing on Member States' asylum systems instead. This mechanism is, however, five-yearly and lacks a similar backstop that is the threat of a Council Recommendation to reinstate border controls. Instead, in a worst case scenario, persistent deficiencies in Member States' asylum systems could only lead to a suspension of the Dublin III Regulation (as under Article 8(3) of or under its envisaged successor, the [Asylum and Migration Management Regulation](#)). Given that arguably the reinstatements of internal border controls during and after the refugee crisis were motivated more by the deficiencies in the Greek asylum system, than [in its external border management](#), the question arises to what extent Dublin and Schengen should not be regarded more as two sides of the same coin. It is not without reason that the rules on the allocation of responsibility for asylum claims were initially included in the [Schengen Implementing Convention](#). Also, the participation of Schengen Associated Countries, like [Norway and Switzerland](#), is

premised on their cooperation in the Dublin rules. The question is therefore whether the threat of a reintroduction of border controls in response to systemic failures in a Member States' asylum system could not act as more of an incentive for necessary improvements, than the possible suspension of Dublin transfer, responding to Member States' concerns over secondary movements.

In the end, it would be important to recall that both the Schengen Evaluation Mechanism and the Vulnerability Assessment Mechanism come in addition to the Commission's ordinary enforcement powers under the Treaty. They should however not be considered fully fledged alternatives. A Strategy for the Future of Schengen should provide guidelines on how the Commission intends to use its enforcement powers to ensure Member States' compliance with the Schengen *acquis*.

ENLARGEMENT OF THE SCHENGEN AREA

Finally, a new Strategy on the future of Schengen will need to address the position of Schengen candidate countries, i.e. those Member States that have acceded to the European Union, but have been effectively excluded from the Schengen area. Three of these countries, Bulgaria, Romania and Croatia have already been declared technically ready by the Commission to join the Schengen area, Cyprus is well under way. A number of Member States, however, have blocked the

adoption of a unanimous Council Decision to allow the lifting of checks at the internal borders to the Schengen area, despite their technical readiness.

Member States in the Council, in particular France and the Netherlands, have been opposing full accession based on political concerns in relation to respect for the rule of law and corruption in the Member States concerned. The European Parliament has repeatedly called for an end to the exclusion of [Romania and Bulgaria](#).

The current situation, in which several Member States find themselves in ‘Schengen purgatory’, has a number of undesirable consequences. It leads to a *de facto* duplication of the external borders and external border controls, creating uncertainty as to the applicable legal regime, given that internal and external borders have been defined [as mutually exclusive](#). Schengen candidate countries have been increasingly participating in Schengen developing measures, most notably the interoperability regulations. They also guard their external borders in line with the Schengen Borders Code, and with the support of Frontex, yet they do not benefit from the advantages of borderless travel.

The Schengen Evaluation Mechanism is used to evaluate acceding Member States’ readiness to join the Schengen area in full, but as also observed in the report commissioned by the European Parliament this does not include a more general

evaluation of the functioning of Schengen and the political context in the Member States under scrutiny. Future enlargements should explicitly include a path towards full accession to Schengen in the accession process, even if the actual lifting of border checks does not coincide with a country joining the EU. It should be clear that one does not change the rules of the game whilst the ball is in play. But it also requires that the legitimate concerns of Member States in relation to the rule of law, corruption and organized crime be sufficiently addressed, either inside or outside the Schengen Evaluation Mechanism.

FURTHER READING

Sergio Carrera and Ngo Chun Luk, ['In the Name of COVID-19 - An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU](#) (Study for the European Parliament, PE 659.506, September 2020)

Sergio Carrera a.o., ['The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016'](#) (Study for the European Parliament, PE 604.943, February 2018)

G. Cornelisse, ['Reinstatement of Border control in the Schengen Area: Conflict, Symbolism and institutional Dynamics'](#), in: Sergio Carrera, Deirdre Curtin and Andrew Geddes (eds), *20 Year Anniversary of The Tampere Programme* (EUI, 2020), p. 81.

Marie De Somer, ['Schengen and Internal Border Controls'](#), 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), p. 151

Elspeeth Guild a.o., [Internal border controls in the Schengen area: is Schengen crisis-proof?](#) (Study for the European Parliament, PE 571.356, June 2016)

ICMPD, ['The state of play of Schengen governance: An assessment of the Schengen evaluation and monitoring](#)

[mechanism in its first multiannual programme](#)' (Study for the European Parliament, PE 658.699, November 2020)

Rijpma J.J. and Fink M., 'The Management of The European Union's External Borders', forthcoming in: Philippe De Bruycker and Lilian Tsourdi (eds), *Research Handbook on EU Asylum and Migration Law* (Edward Elgar forthcoming 2021)

ABOUT THE ODYSSEUS ACADEMIC NETWORK

The **Odysseus Academic Network** is a network of experts in immigration and asylum law in Europe. It was founded in 1999 by Philippe De Bruycker, Professor at the Institute for European Studies of the Université Libre de Bruxelles, with the financial support of the European Commission at its initiation. The network brings together legal experts from all EU members states, including Schengen associated states – like Norway, Switzerland and Iceland – and Turkey. It supports the training of the European Asylum Support Office, the studies of the European Migration Network and conducts research for the European Parliament and the European Commission under specific contracts. The traditional activities of the network include hosting European thematic conferences; publishing collections of books; and studying EU migration and asylum law, including the transposition of directives and their implementation as well as comparative law analysis between the member states. Odysseus also organises the well-known yearly Summer School on EU Migration and Asylum Law and Policy in Brussels, which has trained around 2,000 persons with very diverse backgrounds from all over Europe over the last two decades.



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