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The New Pact on Migration and Asylum as a Response to Current Migration Challenges– Selected Issues

Abstract: The Covid-19 pandemic has significantly affected the movement of people within the European Union, both in terms of nationals of the Member States and others. On many occasions, as an instrument to combat or contain the spread of the virus, EU Member States have made use of the possibility of temporarily reintroducing border controls in the Schengen area, or even temporarily closing their national borders. Despite the Covid-19 pandemic, the migratory pressure on the countries of the European Union has not ceased, although the scale of this phenomenon has decreased in many areas. A separate problem is also the influx of illegal migrants to the territory of European Union Member States and the effective implementation of instruments to combat this practice. The regulations in force in the European Union in the area of migration and asylum were developed under different conditions, i.e. standard migration flows, and despite many modifications (e.g. in the context of the competences and tasks of Frontex) they have not proved effective in emergency situations. Consequently, many attempts have been made to amend these regulations. In 2020, they were replaced by a new comprehensive Pact on Migration and Asylum. The aim of this paper is to present and analyze selected legal problems related to the influx of irregular migrants to the European Union in the light of current migration trends and to show, against this background, the main demands for changes contained in the submitted legislative proposals.

Keywords: irregular migrants, migration routes, migration management, migration control, migratory movement, EU migration policy

Introduction

The inflow of irregular migrants into the European Union increased uncontrollably in 2015, particularly as a long-term consequence of the Arab Spring

and the war in Syria. European Union Member States have taken a variety of multifaceted measures to mitigate the phenomenon, but it has not been completely eliminated. Until now, some EU countries, especially Greece and Italy, have been struggling with the problem of being the country “on the front line” of crossings of the external EU border.

As we know, the problem of migration is complex. On the one hand, we have the problem of the security of people looking for a new, better place to live. On the other hand, there are the justified concerns of the states at the external borders in the context of the particular pressure to which they are exposed. The main burden rests with them, often exceeding the internal capabilities of the country concerned, and as past practice has shown, the solidarity of other EU countries (e.g. in the area of relocation) looks different in practice.

It should be remembered that procedures and their observance at external borders are crucial. They also have an impact on the situation in other EU Member States in terms of asylum, integration or return operations in cases of large influxes of people. The existing EU regulations in this area, designed for “normal” migration flows, have not worked well in an emergency situation. The challenge of the scale of migration after 2015 exposed the weaknesses of the current European asylum system. These have conditioned the need for a new approach to addressing the problem.

The Commission has already put forward several proposals to amend the existing regulations. Based on a comprehensive assessment of the situation, a new pact on migration and asylum was proposed on September 23, 2020. It proposes a proper new migration policy, more efficient procedures and a new balance between Member States’ responsibilities and solidarity. The rationale for this new approach has been the existing practice of implementing migration and asylum policy and the specific problems associated with it.

1. The Current Migration Situation in the European Union

Looking at the statistical data in the area of migratory movements in the EU countries, it is clear that we still have an increased influx of migrants in this direction, although far fewer than in the peak year of 2015. Undoubtedly, this was influenced by the Covid-19 pandemic in 2020. However, the trend of the increase, which is still high, calls for a revision of the current approach to shaping a common policy on migration and asylum. At the level of the European Union, several attempts have been made to modify the current system in this area, with mixed results. Hence another attempt to systematically redefine the common approach to the procedures applied, the scope of responsibility of individual states and their solidarity in the form of a New Pact on Migration and Asylum submitted in September 2020.

Referring to the data in terms of non-EU28 countries' population in 2020¹, the impact of the Covid-19 pandemic on migration movements is clearly visible. The largest indicator in terms of non-EU28 countries' population in 2020 in absolute numbers is recorded in Germany: 8,604,207, which means an increment of 162,888, compared to 2019. However, the dynamics of this increment have decreased in 2020, as the increment in 2019 compared to 2018 was at a higher level, at 646,699. In second place is France: 6,384,234, which means an increment of 133,713, compared to 2019. Here also the dynamics of the increment have decreased compared to the previous year. The increment in 2019 compared to 2018 was higher, at 193,856. In third place is Spain: 5,029,446, an increment of 429,134, compared to 2019. Here, however, the dynamics increased in 2020, as the increment in 2019 compared to 2018 was lower, at 326,898.

The countries most affected by the influx of migrants, i.e. Italy and Greece, were ranked fourth and eighth respectively. Italy recorded 4,430,954 non-EU foreigners in 2020, a decrease of 15,403 compared to 2019. The previous year saw an increase compared to 2018, at 103,485. In Greece, the non-EU population was at 998,150 in 2020, an increase of 39,343 compared to 2019. In 2019, the increase in this indicator compared to 2018 was at a lower level, at 25,046. Detailed conclusions can of course be drawn after a more in-depth analysis, but it is impossible not to point out that the situation in terms of the number of non-EU populations was influenced by the Covid-19 pandemic. This is particularly evident in Italy, where the epidemic situation in 2020 was probably the most dramatic in Europe.

The postulates of revising the current approach to the shape of migration and asylum policy are confirmed by subsequent data on the number of submitted asylum applications. At the time of this article's submission, the latest available full-year data is for 2019. There were 2,712,477 refugees (defined as people who are outside their country of origin due to a well-founded fear of persecution) across the EU in 2019. In contrast, there were 721,075 asylum seekers (who, because their lives are in danger in their country of origin, have made a formal application to the host country and are awaiting a decision) compared to 1,321,600 applications in the peak year of 2015². During this period, Germany had the highest number of asylum applications, with 169,615 (of which first-time applications were 142,450), followed by France with 128,940 (of which first-time applications were 119,915) and Spain with 117,795 (of which first-time applications were 115,175)³.

1 Non-EU28 countries (2013–2020) nor reporting country, https://ec.europa.eu/eurostat/databrowser/view/migr_pop3ctb/default/table?lang=en (accessed 15.01.2021).

2 Evolution of asylum applications and refugee numbers in the EU, https://www.europarl.europa.eu/infographic/welcoming-europe/index_pl.html#filter=2019 (accessed 15.01.2021).

3 *Ibidem*; First-time asylum applications by third-country nationals, <https://ec.europa.eu/eurostat/web/asylum-and-managed-migration/visualisations> (accessed 15.01.2021).

In 2019, there were 714,200 applications for international protection in the EU (plus Norway and Switzerland), 13% more than the 634,700 applications in 2018. This compares to 728,470 applications in 2017 and nearly 1.3 million in 2016⁴. In 2019 EU countries granted protection to nearly 295,800 asylum seekers, down from 333,400 in 2018 and 533,000 in 2017. Almost a third of these (27%) were from Syria, with Afghanistan (14%) and Venezuela (13%) also in the top three. The number of people from Venezuela increased by nearly 40% in 2019 compared to 2018. Of the 78,600 Syrians granted international protection in the EU, almost 71% received it in Germany⁵.

There was a decrease in asylum applications in 2020, undoubtedly related to the restrictions following the Covid-19 pandemic. In the first ten months of 2020, 390,000 asylum applications were made in the EU (including 349,000 first-time applications), 33% fewer than in the same period of 2019. This allowed for some reduction in the backlog of applications, with 786,000 pending cases at the end of October 2020, 15% fewer than at the end of 2019. In the same period (January–October 2020), the number of decisions issued at first instance was 386,000, 2% less than in the same period in the previous year. 43% of these decisions were positive (81,000 decisions granting refugee status, 34,000 granting subsidiary protection status and 50,000 granting humanitarian status)⁶.

Illegal crossings of the EU's external borders are also a persistent problem, albeit with much lower dynamics compared to the situation at the peak of the migration crisis. In 2015 and 2016, more than 2.3 million illegal border crossings were detected. In 2019, the total number of illegal EU border crossings fell to around 141,800, the lowest level since 2013 and 5% lower than in 2018⁷. Of the number of illegal border crossings in 2019, 106,200 cases relate to the maritime border (down 7% compared to 2018) and 35,500 cases to the land border (here a level similar to 2018). According to the data for 11 months of 2020, in this period we had 114,300 cases of illegal border crossings (a decrease of 10% compared to the same period in 2019)⁸.

4 Asylum trends in the EU in 2019, <https://www.easo.europa.eu/sites/default/files/easo-eu-2019-asylum-trends.pdf> (accessed 15.01.2021).

5 Asylum decisions in the EU, <https://ec.europa.eu/eurostat/documents/2995521/9747530/3-25042019-BP-EN.pdf/22635b8a-4b9c-4ba9-a5c8-934ca02de496> (accessed 15.01.2021).

6 European Commission, Statistics on migration to Europe, https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-of-life/statistics-migration-europe_en (accessed 15.01.2021).

7 Asylum and migration in the EU: facts and figures, <https://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/asylum-and-migration-in-the-eu-facts-and-figures> (accessed 15.01.2021).

8 European Commission, Statistics on migration, *op. cit.*

Analyzing in more detail the situation of individual migratory routes⁹ in 2019, there was a clear decrease (-57%, 26,700) in the number of people crossing the border into the Western Mediterranean (including the Atlantic route from Western Africa to the Canary Islands). An equally pronounced, but slightly smaller, decrease (-40%, 14,000) was recorded on the Central Mediterranean route. At the same time, a robust increase was recorded on the Eastern Mediterranean route (+47%, 83,300). On the Eastern borders route (via borders with Belarus, Moldova, Russia and Ukraine) illegal crossings also decreased (-38%, 640), but this is still not the main route. According to the data for January–November 2020 compared to the same period in 2019, there was an increase (year-on-year) in crossings on the Central Mediterranean route (+154%, 34,100) and the Western Mediterranean route (+46%, 35,800) and a decrease in crossings on the Eastern Mediterranean route (-74%, 19,300). This simultaneously resulted in a significant deterioration of the situation in the transit camps¹⁰. One person can cross the border several times, so the number of people actually arriving in Europe is lower, but some Member States are undoubtedly still under considerable pressure, where solutions developed in other circumstances do not fully work.

The justification for the calls for reform of the existing system in the implementation of migration and asylum policy was also based, among other things, on the significant differences in recognition rates across EU countries. For example, in 2019 the recognition rate of Afghan citizens at first instance ranged from 2% in Hungary to 93% in Italy. This range has increased compared to 2018. In practice, the application of the existing provisions of the Dublin Regulation is also sometimes problematic. In 2019 Member States reported 142,900 outgoing requests under the Dublin rules. These requests were sent to other Member States to take responsibility for examining an application for international protection. 131,300 decisions were issued in these cases. 85,700 (i.e. 65%) of the requests were accepted and 24,100 outgoing transfers were executed (which is 28% of the accepted requests)¹¹.

9 See also Sara Casella Colombeau, Crisis of Schengen? The Effect of Two ‘Migrant Crises’ (2011 and 2015) on the Free Movement of People at an Internal Schengen Border, “Journal of Ethnic and Migration Studies” 2020, vol. 46, no. 11, pp. 2258–2274.

10 See E. Kondilis, K. Puchner, A. Veizis, C. Papatheodorou and A. Benos, Covid-19 and Refugees, Asylum Seekers, and Migrants in Greece, “British Medical Journal” 2020, no. 369, doi.org/10.1136/bmj.m2168 (accessed 20.12.2020); K. Mitchell and M. Sparke, Hotspot Geopolitics versus Geosocial Solidarity: Contending Constructions of Safe Space for Migrants in Europe, “Environment and Planning D: Society and Space” 2020, vol. 38, no. 6, pp. 1046–1066, doi:10.1177/0263775818793647 (accessed 20.12.2020); A. DoliwaKlepcka and M. Zdanowicz, The European Union Current Asylum Policy: Selected Problems in the Shadow of COVID19, “International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique” 2020, doi.org/10.1007/s11196-020-09744-3 (accessed 15.01.2021).

11 European Commission: Statistics on migration, *op. cit.*

Resettlement is another important point in the organization of the Common Migration and Asylum Policy system so far. In 2019, around 21,200 people in need of international protection were resettled from non-EU countries to EU Member States (12% more than in 2018). Most of them were resettled from Turkey and the main nationality was Syrian (around 60% of resettled persons). Since 2015 more than 75 000 people have been resettled into the EU under joint EU resettlement schemes¹².

2. Assumptions of the New EU Pact on Migration and Asylum

Previous experience, starting from 2015 when there was an unprecedented influx of migrants to the EU, has shown the inefficiency and ineffectiveness of the introduced mechanisms, including especially in the area of relocation of migrants who found their way to the territory of the European Union¹³. In this context, a New Pact on Migration and Asylum was developed at the EU level. On September 23, 2020, the European Commission presented a new concept of migration policy, revising the procedures used and finding the optimal balance between responsibility and solidarity.

The new pact was based on the 2016 reform concept. Of the proposals made at that time, the Commission withdrew one, the Dublin Regulation (Dublin IV). Instead, additional elements were included to ensure a balanced, common framework linking all aspects of asylum and migration policy. The New Pact on Migration and Asylum is de facto a combination of legislative and non-legislative instruments. They are intended to complement each other and create a comprehensive system –on the one hand, effective management of external borders, and on the other, coherent cooperation in the internal and external aspect of migration policy. In this way, a balance is to be achieved between the demand for responsibility and solidarity in the implementation of a comprehensive policy towards migrants.

The Pact on Asylum and Migration¹⁴ presents a comprehensive approach to the issue of external borders, the asylum and return system and the functioning of the Schengen area. In this set of proposals, both legislative and non-legislative, the Commission has proposed the adoption of a broader, more solidarity-based framework for migration and asylum policy, while at the same time modifying existing concepts from the Dublin IV Regulation.

12 *Ibidem*.

13 A. Doliwa-Klepcka, Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v Council of the European Union, “Polish Review of International and European Law” 2019, vol. 8, no. 2, pp. 141–154, doi.org/10.21697/priel.2019.8.2.07 (accessed 15.01.2021).

14 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the New Pact on Migration and Asylum, COM/2020/609 final, <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A52020DC0609&qid=1607428374739> (accessed 20.12.2020).

The Pact on Migration and Asylum comprises a package of nine instruments, both binding (legislative) and non-binding. The Commission's legislative proposals within the common package include:

- a legislative proposal for a Regulation of the European Parliament and of the Council introducing screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (COM/2020/612 final)¹⁵;
- an amended legislative proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for applications for international protection in the Union and repealing Directive 2013/32/EU (COM/2020/611 final)¹⁶;
- an amended legislative proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX (Regulation on Asylum and Migration Management) and Regulation (EU) XXX/XXX (Regulation on Resettlement) for the purpose of identifying illegally staying third-country nationals or stateless persons and on requesting comparisons with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818 (COM/2020/614 final)¹⁷;
- a legislative proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive 2003/109/EC and the proposed Regulation (EU) XXX/XXX (Asylum and Migration Fund) (COM/2020/610 final)¹⁸;
- a legislative proposal for a Regulation of the European Parliament and of the Council on responding to emergencies and force majeure in the area of migration and asylum (COM/2020/613 final)¹⁹.

In addition to those mentioned above, the pact also includes instruments without a formally binding character:

15 <https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1601291190831&uri=COM%3A2020%3A612%3AFIN> (accessed 15.01.2021).

16 <https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1601291268538&uri=COM%3A2020%3A611%3AFIN> (accessed 15.01.2021).

17 <https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1601295417610&uri=COM%3A2020%3A614%3AFIN> (accessed 15.01.2021).

18 <https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1601291110635&uri=COM%3A2020%3A610%3AFIN> (accessed 15.01.2021).

19 <https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1601295614020&uri=COM%3A2020%3A613%3AFIN> (accessed 15.01.2021).

- a Commission recommendation (C(2020) 6469 final) on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint)²⁰;
- a Commission recommendation (C(2020) 6467 final) on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways²¹;
- a Commission recommendation (C(2020) 6468 final) on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities²²;
- Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorized entry, transit and residence (C(2020) 6470 final)²³.

It is important to note that the comprehensive view of the New Pact incorporates some of the Commission's earlier legislative proposals from 2016 and 2018, on which some political agreement had already taken place in the Council and the European Parliament, but without completing the legislative process (drafts: EU Asylum Agency Regulation, Reception Conditions Directive, Qualification Directive, EU Resettlement Framework and Return Directive).

The submitted draft of the new Asylum and Migration Management Regulation is intended to replace one of the key elements of the 2016 reform, the Dublin Regulation. The new 2020 proposal proposes a more effective and comprehensive management system with greater practical guarantees of solidarity between Member States.

3. New Regulations on Asylum and Migration Management as a Key Element of the Pact

The adoption of the Asylum and Migration Management Regulation and the creation of the Asylum and Migration Fund will mean that the Dublin III Regulation will be replaced by new arrangements. The Commission has justified its legislative

20 https://ec.europa.eu/info/sites/info/files/commission_recommendation_on_an_eu_mechanism_for_preparedness_and_management_of_crises_related_to_migration_migration_preparedness_and_crisis_blueprint_0.pdf (accessed 15.01.2021).

21 https://ec.europa.eu/info/sites/info/files/commission_recommendation_on_legal_pathways_to_protection_in_the_eu_promoting_resettlement_humanitarian_admission_and_other_complementary_pathways.pdf (accessed 15.01.2021).

22 https://ec.europa.eu/info/sites/info/files/commission-recommendation-_cooperation-operations-vessels-private-entities_en_0.pdf (accessed 15.01.2021).

23 https://ec.europa.eu/info/sites/info/files/commission-guidance-implementation-facilitation-unauthorised-entry_en.pdf (accessed 15.01.2021).

proposal at length. It stresses in particular the need for a common framework to facilitate a comprehensive approach to the management of asylum and migration, based on the principles of integrated policy making as well as solidarity and fair sharing of responsibility. It also stresses the need to ensure the sharing of national responsibilities by means of a new solidarity mechanism, as well as to enhance the system's capacity to identify a single Member State responsible for the examination of an application for international protection. This is to be achieved, inter alia, by removing the cessation of responsibility clauses, by eliminating the possibility of shifting responsibility between Member States as a result of the applicant's actions (e.g. preventing unauthorized movement of applicants for international protection between EU countries) and by significantly reducing the time limits for sending applications and receiving replies²⁴.

Justifying its proposal, the Commission noted that Member States' existing asylum and return systems remain largely incompatible. This leads to divergent standards of protection, inefficient procedures and encourages the unauthorized movement of migrants across Europe in search of better reception conditions and residence prospects, thus having undesirable effects on the Schengen area. It is precisely the lack of harmonized and correct implementation in the Member States that has been the biggest weakness in the application of the Dublin procedure so far²⁵. The Commission stressed that a common problem in the European Union is the submission of multiple applications for international protection by the same person. According to the Commission's research, in 2019 (preceding the submission of the legislative proposal), as many as 32% of applicants had already filed applications in other Member States. This demonstrates that the procedures set out in the previous Dublin III Regulation²⁶ did not effectively limit the possibility of multiple applications or the unauthorized movement of persons in the procedure²⁷. However, it must be remembered that the Dublin III Regulation, which has been in force since July 19, 2013, was adopted in different external circumstances. Therefore, it is difficult to maintain that the mechanisms set out in it did not work in the extraordinary situation of migratory pressure or the need to make a fair division of responsibility between Member States.

The draft regulation on asylum and migration management adopts a new working model based on the solidarity mechanism. It aims at addressing the

24 COM (2020) 610 final, p. 5 of the explanatory memorandum of the proposal.

25 The evaluation report and the implementation report are available at https://ec.europa.eu/home-affairs/what-wedo/policies/asylum/examination-of-applicants_en (accessed 15.01.2021).

26 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing criteria and mechanisms for determining the Member State responsible for examining an application for international protection, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32013R0604> (accessed 15.01.2021).

27 COM (2020) 610 final, p. 16 of the explanatory memorandum of the proposal.

challenges posed by migratory pressures. The mechanism is to be applied flexibly in situations with different migration flows and under different conditions. It involves individual Member States making solidarity contributions to finance relocation or return. This contribution will be compulsory for individual EU Member States on the basis of a scale of 50% of GDP and 50% of population. Such a system will, in the Commission's view, guarantee the principle of fair sharing of responsibility²⁸. The new system also assumes that each EU country will have the right to choose whether to participate in the refugee relocation procedure or to make a solidarity contribution by sponsoring the return of persons identified as illegally staying in Member States affected by excessive migratory pressures.

States are left to take the initiative to inform the Commission that they are under migratory pressure. If the Commission's assessment in this respect is in line, the Commission will determine the overall needs of the Member State and the appropriate measures necessary to address the situation. All other Member States will be required to make an appropriate solidarity contribution (sponsoring relocation or return). The beneficiary Member State is not obliged to make a solidarity contribution. Member States indicate the type of contributions they will make in solidarity response plans, which are sent to the Commission²⁹.

It is also possible that the Commission will accept the need for solidarity measures other than sponsoring relocation or return. These could be, for example, measures to enhance the State's asylum, reception or return capacity or external measures to reduce migration flows. In this case, the contributing Member State may identify such measures in its solidarity response plans instead of sponsoring relocation or return. These assistance measures may take various forms: providing assistance for the introduction of increased reception capacity, including infrastructure or other systems, improving reception conditions for asylum seekers, financial or other assistance targeted at infrastructure and equipment that may be necessary to improve the implementation of return decisions, providing materials or means of transport for carrying out operations, etc. In addition to detailed guidance on the relocation procedure and return sponsorship, the Commission's legislative proposal envisages providing additional financial support for relocation to encourage Member States to choose the option of relocating refugees.

The new draft regulation on asylum and migration management also introduces significant changes to the procedure for applying for international protection, in an attempt to address the fundamental issue of the disproportionate allocation of asylum seekers. The proposal requires an application to be made either in the Member State of first illegal entry or in the Member State of legal residence. The applicant will not be allowed to choose either the Member State of application or

28 *Ibidem*, p. 20.

29 *Ibidem*, pp. 22–23.

the Member State responsible for examining the application. It will also introduce the obligation for the applicant to reside, during the determination procedure, in the Member State of application and, after such a determination, in the Member State considered responsible. Undoubtedly, this modification will tidy up the management of migration flows, facilitate the determination of the responsible Member State, and consequently enable faster access to the procedure for granting international protection, preventing unauthorized movement.

Conclusions

The Pact on Migration and Asylum submitted in September 2020 is an expression of a new, comprehensive approach to the problems of managing the EU's external borders, a common migration and asylum policy. For the time being we have a rather early stage of legislative procedures, so it is difficult to prophesy about the real effectiveness of the new set of instruments. Nevertheless, the new approach, at least in its assumptions, seems to respond to the most important challenges of the current solutions in this area. Continuous migratory pressure on the borders of Member States (irrespective of temporary fluctuations in the context of the Covid-19 pandemic) fully justifies the urgent need to revise the current system.

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