

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

*Philippe De Bruycker**

After the failure of the Agenda for Migration¹ of 2015 and in particular the impossibility to introduce solidarity in the Dublin system allocating responsibility to Member States for the examination of asylum applications, so much hope has been put into the New Pact on Migration and Asylum presented by the European Commission in 2020² that it can paradoxically be better understood by analysing what it is not. Regarding the format, it is not a programmatic document paving the way for the development of migration and asylum policies in the future (1.). Regarding the content, it is not a document trying to establish a consensus about new orientations of those controversial policies (2.). The question is then what it could have been (3.).

1. Not a Long-Term Programmatic Document

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

* Professor at the Institute for European Studies of the Université Libre de Bruxelles (ULB).

1 COM(2015)240.

2 COM(2020)609.

This process started with the famous Tampere Conclusions adopted on 15 and 16 October 1999³ by a European summit where the Heads of States and Government put in place the foundations of the area of freedom, security and Justice. These conclusions were followed by the Hague Programme of 2005⁴ and the Stockholm of 2010⁵. These programs were extremely detailed and paved point by point the way for the development of the policies within the next five years. Due to the impossibility of the Agenda for Migration proposed by the Commission in 2015 to overcome the obstacle of the lack of solidarity and the deep political divisions between Member States on this issue, the process of five-year programs could have been relaunched at the occasion of the presentation of the New Pact by the Commission.

The only institution that has decided to follow the process foreseen by article 68 TFET is the Council of Ministers. A draft version of the guidelines⁶ has been discussed at technical level in Council working groups during the first months of 2020. They were not adopted and this is actually not a surprise as they were so general and vague, and moreover did not tackle the main issue of solidarity abandoned to the Commission.

Instead of a five-year program providing important policy guidelines, we have with the New Pact a simple Commission communication (interestingly not addressed to the European Council) and a legislative package that is supposed to pass through the ordinary legislative procedure for the end of 2021 following a roadmap⁷. It is not easy to understand the institutional meaning of this choice. Does the Commission try to confiscate the policy programming without giving to the European Council the occasion to debate the main political orientations of the New Pact? Is the method consisting of five-year programs considered obsolete? Is migration not anymore a policy priority due to the sanitary and economic crisis? Or is the subject of the New Pact so controversial that it is better to avoid a possible failure of the European Council unable to adopt guidelines on migration and asylum?

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

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

4 OJEU, C 53, 3 March 2005.

5 OJEU, C 115, 4 May 2010.

6 Council Document 6330/10 of 14 February 2020.

7 Annex to COM(2020)609.

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

2. Not a Document Expressing a New Consensus

Great expectations have been placed on the New Pact on migration and asylum to overcome the failure of the 2015 Agenda on Migration. Despite over 3 years of negotiations, it has been impossible to adopt the proposed legislative package, in particular the Dublin IV proposal⁸. The Member States divided between North and South, but also East and West, have been incapable of agreeing in Council on a common position concerning the relocation mechanism proposed by the Commission to inject solidarity into the Dublin III Regulation. There have therefore been no negotiations with the Parliament that had already defined its position in the so-called Wikström report⁹. The European Commission was thus expected to bring forth in the New Pact a proposal that could be the object of a consensus to overcome the profound divisions created by the relocation decision of the Council of 22 September 2015¹⁰.

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

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

8 COM(2016)270.

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

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

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

This alternative offered by the Commission proposal does not reflect a consensus, but actually a disagreement between Member States. It may possibly satisfy the Member States part of the Visegrad group as the Commission eventually proposes the concept of flexible solidarity in the way that they have promoted it¹², but it will not contribute to rebuild trust between the EU Member States that will remain profoundly divided about providing asylum. It is also not in line with the Bratislava Declaration of the European Council of September 2016 following which the objective is to “broaden EU consensus on long-term migration policy”. Such an arrangement is not a real pact made to reconcile different views, but a bad compromise made of contradictory elements.

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

3. *What it Could Have Been*

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

11 COM(2020)610.

12 See <www.visegradgroup.eu/flexible-solidarity> accessed 2 December 2021.

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

A “fresh start” to use the words of the Commission about the presentation of its New Pact, would build upon what is a “common policy”. This notion is not used by accident in articles 77 to 79 TFEU. It has been elaborated and given precise content by the legal doctrine, in particular our colleague and French Member of the Odysseus Network Henri Labayle who has been the first to conceptualise it in a seminal paper¹³ where he distinguished between its five components presented below.

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

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

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

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

The adoption and implementation of these proposals would represent a substantial contribution of the EU to this policy. For the rest, the ambition of building a common policy for legal migration appears like a fantasy. A rational analysis taking into consideration the principle of subsidiarity would lead to the conclusion that legal migration should remain *mainly* a competence of Member States. Recognising this explicitly contrary to the European catechism of which a recent report of the European Parliament on New avenues for Legal Migration¹⁴ provides a good example, could appease to a certain extent the politicised debate on migration with some Eastern Member States not used to migration flows and reluctant to open their societies to diversity.

The third element is common implementation contrary to the classical principle of indirect administration under EU law. The idea is that EU agencies are directly involved in the implementation of EU migration and asylum policies on the ground, prefiguring an integrated administration where the national and EU levels cooperate closely in the decision-making process. Some progress in this direction is best observed in the progressive transformation of Frontex into a “European Border and Coast Guard Agency”, particularly the 2019 regulation¹⁵ allowing this agency to recruit its own border guards. Another example is the involvement of the European Asylum Support Office (EASO) personnel in national asylum procedures in Greece by interviewing asylum seekers and providing the Greek administration with a proposal for a decision regarding the admissibility of asylum applications.

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

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

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

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

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

But it is not only about the total amount of the funding of migration and asylum policies. The current logic of distribution of the funds between Member States is not in keeping with the need for more financial solidarity. It is hard to understand why the Asylum and Migration Fund (AMF)¹⁶ allocates more money than before to Germany during the 2021-27 period (because of the very high number of asylum seekers it received during the 2015/16 crisis) and less money to Greece compared to the 2014-2020 period¹⁷. 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

16 OJEU, L 251 of 15 July 2021.

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

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

4. Conclusion

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

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

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

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

