EUROPEUM
INSTITUT PRO EVROPSKOU POLITIKU
INSTITUTE FOR EUROPEAN POLICY

Policy Brief

A "New" pact on Migration and
Asylum? The European migration
policy path-dependency

Agathe Helluin

Contents

Introduction

"A fresh start on migration": this is how the European Commission describes the New Pact on Migration and Asylum, introduced at the September 2020 State of the Union address. Without question, this new Pact captures the expectations of the EU to fully reinvent its migration policy, by recognizing its limits and shortcomings.

In particular it seeks to repeal the very much decried Dublin system, which has been the object of much tension within the community. As to quote Ursula von der Leyen, the new Commission aims to "abolish the Dublin Regulation" and to "replace it with a new European migration governance system."

Indeed, the European governance has, until now, put most of the migratory pressure on the frontline countries, such as Greece or Italy, as migrants had to apply for asylum in their country of arrival in the European Union (EU). Such a system has caused a great crisis of solidarity between European Member States (MS), and has also deeply impacted the trust the latter have placed in European institutions.

Therefore, with the migration crisis being the driving force behind this policy change, the plan seeks, first and foremost, to restore the confidence of its MS through various objectives. First, it aims to create a common asylum policy with updated procedures to simplify the asylum process. One of the ways to achieve this is to replace the quota system, which is very controversial in the Visegrád countries in particular, with a 'flexible solidarity', in order to establish a fairer sharing of responsibilities. Secondly, a very strong emphasis is put on security, especially external border security, to fight irregular migration. However, the main strategy for managing migratory flows is return-oriented: the EU seeks to improve communication and cooperation with third countries as a way to send migrants back to countries considered safe. Therefore, an essential part of the new European strategy relies on the externalization of migration policy, with the main objective of rebuilding a climate of trust within the Union.

By putting "Dublin to bed" the European Union is thus taking on board the deficiencies of past migratory governance. However, while the Union is asserting its ambition to implement a system anchored in novelty and renewal, it seems unlikely for a rupture with past systems to occur, as European migration policy is deeply embedded in path-dependence.

## The New Pact on Migration and Asylum: a breakthrough?

To provide a complete and comprehensive plan, encompassing integration, external relations, or even border management issues, the Pact displays legal proposals, as well as tools and instruments that address the internal and external dimensions of migration policy.

A new solidarity mechanism

The first and most crucial legislative proposal is the Regulation on asylum and migration management (RAMM) which aims to 'replace the Dublin regulation with a new asylum and migration management system that allocates applications better between MS by means of a new solidarity mechanism' Its main objective is therefore to replace the highly controversial and defective Dublin III principle, which determines the Member State responsible for the migrant's asylum application on the basis of responsibility criteria, such as family unity. Yet, in practice, its hierarchy of criteria has been partially respected by the MS, to the detriment of the first countries of entry.

Thereby, the RAMM seeks to replace the Dublin III system by reasserting two notions at the heart of European migration policy: 'solidarity' - as the MS' duty to cooperate in the handling and management of migration flows; and 'responsibility' - as the MS' duty to take part in the management of migration flows, as well as to control national borders.

In order to overcome the impasse concerning the solidarity and responsibility-sharing crisis, the RAMM introduces a new notion: 'flexible solidarity',
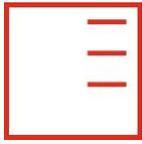
that yet remains mandatory. Once the Commission considers that a Member State is facing migratory pressure, due to an escalation of irregular entries on its territory, the other countries have a responsibility to support them. However, they can demonstrate their solidarity in three possible ways: relocation; return sponsorship; financial aid.

Ultimately, this proposal blatantly reveals the failure to abolish the previous governance, despite the European Commission's promise. Indeed, while the RAMM is introduced as a new start, that will end the Dublin III Regulation, it is still made of articles that repeat words for words those of Dublin III. And the amendments remain minimal: the Regulation does not abolish the Dublin system but slightly modifies it. For example, the Commission underlines its will to facilitate family reunifications, which come first in the responsibility criteria hierarchy, with the inclusion of siblings as family meaningful links, according to article 2 of the proposal. However, these changes remain far too minor to be expected to bring about a shift of situation at the EU's external borders, especially as there is no guarantee that MS will now comply with these new regulations and assume the responsibilities that they have in the past overlooked.

The pre-entry screening principle

However, a significant novelty seems to be introduced in the Pact with the mandatory pre-entry screening of third-country nationals at the external borders of the EU. Indeed, the asylum procedure will only be carried out after having passed the pre-entry screening, which has a double objective. Firstly, the Proposal for Screening Regulation seeks to identify the persons' identities, as well as to do a quick evaluation of health and security risks. Secondly, the procedure aims to classify people according to their likelihood of being granted asylum, so as to direct them either to asylum or to return.

Yet, the first part of the Regulation is not new, since the Schengen Borders Code already foresees identity and registration checks, while health checks have recently been introduced in response to the COVID-19 pandemic. Similarly, migrants have already

experienced screening and identification at the height of the 2015-2016 migration 'crisis' in Greek hotspots. However, these screenings did not yield effective results, as they increased the bureaucratic burden of asylum claims on frontline countries for instance. Which is why many fear that the Screening Regulation might replicate the hotspot approach, which is particularly alarming, as it led to the violation of migrants' rights.

The externalization dimension of migration policy

Similarly, the Pact places a strong emphasis on the externalization of migration policy, especially through the EU's desire to improve its ties and cooperation with third countries, as a way to encourage return to countries designated as safe. For example, the European Council for Refugees and Exiles (ECRE) deplores the prominence given on external policy in the Pact and 'finds it unwelcome that the most important legislative proposal on the future of asylum in Europe begins with a reference to the responsibilities of third countries rather than those of European countries. This demonstrates the continued efforts at 'externalization' that are embodied in the Pact.' Nevertheless, this strategy is far from new, as evidenced by the numerous pacts and treaties that have devoted a significant place to the EU's relationship with third countries: the 2004 Hague Programme; the 2009 Stockholm Programme; the 2015 EU Agenda Migration.

Such an objective stresses, once again, the lack of innovation and fresh perspective of the Pact and the continuum of the security-centered strategies that have been encouraged for years, in spite of the urgent need for reform and the promises of the European Commission. In essence, this Pact appears to merely rehash old ideas - so much so that it is claimed that the Pact is only a "slightly milder version of the Dublin IV Proposal", as to ensure that the proposals get through. Yet, without significant reform, it is very unlikely to avoid a new crisis of solidarity to occur within the EU, nor will it tackle the humanitarian crisis at its external borders.
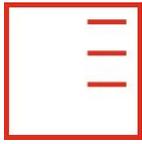
A new start in violation of human rights?

Quite the contrary, NGOs are alarmed the Pact will lead to a degradation of refugees' rights, as it may merely be intended to restore mutual trust within the European community, at the expense of human rights. Firstly, it must be stressed that the humanitarian aspects of the Pact are mere recommendations that have no legal binding status. Moreover, by replicating the hotspot approach, the pre-entry screening procedure implies that individuals can remain stranded at borders for several months, making them highly vulnerable to rights violations. At the same time, the notion of 'safe countries' is much criticized by humanitarian actors, as it does not take into account individual situations. Indeed, by designating a country as 'safe', this notion violates the right of individual assessment of asylum applications, inscribed in the 1951 Geneva Convention. EuroMed Rights deems this dimension of the Pact highly alarming as "Nobody can guarantee that a country is safe for all its citizens and to label a country as "safe" suggests that there is no general risk of persecution and that the state of law is respected, which is not the case in many countries considered "safe" by the EU and its Member States." This is all the more worrying as the political stability of certain third countries can be misread by foreign authorities. Such was the case of the city of Kabul, considered as 'safe' by some countries – while the rest of Afghanistan 'unsafe', which may have led to wrongful returns, and inevitably the endangerment of refugees' lives. Thus, the prevailing strategy of externalizing migration policy runs the risk of leading to a series of refugees' rights violations, which seems to be truly the only novelty of this Pact.

An issue of path-dependency

An unsettling assessment can then be observed: despite the Commission's awareness of the deficiencies of past migration governance, the EU seems incapable of offering substantial and innovative solutions to migration issues, although change and progress are genuinely sought in this area. This article attempts to provide an insight into this contradiction, based on the theory of historical institutionalism.

Through the concept of path-dependence, this theory explains the evolution of European migration policy, in particular its failure to distance itself from past decisions. Margaret Levi characterizes the phenomenon of path-dependence as "once a country or a region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice." Path dependence arises when past decisions narrow the range of possible options for future decisions, and thus encourage a form of policy continuity. This means that once a political decision is institutionalized, a self-reinforcement dynamic sets in, making reform challenging. This helps to illustrate why the EU has continuously clung to policies that have been heavily criticized and deemed ineffective.

Historical institutionalists nevertheless argue that institutional change can be achieved thanks to 'critical junctures', which Capoccia and Kelemen define as brief events, which can either be endogenous (political upheavals, the unfolding of social movements…) or exogenous (economic crisis, war…), that bring about an abrupt discontinuity with what was previously done. For example, it is argued that the end of the 1980s consisted of a critical juncture that considerably altered European migration policy, given the surge of asylum applicants (from 320,000 to 695,000 between 1989 and 1992) in Europe. External border control and security then became a key priority, leading to the signature of the Dublin Convention in 1990. Thus, the rapid intensification and development of the Europeanisation of migration policy can be traced back to this occurrence.

Still today, it can be noticed that European migration policy is pursuing the same pattern built in 1990, as the New Pact on Migration and Asylum perpetuates the security-centered framing, that is specific to the

Dublin regulation, and which has been progressively reinforced after the war on terror and the intensification of irregular migration flows to Europe. Indeed, Sarah Sommer argues that the debate on migration has been framed in terms of "'combating' irregular migration and the 'persecution' of connected crimes", which gives an explanation as of the prevalent phenomenon of securitization and criminalization of immigration in Europe.

Yet, it is rather puzzling that no institutional changes have taken place, even though 2015 appeared to be a critical juncture in many respects. Indeed, the same way the end of the 1980s was determining, 2015 is decisive because it is marked both by an exogenous crisis - the massive influx of migrants into Europe, and an endogenous crisis - a crisis of solidarity between MS and of confidence in the European institutions, which could have profoundly challenged the model of migration governance. Still, EU migration policy has remained mired in a continuum of past and outdated policies, despite the changed context from 2015 onwards. For example, while the period 1990-2015 was innovative and progressive in terms of the externalization of migration policy, a change of dynamics is noted from 2015, as no new policy is truly being considered. Instead, the EU "is continuing old policies in a new context" as shown by the readmission agreements reinforcement, which consolidates the security continuum, since they aim to prevent migrants' arrival, at the expense of the EU's democratic values.

Conclusion

It is thus clear that the EU is once again facing an impasse. Despite the new context and the crisis it led to, the Commission cannot come up with significantly new and innovative solutions, not least because of its entrenched path-dependent policy and the lack of options left open (as the EU has been pursuing the same security-centered strategy for years). On the other hand, the EU also has to cope with MS not at the forefront of migration, which are particularly reluctant to change, because of its perceived high and risky costs. As a matter of high

politics, the Commission has to juggle with the debate on national sovereignty and domestic policy aspirations to restrain migration outside of the EU, which ultimately lends weight to the externalization strategy, - as highlighted by the Visegrad countries statements, such as the Czech Republic PM who declared that "We have to stop migration and the quotas and relocation. These rules are not acceptable for us."

Recommendations

1. Economic incentives to guarantee the respect of the new solidarity principle

To prevent a new crisis of solidarity, the EU should address the socio-economic challenges by offering economic incentives as a way to guarantee the flexible solidarity compliance.

2. The humanitarian aspects of the Pact must be legally binding

To avoid new violations of migrants' rights, the EU must grant legal binding status to the humanitarian aspects of the Pact, which are presently merely recommendations. Especially as this would allow a humanitarian-nexus strategy to start to emerge and would weaken the strategy-centered one.

3. Legal migration should be further encouraged

European countries should be more involved in the Marrakech Pact, to encourage legal immigration, which would reduce the bureaucratic burden of asylum claims, as well as humanitarian tragedies.

About EUROPEUM

EUROPEUM Institute for European Policy is a non-profit, non-partisan, and independent think-tank focusing on European integration and cohesion. EUROPEUM contributes to democracy, security, stability, freedom, and solidarity across Europe as well as to active engagement of the Czech Republic in the European Union. EUROPEUM undertakes original research, organizes public events and educational activities, and formulates new ideas and recommendations to improve European and Czech policy making.

More about us

Contact

Web: europeum.org

Prague Office address: Staroměstské náměstí 4/1, 110 00, Praha 1
Tel.: +420 212 246 552
E-mail: europeum@europeum.org

Brussels Office address: 77, Avenue de la Toison d'Or. B-1060 Brusel, Belgie
Tel: +32 484 14 06 97
E-mail: brussels@europeum.org

More publications can be found on our website.