



THE EUROPEAN UNION PACT ON MIGRATION AND ASYLUM

CONTRIBUTION OF EURODEFENSE-ESPAÑA TO THE PERMANENT OBSERVATORY ON EUROPEAN MIGRATION POLICY

Abstract

The EU Commission has presented to the Council and the Member States a document – entitled “The New Pact on Migration and Asylum”- that intends to give a comprehensive response by the Union to the issue of migration. It includes concrete proposals encompassing the main aspects of the EU migration policy and a roadmap to enact and implement these proposals. The Commission aims to reach agreement on the new regulations on asylum and migration management by June 2021.

The New Pact introduces measures to reinforce border controls, including the progressive deployment of a standing corps of 10.000 Frontex European Border Guards as of January 2021. It also stresses the importance of cooperating with countries of origin and transit. Consensus on these matters seems feasible within the timeline suggested.

However, reaching agreement on the sharing of responsibility and solidarity among member states seems to be more difficult, especially in situations of crisis caused by the massive arrival of migrants and the disembarkation of people rescued at sea. One of these crises is taking place right now on the coasts of the Canary Islands.

The New Pact will not establish a common EU migration policy, because member states retain their sovereignty as regards the entry and permanence in their territory of migrants and asylum seekers. A disproportionate part of the responsibility is still attributed to the countries of first arrival.

Introduction

On 23 September 2020, the European Commission proposed a so-called “New Pact on Migration and Asylum” -document COM (2020) 609 final-. In August 2020, EURODEFENSE-ESPAÑA presented to the Commission a paper on The New Pact, responding to the opportunity offered for interested parties to contribute to this debate. This paper was later distributed within the EURODEFENSE network.

The New Pact intends to give a comprehensive response to the issue of migration in the EU. Following the provision established in article 67 (2) of the Treaty on the Function of the European Union (TFUE), the Commission manifests that *“No Member State should shoulder a disproportionate responsibility and all Member States should contribute to solidarity on a constant basis”*. This has not been the case so far, because some Member States refused to accept relocation of people in their territories to alleviate the burden of other Member States in times of extraordinary migratory pressure.



Migration constitutes one of the most sensitive issues among European public opinion, because it has profound political, economic and social repercussions when and where this phenomenon takes place. A Eurobarometer Survey, conducted in the summer of 2020, showed that migration was the third biggest concern for Europeans. But reaching agreement on the main elements of a true European migration policy has been so far elusive, in spite of the fact that Eurobarometer shows that 73% of European citizens want the EU to do more on this issue¹.

While agreement on some of the main elements - such as border controls and cooperation with countries of origin and transit - seems reachable within the time schedule proposed, it looks more difficult on others, such as sharing responsibility and solidarity among member states as regards relocation, integration and return of migrants. This has been the case during crisis situations in which a massive arrival of migrants took place, as it happened during the 2015 refugee crisis in the Eastern Mediterranean and the disembarkation of migrants rescued at sea in the southern coasts of Italy in 2018-2019. A new crisis is taking place right now with the arrival of thousands of migrants to the coasts of the Canary Islands.

The current Canary Islands crisis

Since the beginning of 2020, almost 18,000 irregular migrants² have reached the southern coasts of the Canary Islands -an increase of 1,019,6% in comparison with the same period of 2019-, the majority of which were travelling in small crafts ("cayucos"), carrying between 30 and 50 people each. This is the biggest number of irregulars arriving to the Islands in such a short period of time since 2006, when 31,600 migrants arrived in "cayucos" within a few months. The big number of people arrived –especially in the months of October and November 2020- has overwhelmed the reception capacities of the Islands. Thousands had to be placed in hotels, paid by the Spanish Government, at great cost. The Spanish Coast Guard had to rescue many of these migrants at sea. A number of them perished in the journey.

The majority of these irregular migrants come from the Maghreb and Sub-Saharan Africa travelling from the coasts of the Western Sahara (Dakhla mainly), Senegal and Mauritania. They are usually transported first in motherships and disembarked later into small crafts when getting closer to the Islands' shores. Usually the migrant flow increases when the sea tide is milder. The logistics are provided by criminal organizations that charge fees of between 1,500 € and 2,000 € for each passenger, which must be paid by the migrants in advance. When the migrants do not have enough money to pay, they sign an agreement with these organizations to repay their debts later, often at double the price, deducting a large part of their earnings if they are able to remain in the EU territory and work or carry out any other economic activity³.

¹ However, the increase of EU funds to manage migration came only in 8th place of priorities for EU citizens, according to the October 2020 Eurobarometer.

² Figures according to press and other media reports.

³ This information has been revealed by some migrants who were able to obtain legal residence in Spain.



Although some of these migrants come from countries under civil wars and local conflicts -such as Mali- a majority of them migrate for economic reasons⁴. When asked, most of them mention the lack of working or professional opportunities in their countries of origin, a situation which has worsened with COVID-19. However, many present claims for asylum as a means to delay their return, which adds to the burden for Spanish authorities.

This massive arrival of irregular migrants is causing great damage to the economy of the Canary Islands, already severely hit by the pandemic. The Island's main economic resource is tourism, a sector in which a large part of the population is employed. Due to COVID-19, tourism to the Islands has been reduced to a minimum in 2020, and precisely when the activity is restarting in the high tourist season, this migration crisis may further deter many visitors. It should be stressed that the Canary Islands are part of the European Union's territory and their shores constitute an EU border.

While this massive flow has been taking place, returns to the countries of origin have been stopped almost to a standstill due to COVID-19 and the closing of international borders. Return agreements signed by Spain with Mauritania and Morocco cannot effectively be applied in this situation.

An ambitious agenda

The Commission's document indicates that the New Pact brings together the areas of migration, asylum, integration and border management. Overall effectiveness depends on progress on all fronts. The Pact aims -it is stated- to reduce unsafe and irregular routes and promote sustainable and safe legal pathways for those in need of protection. The policy, *"needs to include relationships with third countries, address the root causes of irregular migration, combat migrants' smuggling, help refugees residing in third countries and support well managed legal migration"*.

The main elements of the Pact are the following:

- Robust and fair management of external borders, including identity, health and security checks.
- Fair and efficient asylum rules, streamlining procedures of asylum and return.
- A new solidarity mechanism for the situations of search and rescue, pressure and crisis.
- Stronger foresight, crisis preparedness and response.
- An effective return policy and an EU coordinated approach to returns
- Comprehensive governance at EU level for a better management and implementation of asylum and migration policies.

⁴ According to ACNUR, only 15% of those illegal migrants arriving to Spain in 2020 could claim the refugee status. More than 85% of them do not come from countries where there is an internal conflict: 39% came from Algeria, 30% from Morocco, 13% from Mali, 8% from Guinea, 7% from the Ivory Coast, 5% from Senegal, 1% from Tunisia, 1% from Syria and 1% and 1% from Egypt. <https://okdiario.com/espana/menos-del-15-inmigrantes-ilegales-llegados-puede-acogerse-estatus-refugiado-6465233>



- Mutually beneficial partnerships with key third countries of origin and transit.
- Develop sustainable legal pathways for those in need of protection and to attract talent to the EU, and
- Support effective integration policies.

The current German Presidency intends to reach a general political agreement on the major issues by the end of 2020⁵. The Commission wants the Reception Conditions Directive (harmonizing appeal procedures), the Qualifications Regulation (replacing a previous directive on criteria for protection) and a recast Return Directive to be adopted by June 2021. Although the Council and the European Parliament had reached provisional agreements on the first two legislative instruments in 2019, some Member States are not satisfied with these agreements. This ambitious agenda seems, therefore, difficult to achieve.

Robust and fair management of external borders

The Commission proposes to introduce integrated border management, which would include:

-Improved management of external borders with a European Integrated Border Management. This will entail the progressive deployment, as of January 2021, of a European Border and Coast Guard, composed of the Member States' border and coast guard authorities and Frontex. A Standing Corps will be created, with a capacity of 10,000 staff, including personnel from Member States and Frontex. This Corps will provide support when needed by Member States.

-Pre-entry screening for the identification of migrants entailing health and security checks, fingerprinting and registration in the EURODAC.

-Faster examination of asylum applications to determine which ones have a low chance of being accepted (for example those which include misleading information, applicants who come from safe countries of origin, have a criminal record or pose a threat to national security). *"Whilst asylum applications made at the EU's external borders must be assessed as part of the asylum procedures, they do not constitute an automatic right to enter the EU"*, says the document.

-For those whose claims have been rejected in the asylum border procedure, an EU return procedure would apply immediately, with full respect for the principle of "non-refoulement", international law and human rights. An accessible, timely and effective decision-making process should be established.

-An EU Agency for Asylum will be created, which will provide operational and technical assistance to Member States in managing asylum applications.

The Pact aims at dealing with the status of irregular migrants as swiftly as possible. It proposes the establishment of a "seamless procedure" at the border applicable to non-EU citizens crossing without authorization (pre-entry screening, asylum and swift return procedure). According to the document, *"It*

⁵ According to the Commission's Communication, this would include *"The core principles of the Asylum and Migration Management Regulation, to adopt the Regulation on the EU Asylum Agency, as well as the Regulation on EURODAC"*



should be possible to relocate applicants during border procedures, allowing for procedures to be continued in another member state". Although this will be difficult to implement, it is one of the main demands by southern border countries (Italy, Malta, Greece and Spain) that have been calling for more solidarity in the processing of asylum applications.

The Pact proposes to establish a new Qualification Regulation, which will harmonize criteria for granting international protection, clarify the rights and obligations of beneficiaries and determine when protection should end (for instance if the beneficiary becomes a serious threat to security or has committed serious crimes). A Reception Conditions Directive would seek to establish improved reception conditions for asylum applicants, including earlier access to labor markets and education for child migrants. These conditions would be provided only in the responsible Member State, deterring unauthorized movements. EURODAC should be further developed to track unauthorized movements, tackle irregular migration and improve returns. It would provide information to Member States about applications that were already rejected in other MS and track voluntary departures.

The reality, however, is not so clear. *"Even if asylum applications were more evenly shared across member states thanks to the new system, it would not resolve the problem of asylum being a lottery where one's chances of protection depend on where the application is processed"*⁶.

A common framework for solidarity and responsibility sharing

This is a key element of the New Pact. The document states that the new approach goes beyond the limitations of the current Dublin Regulation. A new solidarity mechanism (contemplated in a new Asylum and Migration Management Regulation), which is based on shared responsibility, is established so that *"The irregular arrivals of migrants and asylum seekers are not handled by an individual Member State alone, but by the EU as a whole. Solidarity implies that all Member States should contribute"*. In the event of strong migratory pressure or disembarkations after rescue operations, a Member State may request, or the Commission may decide, that the solidarity mechanism should be triggered.

The new system intends to guarantee solidarity, but in a flexible way. In those situations, other Member States should provide support to the country under migratory pressure. There are several possible ways to contribute, according to the document: -relocation of asylum-seekers or of recent beneficiaries of protection. -return sponsorship. -capacity-building. -implementation of measures to help on asylum, reception and return. -operational support and -measures related to migratory trends. Member states will be able to choose among these measures and the Commission will then adopt a legal decision to implement this solidarity.

The degree of "solidarity" is based on each Member State's population and GDP. If the voluntary contributions prove to be insufficient (30% shortfall), the Commission could adjust the measures and the

⁶ See, Saila Hinikoski: *"European Migration and Border Management"*. Finnish Institute of International Affairs (FIIA), Briefing Paper 295, November 20, 2020. <https://www.fiaa.fi/en/publication/european-migration-and-border-management>



Member State concerned would have to provide 50% of its calculated share, choosing either to contribute to relocations or return sponsorships.

As relocation of migrants is not likely to be the preference of many Member States an important alternative will be the return sponsorship, by which the country concerned will take responsibility for managing the return of the migrants who cannot remain in the EU territory. However, this may sometimes be difficult, as not all Member States have readmission agreements (or even diplomatic representations) with, for instance, many African countries. If the migrant is not returned in eight months, he/she would be transferred to the territory of the member state responsible for the sponsorship. Although the countries have alternatives to choose from, it would eventually be up to the Commission to determine the number of people to be relocated and the countries would have to adjust their share. This is a power that may face strong resistance from some Member States⁷.

It seems that it will be difficult to achieve consensus on the proposed system for responsibility sharing and solidarity. To some, it will seem too much responsibility. To others, it will be considered that the solidarity mechanism is insufficient. Besides, a sanction system to the Member State that refuses to accept its solidarity obligation is foreseen, but the mechanism is not yet defined. And the solidarity mechanism could be long and complicated as, for example, there is no common EU list of “safe countries of origin”⁸.

It should be remembered that the processing of asylum applications, as established in the Dublin III Regulation, still falls upon the country of first arrival, although the New Pact foresees other criteria to determine which country should do that.

An effective and common EU system for return

The Commission’s document indicates that, currently, about a third of the migrants ordered to return from member states actually leave. It proposes to set up a common EU system for returns based on fast-track procedures to deal with migrants whose asylum applications have a high chance of being rejected⁹, as well as an effective cooperation with third countries on return and readmission, both at the EU and the Member States level. National return efforts will be assisted with operational support. A recast of the Return Directive and an effective operational support through Frontex, integrating the return sponsorship is proposed. The Commission will appoint a Return Coordinator, supported by a High Level Network for Return. The Coordinator will provide technical support, building on positive experiences of Member States in managing returns.

⁷ FIIA Briefing Paper 295, cit. Page 4.

⁸ See Fondation Robert Schuman: “*Understanding the new migration and asylum pact*”. European Issues N° 577/17 November 2020. www.robert-schuman.eu/en/european-issues/0577-understanding-the-new-pact-on-migration-and-asylum

⁹ This includes nationals of countries –such as Tunisia and Morocco- with a low rate of positive response to applications. Fondation Robert Schuman, cit. page 4.



The EU would seek to conclude readmission arrangements with third countries¹⁰, although their implementation is not easy because often third countries are neither willing nor able to facilitate return of their nationals. As an incentive, it is proposed to establish a link between cooperation on readmission of the third country and issuance of visas to the country nationals under the Visa Code. Once a year, an assessment will be made as to the level of cooperation on readmission of migrants by the country concerned.

While the linkage between readmission and visa issuance is a valid policy instrument, it will have to be managed carefully taking into account many other circumstances, of a political, economic and humanitarian nature.

The Pact stresses that return is more effective when carried out voluntarily and accompanied with strong reintegration measures. Promoting voluntary return is a key objective, reflected in the 2018 Commission proposal on the Return Directive.

Working with key international partners, countries of origin and transit

The Pact indicates that migration is central to the EU's overall relationships with key partner countries of origin and transit, and should be a relevant part of the Union's external policy. It will be based on bilateral engagements, combined with regional and multilateral commitments. A comprehensive strategy would include development cooperation, security arrangements, visa policy, trade, agriculture, investment and employment, energy, environment and climate change, and education. Helping partner countries to address the root causes of migration, improve border controls and combat migrant smuggling networks will also be part of the strategy. Coordination between the EU bodies and Member States will be essential.

Key to this ambitious strategy will be the resources allocated to this end. This policy must be quite solid from the economic and financial points of view. So far the budgets allocated by the EU for refugee and migration purposes seem to have been inadequate. An urgent plan of economic support to Africa (including the Cotonou Agreement) is also needed to stem the flow of migrants and help African people find opportunities at home.

Reinforcing the fight against migrant smuggling

A new 2021-2025 EU Action Plan against migrant smuggling will focus on combating criminal networks. The Plan will build on the work of Europol and its European Migrant Smuggling Center, Eurojust, Frontex and the EU Agency for Law Enforcement Training, dealing with issues such as financial investigations, document fraud and digital smuggling (used by criminal groups for advertising, organizing, collecting payments, etc.)

¹⁰ Currently the EU has concluded 18 readmission agreements (among which 1 African country) and 6 readmission "Schemes" (among which 5 African countries, but not with Morocco, Algeria or Tunisia). See Fondation Robert Schuman. Cit. Page 4.



Another area is combating illegal employment, ensuring effective measures to prevent employment by irregularly staying third-country nationals by making the legislation (the Employers Sanctions Directive) more effective.

Key on this matter is to enhance cooperation with third countries, by establishing counter migrant smuggling partnerships, supporting countries of origin and transit in capacity-building, both operational and in law enforcement, and improving information exchange.

CSDP missions, such as EUCAP Sahel Niger and EUBAM Libya, operations EUNAVFOMED IRINI and others will continue making important contributions to this effort.

Developing legal pathways to Europe

The Pact recognizes the importance of enhancing legal migration, as a benefit to both the EU and the countries of origin and a way to remove the incentive to embark on dangerous journeys to reach Europe. It proposes to establish Talent Partnerships with key third countries, first in the EU's neighborhood of the Western Balkans and Africa. The Commission will organize a high level conference with Member States and key EU partners to launch this initiative.

CONCLUSIONS

The New Pact on Migration and Asylum has been discussed by the Council in its Justice and Home Affairs format, both in October and November this year and will be examined again in December. It might also be included in the Agenda of the European Council in December. Most likely, negotiations will continue during the Portuguese Presidency, as some of the proposals meet resistance by some Member States, while others insist that an agreement must include the whole package. The Commission's proposals are not perfect but, if and when adopted, could represent a substantial progress on this matter. Some NGOs working with migrants and refugees consider that the New Pact puts too much emphasis on border controls and returns and not enough on the protection of asylum seekers.

Perhaps the most difficult issue is the common framework for responsibility and solidarity sharing. The main responsibility for processing applicants still rests in practice with the Member States of first entry. The Commission's proposals do not envisage a common European Migration and Asylum Policy but, rather, a system of shared responsibility in processing asylum applications, in which solidarity is not automatic as it contemplates several options that can be chosen by the other Member States.

The fast-track procedure for the examination of asylum applications could also raise some questions as regards implementation. What happens with the applicants whose request has been rejected?

On border controls, the creation of a standing corps and the other measures might be difficult to finance with the current Frontex budget envisaged in the 2021-2027 MFF (€ 5,148 million). Funding may also be inadequate to develop the external dimension, especially as regards African countries. However, this is an essential element for the EU migration policy to be successful.



An effective and common return system is crucial. The EU must build on its own experience and that of some Member States that have signed readmission agreements with countries of origin and transit (for example Morocco and Mauritania) to facilitate returns. The Union should seek to conclude such agreements, using the various instruments available (development and economic assistance, trade, technical cooperation, capability building and even visa policy) to support this policy.

Linked with this issue is the fight against the criminal networks that operate in human trafficking towards Europe. The EU must establish this fight as a priority within its migration policy. It will require enhanced cooperation with countries of origin and transit, using appropriate measures of pressure when necessary.

Finally, it seems a bit surprising that “supporting well managed legal migration” does not receive the highest priority within the proposed New Pact. Obviously, a successful EU migration policy should have as its first objective to facilitate and encourage legal migration, both temporary and permanent. Quite frequently there is a shortage of labor in the EU in some sectors, such as agriculture, that would require the establishment of the appropriate mechanisms for the legal presence of foreign nationals. Legal migration is the best way to facilitate integration and avoid tragic loss of life in dangerous journeys. Unfortunately, the Commission’s proposals seem to be rather vague on this matter, perhaps due to the lack of harmonization of immigration laws and policies among the Member States.

The current migration crisis in the Canary Islands, with massive arrival of migrants (many of them coming from the Maghreb region), shows that the Member States of first entry, due to their geographic location, are the ones who must often bear a disproportionate part of the burden from the economic, social, organizational and security points of view. This cannot be sustained. Migration is an issue of common responsibility of the Union, which requires not only solidarity, but a common effort by all. It is, therefore, urgent that the EU gives a coherent response on this matter.

November 30, 2020