

MONITORING THE DEBATE ON THE NEW PACT ON MIGRATION AND ASYLUM

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Abstract

The New Pact on Migration and Asylum presented by the European Commission on 23 September 2020 aims at representing a new start with regard to the whole of issues related to the management of the challenges posed by migrants, refugees and asylum seekers arriving in the European Union. High expectations were raised that the reform would truly address the pressing questions that are high on the political agenda in many European countries. The New Pact has provoked a controversial debate. International organizations, European institutions, Member States, civil society organizations, academics have commented the complex package of policies and legislative proposals. One of the most conflictive issues regard the external dimension in the migration and asylum fields. Some observers, in particular Governments and the Council, deem that the cooperation with third countries of origin and of transit or first safe haven represents an essential aspect of solution, having regard to the “success” of the agreements with Turkey and Libya in terms of the reduction of arrivals from these countries. Others are most critical with respect to the “externalization” of responsibilities and of the control of external borders. Another conflictive issue is the reform of the “Dublin” system, addressed in the Pact as part of the Regulation on Migration and Asylum Management. The Mediterranean Member States oppose the continuing attribution of responsibility for asylum seekers to countries of first arrival and the insufficient solidarity mechanisms. Other Member States refuse any obligation of accepting asylum seekers relocated from other Member States. For the time being, no solution is in sight to overcome these divergencies.

Keywords: *Asylum, Dublin System, External Dimension, Legal Pathways, Migration, Principle of Solidarity.*

MONITORIMI I DEBATIT PËR NJË PAKT TË RI PËR MIGRACIONIN DHE AZILIN

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Abstrakt

Pakti i Ri për Migracionin dhe Azilin paraqitur nga Komisioni Europian më 23 shtator 2020 synon të paraqesë një fillim të ri në lidhje me tërësinë e çështjeve lidhur me menaxhimin e sfidave të krijuara nga migrantët, refugjatët dhe azilkërkuesit që mbërrijnë në Bashkimin evropian. Pritshmëri të larta u krijuan pasi reforma do të adresonte me të vërtetë çështje të ngutshmë që janë në krye të axhendës politike të shumë vendeve evropiane. Pakti i ri ka nxitur debate. Organizata ndërkombëtare, institucionet evropiane, shtetet anëtare, organizatat e shoqërisë civile dhe akademikët kanë komentuar paketën e plotë të politikave dhe propozimeve ligjore. Një nga çështjet në problematike është dimensionimi i jashtëm në fushën e migracionit dhe azilit. Disa observues, në veçanti qeveritë dhe Këshilli besojnë se bashkëpunimi me vende të treta të origjinës dhe tranzitit apo strehës së parë të sigurtë përfaqësojnë një aspekt thelbësor të zgjidhjes, duke patur parasysh “suksesin” e marrëveshjeve me Turqinë dhe Libinë në kuadër të uljes së mbërritjeve nga këto vende. Të tjerë janë më shumë kritikë në lidhje me “eksternalizimin” e përgjegjësisë dhe kontrollit të kufijve të jashtëm. Një çështje tjetër konfliktuale është reforma e sistemit të “Dublinit”, adresuar në Pakt si pjesë e Rregullores për Migracionin dhe Menaxhimin e Azilit. Shtetet anëtare mesdhetare kundërshtojnë ngarkimin e vazhdueshëm të përgjegjësisë për azilkërkuesit tek vendet e para pritëse dhe pamjaftueshmërinë e mekanizmave të solidaritetit. Vende të tjera anëtare refuzojnë çdo detyrim për pranim të azilkërkuesve të zhvendosur nga vende të tjera anëtare. Për momentin, nuk ka asnjë zgjidhje në horizont për të kapërcyer këto mosmarrëveshje.

Fjalë kyçe: Azil, Sistemi i Dublinit, dimensionimi i jashtëm, rrugët ligjore, migracion, parimi i solidaritetit.

1. Introduction

The European Commission has presented on 23 September 2020 the New Pact on Migration and Asylum. After a long period of announcements and of postponing the publication of the document, expectations were high to see finally an innovative and holistic long-term programme on migration and international protection. On occasion of presenting the New Pact to the public, the Commission’s President Ursula von der Leyen stated: “[t]he old system no longer works”. The package would “offer a new start”, she said, and announced a “predictable and reliable migration management system” that

“brings together all aspects of migration: border management and screening, asylum and integration, return and relations with external partners” (1).

Asylum has become over the last years, precisely after the “European refugee crisis” of 2015, one of the most debated and controversial issues of policy making in the European Union. The Member States of the EU have completely different approaches with regard to the mode in which the right to asylum, enshrined in the EU Charter on Fundamental Rights, article 18, should be implemented. In particular, the principle of solidarity between the Member States in respect of all matters related to asylum and migration established in article 80 of the Treaty on the Functioning of the European Union (TFEU) is interpreted controversially in the various sub-regions of the Union. International organisations like the UN High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) (2) as well as civil society organizations (3) warn against the tendency of closing the EU external borders to people in need of protection. The “European refugee crisis” and its political consequences have provoked a kind of collective “trauma” that is becoming apparent at the moment of writing this article, September 2021, with regard to the Afghan disaster and the shifting of responsibilities for Afghan refugees to third countries (4). Countries like Pakistan and Iran, which already host far bigger numbers of Afghan refugees with regard to the total number of them in Europe, according to the EU, should be induced by financial aid to take care of the expected new exodus from Afghanistan. Already before the Afghan crisis, Filippo Grandi, the UN High Commissioner for Refugees, reminded Europe’s global responsibility. “Avoid the narrative of invasion, there is no invasion. Look at the numbers of refugees and displaced persons in countries like Colombia or Uganda or so many others in the developing regions, and be aware that the EU has a global relevance, that good or bad examples have a direct impact on the rest of the world” (5). In fact, in 2020, the number of asylum seekers in the EU dropped by 32% with respect to 2019, not only as a consequence of the Covid-19 pandemic. The trend continued in the first semester of 2021, with a drop of approximately 40% compared to same period of 2019.

The Common European Asylum System (CEAS), meant to establish uniform policies and rules to be observed by all Member States, appeared already in 2015 to be inadequate and insufficient for dealing with the sudden arrival of more than one million asylum seekers originated mainly from Syria. As a response, the Union has taken two different lines of action. On the one hand, preventing arrivals of asylum seekers in the Union through multilateral or bilateral agreements with countries of transit or first refuge like Turkey (March 2016) or Libya (February 2017). On the other, reforming substantially the CEAS through new legislative measures. The European Commission has presented in May 2016 a proposal for the reform of the “Dublin” system on the attribution of responsibility for asylum seekers to a single Member State. Further, in July 2016, the Commission has adopted a package of proposals aimed at reforming a wide range of subjects like the qualification for international protection, the reception of asylum seekers, the asylum procedures, and the transformation of the European Asylum Support Office (EASO) into a fully-fledged asylum agency (EUAA). After four years of debate, none of these proposals have become law, due to divergences within the Council as well as between the Council and the European Parliament (EP). In light of this impasse, the Commission decided in 2020 to re-write the previous proposals and to present the legislative package in the frame of a comprehensive strategic document (6), which is presently under debate.

2. The New Pact – A Comprehensive Package of Policies and Proposals

The Vice-President of the Commission and responsible for coordinating the Commission's work on the New Pact, Margaritis Schinas, has described the Pact as a three-floor-building in which all levels must be equally stable and reliable (7). The ground floor is the external dimension, the relation with countries of origin and of transit of migrants and asylum seekers, with the intention "to create better life there". The task would be to create win-win-partnerships with approximately 25 of those third countries. Supposedly, all Member States would agree on this subject.

The second floor concerns the management of the EU's external borders of the EU. According to Schinas, this must be considered a common, shared responsibility, for it would be unfair to delegate such a critical task to 5 or 6 countries of first entry. Frontex, the European Border and Coast Guard Agency would have a pivotal role to play. Frontex would count on a budget increase of 6 billion Euro per year and would have some 10,000 border and coast guards at its disposal. Management of external borders should also include obligatory screening procedures for all arriving third country nationals lacking admission documents as well as effective return mechanisms regarding people without a valid residence permit in a Member State.

The third floor consists in a new system of permanent and effective "solidarity and burden sharing" where countries of first entry could trigger solidarity mechanisms, and the other Member States could choose between different options, "in order to reduce pressure on the system".

The New Pact constitutes finally, in the view of Schinas, a true and comprehensive system. Previously, he said, the Union had failed altogether in migration and asylum policies. The previous Commissions including the last one under the presidency of Juncker had only achieved a patch-work. The legislative proposals of 2016 on the reform of the Common European Asylum System have represented a non-system, a puzzle of non-interlinked elements. "Moria, Calais, Canary Islands are a direct consequence of this non-system we have today", Schinas said.

The New Pact builds on the Commission's seven legislative proposals of 2016, meant as a fundamental reform of the Common European Asylum System (CEAS) and as a response to the "European refugee crisis". The CEAS, already substantially reviewed only few years earlier, in 2013, deemed to be insufficient and inadequate as an instrument to manage the sudden arrivals of more than one million asylum seekers in some Member State of the Union. On five of these proposals, a political agreement had already been reached, namely regarding the Regulations on Qualification for International Protection; on the upgrading of the European Support Agency for Asylum (EASO) to the EUAA; the revision of the Eurodac system on the establishment of a data bank of asylum seekers; a framework for resettlement and humanitarian admission of refugees, as well as on the reform of the Directive on the reception of asylum seekers.

However, the process of reforming the CEAS on basis of the 2016 Proposals did not develop during the subsequent years because of entirely different views within the Council on two substantial issues: the proposed Regulations on Asylum Procedures and on the "Dublin system". The European Council had reiterated its position that the reform had to be approved as a "package", in view of the inter-link between the different issues

addressed by the Commission's legislative Proposals. In the frame of the New Pact, the Commission has now presented revised versions on both conflictive topics, expecting that the new versions would facilitate the reaching of a compromise between the divergent positions. On the eve of the presentation of the New Pact, the Vice-President of the Commission, Ylva Johansson, had foreseen that "no one will be satisfied", but precisely for this reason, the Pact would have a chance of succeeding (8).

The New Pact comprises also two new Proposals for Regulations: on the screening of third country nationals at external borders and on addressing situations of crisis and *force majeure* in the field of migration and asylum, in substitution of the – never implemented – EU Directive on Temporary Protection of 2001.

Moreover, together with the introductory Communication to the European Parliament and to the Council, the Commission has issued Recommendations on the cooperation between Member States concerning private entities concerned with rescue at sea activities as well as on legal pathways to protection in the EU.

Finally, the Commission has provided a Guidance to Member States on the implementation of EU rules concerning the definition and the prevention of facilitation of unauthorized entry, transit and residence.

The Commission has published on 24 November 2020 an Action Plan 2021-27 on Integration and Inclusion, and on 29 April 2021 a "New Strategy on Voluntary Return and Reintegration for Migrants and Asylum Seekers" (9).

The Commission has also announced, for 2021, the development of a Strategy on the future of the Schengen System, following a meeting of several Heads of Government and members of the EU Commission in November 2020 promoted by the French President Emmanuel Macron. In light of the terrorist attacks in France, the French President is demanding a review of the Schengen Border Code. Eventually, a revised Schengen Regulation will be adopted under the French EU Presidency during the first semester 2022.

3. The External Dimension of the EU Migration Policies

There is no doubt that the New Pact represents a very comprehensive package of legislative and structural issues that encompasses nearly all aspects of migration and asylum policies. However, the legislative Proposals presented by the Commission have generated extremely controversial comments by Governments, policy-makers, academics and civil society organizations. A number of observers are doubtful regarding the innovative character of the strategy. For example, the "external dimension" of migration and asylum policies had already been highlighted in the 1999 Conclusions of the Extraordinary European Council in Tampere. The Hague Programme of 2004, the Stockholm Programme of 2009 and the EU Agenda of Migration of 2015 as well as subsequent programmatic and strategic documents of the European Commission dedicated vast chapters on the relationship with third countries. The need to induce home countries to re-accept their citizens served with expulsion orders by Member States by promising some benefits for enhanced cooperation and for the conclusion of readmission agreements has been a constant feature of EU policies for more than 20 years. However, it is evident that the New Pact stresses predominantly the role and responsibilities of non-EU countries of origin and of transit. In its Opinion on the New Pact adopted on 27 January 2021, the European Economic and Social Committee (EESC) "regrets that most

of the proposals are devoted to the management of external borders and return, while failing to pay due attention to regular channels for immigration, safe pathways for asylum or the inclusion and integration of non-EU nationals in the EU” (10).

The European Council for Refugees (ECRE) “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” (11). Actually, “return” is a key term in the strategic part of the New Pact as well as in a number of legislative proposals.

The Conclusions of the European Council, in its meeting of 24 June 2021, on the topic of migration has addressed exclusively the cooperation with third States, whether of origin or of transit (12). In close cooperation with UNHCR and IOM, all available EU and Member States’ instruments and incentives should be used to tackle root causes, supporting refugees and displaced persons in the regions, building capacity for migration management, eradicating smuggling and trafficking, reinforcing border control and cooperation on search and rescue, addressing legal migration, ensuring return and readmission.

Prior to the European Council meeting, various recent meetings of the High-Level Working Group on Migration and Asylum identified the priority regions: North Africa, the Sahel region, sub-Saharan Africa, Western Balkans, and the Silk route. Within these regions, partnerships should be established first and foremost with Tunisia, Morocco, Pakistan, Nigeria, Afghanistan. Full use should be made of the Neighbourhood and International Cooperation Financial Instrument, especially for the prevention of irregular migration, and at least 10 per cent of the funds should be used for this purpose. The EU-Turkey Statement of March 2016 should be entirely implemented and renewed. Additional funding for Turkey should be earmarked. The Commission and the High Representative will put forward action plans for partnership agreements with priority countries. The Ministerial Conference on the management of migration flows, 10/11 May 2021, in which a number of African countries participated, has presented an occasion for trying to involve one of the priority regions into the EU strategy.

The UN High Commissioner for Refugees, Filippo Grandi, has warned against the externalization of responsibilities, “which is neither legal nor practical. It puts the burden on countries lesser equipped and represents a colonial approach” (13). However, from the Council report of 24 May 2021 on the progress made on the New Pact, it appears that a vast majority of Member States support the external dimension package. The Danish Parliament voted a law allowing for the processing of asylum claims in third countries. Diplomatic efforts with Libya, aiming, among others, at stemming the migration flows from and to Libya have intensified during the last 2 months. 44 million Euro of the Trust Fund for Africa are being used for the support to integrated border and migration management in Libya, first phase. Italy continues to finance vessels and equipment of the so-called Libyan Coast Guard. Regarding the crisis in Afghanistan following the taking of power of the Taliban, Aleš Hojs, Minister of Interior of Slovenia and President of the Home Affairs Council has stated: “[t]he EU remains committed to support vulnerable Afghans, and in particular women and children, both in Afghanistan and in the region. At the same time, we are determined to prevent smugglers and human traffickers from exploiting this dire situation by coordinating our response to any illegal migration movements and protecting the EU external borders. The EU will also engage and

strengthen its support to third countries, in particular the neighbouring and transit ones, hosting large numbers of migrants and refugees” (14). The EU Home Affairs Council of 31 August 2021 has endorsed this announcement and has stated: “[t]he EU and its Member States, with the support of Frontex, remain determined to effectively protect the EU external borders and prevent unauthorized entries, and assist the most affected Member States. Appropriate security checks should be carried out, including through the full use of relevant EU databases, as well as registration in Eurodac. Furthermore, as part of our comprehensive approach to external cooperation on migration, third-country national clauses in the readmission agreements between the EU and certain transit countries should be used where the legal requirements are met” (15).

Thus, it becomes evident that the external action part of the Pact (16) is the field where “progress” is actually been made, irrespective of the numerous disagreements on the legislative proposals. A common denominator within the divergent positions of the Member States is constituted by the general objective to keep refugees and migrants away from the soil of the Union by shifting the responsibility to third countries including the candidate States in the Western Balkans.

4. The Management of External Borders

A more efficient management of external borders, the “second floor”, has been on the migration agenda of the Union for many years as well. Allocating a pivotal role to Frontex in integrated border control and surveillance is one of the – few – topics where broad agreement between the Governments of Member States seems to be assured. Since the creation of Frontex in 2004, the Regulation governing the activities of the Agency has been amended four times, the latest in force as from 2020. In each exercise, new and extended competences have been assigned to the Agency. It’s budget has been increased and is being further increased to a level of around 500 times the original financial allocation.

Part of the external border management are the envisaged screening and border procedures. According to the Commission’s Proposal (17), the objective of screening of all undocumented third country nationals arriving at the external borders is not only to identify the persons and to establish health and security risks, but also to channel them immediately into either the asylum or the return procedures. During the screening, no distinction is made between *bona fide* asylum seekers and other migrants (18). The debriefing at the end of the screening and the channelling into the subsequent procedures is not subject to an effective remedy. During the screening, people remain in designated areas at or in proximity of the border, entailing “the risk of creating more Moria Camps” (19).

Really innovative is the proposal to examine jointly and on the spot, in the frame of the “border procedures”, the qualification of an asylum seeker to receive international protection and the issuance of a return order in case of non-qualification. During this procedure, like previously during the period of the screening procedure, it is supposed, on basis of a *fictio iuris*, that the migrants and asylum seeker have not yet entered the EU territory. Border procedures for the examination of asylum requests are already allowed – however, not obligatory for Member States – under the Directive on Asylum Procedures of 2013. With the proposed new Regulation (20), there introduction becomes, with few exceptions, mandatory for all asylum seekers arriving at external borders without

authorization for entry into the territory, including those disembarked following a search and rescue operation. With respect to asylum applicants of a nationality for whom decisions granting international protection is lower than 20% of the total number of decisions for that third country in the average of all Member States, the accelerated procedure at external borders must be applied. In these cases, it is assumed that the application is unfounded, thus *de facto* enlarging the concept of “safe countries of origin”. In case of rejection of the asylum application, the person is channelled *ipso facto* into the return procedure. Decisions in the frame of border procedures should be taken in a period “as short is possible”, in any case not beyond 12 weeks, including decisions on an appeal. Among the many critical comments (21), we may cite that of the German MEP (Greens/EFA) Erik Marquardt: “[m]igration management has become an euphemism for repelling refugees” (22). The European Economic and Social Council “considers that the projected pre-entry screening and border procedures are inadequate” and do not provide enough procedural guarantees for the respect of the fundamental rights”. In responding to these criticisms, Schinas has assured that the EU Fundamental Rights Agency (FRA) will be involved in monitoring border management with respect to the observation of human rights.

The main European and national NGOs concerned with the protection of the right to asylum have published in February 2021 a joint statement (23) highlighting that the New Pact could be an opportunity to change direction and to overcome the “crisis mode” in which asylum and migration have been treated for many years. However, they express deep concern about a number of the proposals of the European Commission, first of all about those regarding a mandatory accelerated border procedure to be applied to all persons who arrive irregularly in the EU to seek protection. The NGOs fear that this procedure would “undermine access to protection in Europe”, remove many necessary safeguards, and lead to massive extension of detention centres at the borders.

5. “Dublin” Replaced?

After 30 years of flaws and criticism regarding the initial “Dublin” Convention of 1990 and the subsequent “Dublin” Regulations of 2003 and 2013 on the attribution of responsibility of a Member States to examine an asylum request, the Commission has presented a revised Proposal in the frame of the New Pact. The term “Dublin” does no longer appear, being replaced by the more neutral expression “Regulation on Asylum and Migration Management” (RAMM) (24). The Proposal addresses as well the issue of the relocation of asylum seekers rescued at Sea and disembarked in the port of a Member State. In the intention of the Commission, this Proposal reflects the principles of solidarity and burden sharing. Not surprisingly, the implementation of the principle of intra-EU solidarity as enshrined in the Lisbon Treaty appears to be the most conflictive issue of the whole Pact, in light of different positions of Member States as well as between the European Parliament and the Council. A number of Governments and many observers were astonished to discover that the core elements of the Dublin III Regulation remain unchanged in the RAMM Proposal. In particular, the responsibility of the country of first entry into the EU is still in place.

The public announcements made beforehand by political leaders like the German Chancellor Angela Merkel (25) and even the President of the Commission Ursula von der Leyen that “Dublin” would be overcome and replaced by a wholly different approach

regarding the attribution of responsibility for an asylum seeker had led to expectations not met by the New Pact.

The legislation on the determination of responsibility for examining an asylum application presented in an EU Member State is considered to be the cornerstone of the CEAS (26). A comprehensive reform of CEAS envisaged by the European Council in the aftermath of the “refugee crisis” in 2015 and proposed by the European Commission in 2016 has not been achieved so far. The difficulty to find an agreement is mainly due to extreme divergences of policy orientations regarding the future of the “Dublin” system. After 5 years of debate, even the general approach to the question how to attribute responsibilities and at the same time ensure a more equal distribution of asylum seekers and refugees between the Member States remains unresolved, notwithstanding the common view that the present situation is unsustainable and that the Dublin Regulation of 2013 (“Dublin III”) is inefficient. The debate is not so much concerned with technical issues regarding the concrete functioning of the system. At stake is the very concept of the European Union, the principle of solidarity between the Member States and the values enshrined in the Lisbon Treaties. The uncertainty on how to reformulate “Dublin” goes beyond the refugee and migration policy fields. It touches on the nature of the relationship between the Member States and the role of the European institutions. The need to find an adequate balance between the respect for the right to asylum guaranteed in article 18 of the European *Charter* on Fundamental Rights, on the one hand, and the national interests of Member States on the other appears to present, under prevailing political circumstances, an unresolvable challenge.

Since the time the Commission has posted the reform proposals in 2016, the overall “migration pressure” and the number of asylum seekers arriving in Europe has diminished dramatically. Nevertheless, the refugee and migration issues remain to be among the most prominent political themes in a broad number of Member States and in electoral campaigns. At the same time, the debate on responsibility of Member States is fuelled again by the conflict regarding the identification of ports of disembarkation of rescued refugees and migrants in the Mediterranean Sea and subsequent relocation of asylum seekers to other Member States, in derogation from the “Dublin” rules.

More than 30 years have passed since the signature of the “Dublin” Convention of 15 June 1990. It has been a period of continuous research for a solution to the problem how to reconcile the concept of freedom of movement within the EU territory and of the abolition of controls at the internal borders with the need to allocate the responsibility for asylum seekers to one single Member State.

The approach to allocate the responsibility on the basis of objective criteria has been maintained throughout the whole period and has been reiterated in both the Dublin Regulations of 2003 and of 2013 as well as in the 2016 reform proposal presented by the European Commission. This approach excludes explicitly the option that the asylum seeker is free to choose the envisaged asylum country. The preferences, the links or similar subjective elements from the side of the applicant are not taken into consideration. The rigid concept is marginally remedied by the “opt in” or sovereignty and the humanitarian clauses that allow a State to examine an asylum application even if it is not its responsibility, provided that the applicant agrees to it. However, the application of these clauses is entirely at the discretion of the concerned State and little use has been made in practice of this possibility to consider humanitarian, in particular family grounds and to assume voluntarily the responsibility (27).

The 2016 Proposal, presented shortly after the memorandum between the EU and Turkey of 18 March 2016 (28), has had the declared aim to end irregular and dangerous movements and the business model of smugglers. In that occasion, the Commission recognized that the migratory and refugee crisis had exposed significant structural weakness and shortcomings of the Dublin rules. The Commission sustained that current system was anyhow not designed to ensure a sustainable sharing of responsibility across the Union nor to deal with situations of disproportionate pressure. In the frame of the New Pact, the Commission has addressed precisely these two issues. Solidarity with a Member State exposed to extraordinary numbers of asylum applicants should be ensured by a “corrective allocation mechanism”. In case of particular pressure on the whole system, the proposed Regulation on crisis and *force majeure* (29) should be triggered.

The European Parliament had prepared the terrain for an alternative approach to the question of allocation of responsibility for asylum seekers as from 2014, *inter alia* by commending academic studies on the subject (30). An important input has been given also by Marcello Di Filippo (31) who has provided a different scheme based on the view that the true cornerstone of CEAS is not the Dublin system but rather the solidarity principle enshrined in article 80 TFEU. He puts emphasis on the “genuine link” an asylum seeker may have with a specific country as a fundamental criterion to determine the Member State responsible. Already times ago, the Council of Europe and later on UNHCR, NGOs and academics have stressed the necessity to take the legitimate interests and preferences of the person into account, however without going so far to give the asylum seeker free choice to select a country where to file his/her application. Di Filippo considers four types of genuine links that should contribute to the determination of the responsible State: the wider family; study or working experience; language skills; private sponsorship offered to the benefit of an asylum seeker. In case of mass arrivals of asylum seekers in a particular country, an emergency allocation mechanism should be triggered. In the current Dublin system, the only subjective and individual factor considered obligatory for the determination of responsibility is the presence of close family members in another Member State. In the evolution from the Dublin Convention to the Dublin Regulation III and to the 2016 and 2020 Commission’s Proposals, the notion of “family” has been slightly widened by including also siblings, without however considering links to relatives in a broader sense, and, less, other forms of genuine links to a particular country.

In October 2017, the LIBE Committee of the European Parliament, rapporteur Cecilia Wikström, has presented a report containing a broad number of amendments to the Commission’s Proposal for a Dublin IV Regulation. The Parliament adopted the report on 6 November 2017 by a vast majority and provided the mandate for negotiations with the Council on the basis of the report (32). Different from the previous Dublin rules, the responsibility of countries of first irregular arrival of asylum applicants should be limited to registration and fingerprinting, a security check and a summary examination if it appears manifestly unlikely that the applicant would qualify for international protection. Only in that case, the State would be responsible for further procedures, in particular the return of the person to the home country, with the assistance of the future European Agency for Asylum and of Frontex. Cost for the reception and return of these persons should be covered by the EU budget. The criterion for allocation of responsibility based on irregular entry into the first EU country should be entirely abolished. There should be no mandatory admissibility procedure prior to the transfer to the responsible State. The

EP report puts emphasis on a thorough and individualized interview with the applicant to be carried by specialized personnel, informing the person about the rights and procedures and enquiring about eventual genuine links to a particular country. The applicant may make a written and motivated request to be transferred to a Member State for reasons of the presence of extended family members, cultural or social ties, language skills or other meaningful links. The request would be immediately transmitted to the requested State for verification of the declared links and for acceptance of the transfer.

The notion of family links with a specific country should be extended to persons legally residing there on whatever grounds, not necessarily as beneficiaries of international protection. Meaningful links in terms of previous legal residence or the possession of educational diplomas should be added to the hierarchy of criteria.

If none of these criteria apply and whenever the number of applicants accedes 100% of the figure identified in the reference key, the corrective allocation mechanism should be automatically activated. Furthermore, the EP Report proposes some incentives for motivating the asylum seeker to cooperate with the process of relocation under the mechanism. He or she should have the choice among four Member States with the lowest number of asylum seekers in relation to the established quota. In order to facilitate the future integration, the applicant may request the transfer of a group belonging to the same community, composed of up to 30 persons. No Member State may retain the right to opt out from the obligation to accept relocated asylum seekers, even not by paying a financial compensation. However, Member States that have not been among the main destination countries of applicants for international protection in recent years may be given sufficient time to build up their reception capacities and benefit from a transition clause by which the allocation mechanism is applied gradually over a number of years.

The 2020 RAMM Proposal of the European Commission does not reflect the position taken by the European Parliament in 2017. The RAMM intends to simplify and enhance the effectiveness of the system, to discourage abuses by asylum seekers, to prevent secondary movements as well as to alleviate the pressure on Member States faced with disproportionate numbers of asylum applications, however without contemplating any “automatic” relocation of asylum seekers to other Member States. Greater effectiveness should be achieved through the shortening of time limits in the procedure and the provision that a Member State where an asylum application had been filed previously should only be notified on the “take back” transfer without need to accept the request. Moreover, the check on inadmissibility of an application on grounds of arrival from a third safe country or a country of first asylum and the eventual return of the person to that country should become obligatory and carried out in all cases prior to the determination of the Member State responsible under the RAMM rules. Abuses of the system and non-compliance with obligations incumbent on the applicant should have procedural and material consequences, in terms of applying accelerated asylum procedures, reducing the degree of legal safeguards and imposing restrictions or even the withdrawal of material reception. The foreigner who has entered the EU territory irregularly should be obliged to present the asylum request in the first country of arrival and would be sanctioned in the case of a secondary movement towards another country. An extremely complicated corrective allocation mechanism is based on a “distribution key”, a sort of quota of applications calculated for each Member State according to the size of population and to the GDP. In case of a particular migratory pressure on one Member State, in particular the “frontline” States, the Commission would draft a report, setting out the measures that

could support the Member State in question. Relocation of a certain number of asylum seekers would be only one option, anyhow not applicable to persons falling under the accelerated border procedures. Other options are the “return sponsorship” by which another Member State would support the procedures of return to the home country for asylum seekers not found in need of international protection, or other forms of support. Schinas has stated that the “countries of first entry will never be left alone”, but this assurance does not have foundation in the text of the proposal and does not convince a number of “frontline States”. The Ministers of Interior of Cyprus, Greece, Malta, Italy and Spain, concluding a meeting in Athens on 20 March 2021, have declared: “[w]e repeat our strong plea in favour of a needed balance between solidarity and responsibility as the current format of the Pact does not provide reassurances to the frontline Member States”. Even more explicit is the statement made on the same occasion by the Home Affairs Minister of Malta, Byron Camilleri: “[w]e can no longer be punished for our geographical position” (33). The Italian Minister of Interior Luciana Lamorgese has pointed out the common stand of the Mediterranean countries and has urged the Union to implement the agreement reached in Malta in September 2019 on the relocation of people rescued at Sea (34). The Italian Prime Minister Mario Draghi, commenting the New Pact in occasion of the presentation of his Government to the Parliament on 16 February 2021, stated: “[a]ctually, the contrast persists between the external frontier States like Italy, Spain, Greece, Malta and partly Bulgaria, primarily exposed to migratory flows, and the States of Northern and Eastern Europe, mainly worried to prevent the so - called secondary movements from the States of first entry to their territories. Italy, supported by some other Mediterranean countries like Spain, Greece, Cyprus and Malta and partly Bulgaria, propose a mechanism of redistribution of migrants pro quota, as a concrete measure of solidarity, underlining the specificity of the management of external maritime borders” (35). The Greek Minister of Migration and Asylum, Notis Mitarachi (36), holds that solidarity should not only be a remedy for pressure situations but should be applied to all aspects. “Migrants are coming to Europe, not to a specific country”. For Greece, relocation remains a priority. The effectiveness of return sponsorships has to be questioned, and anyway, during the period pending return, the burden would be solely on the first country of arrival. Greece is also in favour of mutual recognition of positive asylum decisions, thus allowing beneficiaries of international protection to move legally to another Member State.

The European Court of Justice, in the “relocation case” (37) has affirmed that article 80 TFEU governs the whole EU asylum policy and that the burden created by elevated numbers of asylum seekers must be divided between the Member States, in accordance with the principle of solidarity. Following the infringement procedure brought by the European Commission to the Court of Justice against Poland, Hungary and the Czech Republic for their refusal to participate in the relocation programme, the Court has judged that the States in question have failed to fulfil their obligations under EU law. The Court has rejected the argument that the transfer of asylum seekers would have constituted a threat to national security and public order.

The question of relocation of rescued third country citizens to Member States different from that of the port of arrival is again high on the agenda. A political, unformal arrangement on the issue between some few Member States reached in Malta in September 2019 (38) has not been followed, up to now, by the expected adhering to it by a broad number of other States nor by the conclusion of a binding EU instrument. In

principle, asylum seekers rescued in the Mediterranean remain, in virtue of the Dublin Regulation, under the responsibility of the Member State that has allowed disembarkation unless other Member States voluntarily agree to their relocation. Again, the solidarity principle of article 80 TFEU is triggered. However, in absence of any legal act relating to this question under ordinary EU legislation, the reference to article 80 is more theoretical. For this reason, it is advisable that the “Dublin” reform incorporates also the attribution of responsibility for rescued asylum seekers.

6. Legal Pathways to Protection in the EU

The creation or extension of existing legal pathways for refugees, asylum seekers, non-EU workers and students for reaching the Union’s territory is part of the Commission’s proposal of the New Pact. The fundamental problem for implementing the various programmes is that the Lisbon Treaties do not foresee a legislative competence of the EU with regard to determining the numbers and qualifications of third country nationals to be authorized to enter. This competence lies exclusively with the individual Member States. Restrictive visa policies and the entire “Schengen System” have greatly limited the possibilities for legal arrival, in particular regarding citizens of developing countries: it is to recall that all African and Middle East citizens are subject to the visa requirement. However, in a number of occasions over the last 15 years, the Commission has been promoting legal pathways, particularly via the launch of resettlement programmes. Resettlement, which concerns “the admission of non-EU nationals in need of international protection from a non-EU country to a Member State where they are granted protection” (39), allows migrants to reach the EU territories safely and legally, without exposing themselves to perils or to smuggling networks. The Commission had presented a Proposal for a Framework Regulation on Resettlement and Humanitarian Admission already in 2016, and is now urging the EP and the Council to adopt said instrument.

The New Pact recommends again to promote resettlement, enhance humanitarian admission and other complementary pathways aiming “to support Member States’ sustained efforts in providing and enhancing legal and safe channels for those in need of international protection” and to show solidarity towards non-EU countries burdened with a large number of people in need of international protection, thus contributing to a “better overall management of migration”. With this Proposal, the Union acknowledges that it needs to move from ad hoc resettlement schemes to schemes that operate on the basis of a stable, sustainable and predictable framework (40).

Particular attention needs to be paid to humanitarian corridors, which have their roots in a Memorandum of Understanding between the Italian Government and the Community of Sant’Egidio, together with the Federation of Evangelical Churches, the Waldensian Table, and Caritas Italy. The programmes started in Italy in 2016, and were later replicated in France, Belgium, and Andorra (41). Since 2016, more than 2,700 individuals in need of international migrations arrived in Europe through these corridors.

The humanitarian corridors are not funded by States, but uniquely by the civil society organizations which promote them. The aim to replicate this example of “good practice” throughout Europe and to transpose it to the European level was already formulated by the Vice-President of the European Parliament in 2019. Said proposal followed a declaration made by 15 representatives of Protestant churches from 15 EU countries and a subsequent concept paper presented by the coordinator of the refugee and migrant

programme of the Federation of Protestant Churches in Italy (FCEI), that outlined goals and principles for “European Humanitarian Corridors” (42). The abovementioned Recommendation of 2020 reprised those intention, and underlined the necessity to include humanitarian corridors in the EU’s project for discouraging irregular movements of migrants. On this matter, Italy still leads the way: a new protocol has been signed recently, allowing 500 asylum seekers to arrive legally in Italy, of which 300 under the State programme, while Sant’ Egidio and the Evangelical churches will manage the remaining 200 people (43).

7. Conclusions

A high level of expectations had been raised on the “new start” of the migration and asylum policies of the Union, which the “New Pact” had promised. In light of the disastrous events on the Greek islands, on the “Balkan route” and in the Mediterranean Sea, the need to re-formulate the approach to the plight of asylum seekers, refugees and migrants seeking refuge or a better life in European countries had become apparent. The deadlock experienced as from 2016 in the negotiations on a different Common European Asylum System had obliged the European Commission to propose alternative ways acceptable to all Member States. However, the debate following the presentation of the New Pact in September 2020, that we have tried to describe in this article, does not lead to a prospect of easily overcoming the profound divergencies between the positions of the Member States, nor to that of addressing differently the problems of people looking for protection. While recognizing the attempt made by the Commission to find a compromise and, at the same time, to present a holistic approach to the challenges in the fields of migration and asylum, we have to conclude, unfortunately, that many elements of the New Pact do not provide a satisfactory solution.

Particular concern has to be raised regarding the shifting of responsibilities to third States, namely developing countries. Some of them have a most worrying record on Human Rights and cannot be regarded as “place of safety, others host already impressive numbers of refugees, far beyond those of the whole of the EU countries. The Union should not evade from its obligations under the Lisbon Treaties and from its global responsibilities, under the heading of “cooperation with third countries”.

With regard to intra-European relations, a fair distribution of asylum seekers and refugees among the Member States, including persons rescued at sea, does not seem to be guaranteed by the proposed Regulation on Asylum and Migration Management. Indeed, the “frontline” States have expressed their disagreement with the proposal, while other groups of States reject entirely a relocation to their territories.

A truly modern reform should be oriented by two different but not contradictory maxims: the intra-EU solidarity enshrined in article 80 TFEU and the subjectivity of the person who presents a request for protection, and, at the same time, a request for obtaining conditions that allow restarting a dignified life. The jurisprudence of the European Court of Justice has interpreted article 80 TFEU in a way that the responsibilities for asylum seekers and refugees are to be shared between the Member States. Any reform of the “Dublin” system must respond to this treaty obligation.

The aim to dispose of an efficient instrument, also in terms of reducing the length of the procedures and the costs involved, can be reached only under the premise that these two maxims would adequately and trustfully guide the legislative process as well as the

implementation of a future regulation. The RAMM Proposal constitutes, to a certain degree, the antithesis of solidarity and the result of an unfair responsibility sharing. A reform that continues to neglect the subjective condition and consequently the humanitarian character of refugee law is likely to represent a repetition of failures of the past, a useless exercise.

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