

Solidarity in the Common Asylum System and the Control of Illegal Immigration: A Critique of the New EU Migration Pact

Filippo Scuto (University of Milan)

The new European Pact on Migration and Asylum, published on the 23rd of September of 2020 (COM(2020) 609 final), saw the light in a context in which the enormous difficulties (and even, perhaps, the failure) of the European common policy on migration and asylum were apparent. This work will focus, in particular, on the Pact's provisions with regard to the right to asylum and to the action to control illegal immigration. The analysis will be developed by trying to single out the possible impact of the new (?) European proposals on these vital elements of Immigration Law.

The issues regarding the effectiveness of the right to asylum of migrants that arrive in Europe after fleeing their Countries of origin have been apparent for years now. The lack of implementation of the principle of solidarity between States (despite the explicit recognition of said principle in articles 67.2 and 80 TFEU), still represents the fundamental issue in this matter. As it is well-known, the “Dublin System” (Dublin Regulation) at its core, requires that the European States that find themselves in a geographically disadvantageous position (and therefore especially those overlooking the Mediterranean Sea) examine the asylum applications of migrants that arrive in Europe through States such as Italy, Greece, Spain and Malta.

After several months of announcements (also by President von der Leyen) of a plan aimed at overcoming the Dublin System's inefficiencies, the proposals enclosed in the new European Pact look disappointing. The Pact aims at providing a new solidarity mechanism to embed fairness into the EU asylum system, reflecting the different challenges created by different geographical locations, and ensuring that all contribute through solidarity so that the real needs created by the irregular arrivals of migrants and asylum seekers are not handled by individual member States alone, but by the EU.

The “new” solidarity mechanism focuses on **relocation** or **return sponsorship**. Under return sponsorship, member States would provide all necessary support to fellow members under pressure

to swiftly return those who have no right to stay, with the supporting member State taking full responsibility if return is not carried out within a set period.

The first issue with this framework is that it does not provide for a mandatory and binding mechanism of relocation. In fact, the Pact states that “member States will have the flexibility to decide whether and to what extent to share their effort between persons to be relocated and those to whom return sponsorship would apply”. Moreover, the Pact specifies that Member States have always viable alternatives to relocation, and that “the current criteria for determining responsibility (regarding the examination of the asylum applications) will continue to apply”. Basically, the problematic criterion of the Dublin Regulation is maintained, while no structural and binding relocation mechanism is implemented, and no sanctions (economic or of any other kind) are imposed upon the States that refuse relocation. However, a system of sanctions would have been extremely important for an effective implementation of the relocation system, and, therefore, for an effective implementation of the principle of solidarity between States in governing immigration, as prescribed by the Treaties. The Pact’s proposals on this matter could even be regarded as a step backwards, if compared to the measures envisioned in recent years. As a matter of fact, the European Commission had already put forward, in 2016, a set of proposals aimed at structurally overcoming the Dublin system. These proposals were supported and passed by the European Parliament, only to be stalled in the Council of Ministers of the EU due to the opposition of some States.

On the other hand, returning immigrants to their home Countries is a sensitive issue under many perspectives, as it intersects the matter of fundamental rights. For many years now, starting with the Hague programme of 2004, the EU and member States have elected return to home Countries as an extremely important instrument in the management of migratory flows and control of illegal immigration. However, it is well-known that this mechanism currently does not properly work since only one third of the illegal immigrants that should leave the EU’s territory is actually returned (as the Pact itself notes). Therefore, the Pact deals with the issue in the perspective of an improvement of the efficiency of the measure at hand, by demanding better performances on the member States’ behalf and proposing some amendments to the “directive on common standards and procedures in member States for returning illegally staying third-country nationals” of 2008. However, the causes of the low level of efficiency in the returns are deep and do not actually stem from inefficiencies of member States or of national and European regulation on the matter. If there is no cooperation

(through readmission agreements) with the Third Countries which the immigrants come from or with the Countries of transit (such as Libya) it is extremely difficult for immigrants to be effectively returned. As a matter of fact, member States and the EU cannot (and shall not) enter into agreements with several States in which migratory flows originate, since in many cases those States do not assure an adequate standard of protection of fundamental rights and lack any form of protection of the right to asylum. This is an objective limit to the possibility of returning immigrants to those Countries.

Under this perspective, a proposed remedy was to increase the time limits of the irregular migrants' detention in order to prepare the return. This increase, however, does not strengthen the ability to return immigrants to third Countries. The aforementioned directive of 2008 already allows member States to keep in detention immigrants for an excessively long time (up to 18 months). This, however, did not bring to an increase in the number of immigrants returned and, on the contrary, generated some objective problems when it comes to the protection of fundamental rights, as the possibility to hold immigrants for such a long timespan could be regarded as incompatible with their right to personal freedom: in fact, the length of the stay in expulsion centers should always be compatible with the criteria of proportionality and equality.

The measure of the voluntary return to the Country of origin, already enclosed in the directive of 2008 and that the new Plan is supposed to reinforce, is useful and reasonable in theory, but in practice has proven extremely difficult to implement. A proper and effective policy of voluntary returns would require the implementation of a strong and structural partnership with the Countries of origin. However, as of today, the EU and member States only entered into return agreements that often just provided for an increased cooperation in the control of illegal immigration in exchange for a facilitated access to visas. Therefore, what would be really necessary is an effective plan of cooperation for the socio-economic development of said Countries, and for the creation *in loco* of the conditions for the return of economic migrants and for the decrease of departures through a real perspective of economic development and strengthening of occupational levels. This is, however, an extremely complex issue, as the dialogue with the Governments of these Countries is often difficult (in many cases these are dictatorial systems) and it would require a common European foreign policy that looks beyond national and particular interest of the single member States in those areas. However, the lack of a common foreign policy is, as of today, still one of the main shortcomings of the European integration process.

If one takes all of these aspects into account, the Plan's proposals to strengthen the efficacy of the return policy are narrow and scarcely credible. The main building block to achieve an effective EU return system is the proposal to recast the Return Directive through the possibility to use detention for public order and security concerns. It would boost assisted voluntary return programmes, as the most efficient and sustainable way to enhance return. Considering that National return efforts also need operational support, the new Pact underlines that Frontex must play a leading role in the common EU system for returns, making returns work well in practice. It should be a priority for Frontex to become the operational arm of EU return policy. To this end, the Commission will appoint a Return Coordinator, supported by a new High Level Network for Return. The Coordinator should provide technical support to bring together the strands of the EU return policy. The probability that these proposals will actually increase the number of returns is extremely low.

A more realistic policy should perhaps reduce the importance of returns to home Countries as a measure to control illegal immigration. Returns and refoulements alone are not enough to control the phenomenon of illegal immigration as a whole, and present a number of problems when it comes to the protection of fundamental rights. These measures could be maintained, under the condition that their limits are properly assessed. Alongside them, it is now time to amend the policies concerning the legal access of migrants. A more realistic management of migratory flows that envisions a stronger opening to legal accesses (*in primis* for economic migrants) on the basis of the objective needs of the EU's member States should become the main instrument in the control of illegal immigration.

The Union must be bolder on the matter of immigration. The model that looks at this phenomenon as an emergency and that prescribes widespread expulsions must be rejected. An example of the effects of this model can be found in the permanent refugee and migratory "crises", characterized by the ever-increasing migratory flows via sea and the consequent deaths in the Mediterranean, the stabilization of the model of the large refugee camps in the Greek islands (such as Lesbos), the constant tension at the borders of the Southern European States that inevitably also impacts the Northern States when it comes to the management of migratory flows.

In conclusion, the Pact of 2020 does not bring forward the much desired (and proclaimed) change of course towards a new common policy on immigration. On the contrary, the Pact seems to reproduce the old recipes of the last 15 years, that generated many problems with regard to the

protection of fundamental rights and did not promote a rational and effective management of migratory flows. In order to effectively change the course, it would be necessary to effectively apply the principle of solidarity between States to a fair distribution not only of asylum seekers, but also of economic migrants. It would be also necessary to increase the legal pathways into the EU both through humanitarian corridors (to effectively implement the right to asylum) and through a reform of the rules on admission of immigrants coming in order to seek work. On this point, however, the Treaties are characterized by a structural defect, as they substantially leave the relevant competence to member States (article 79.5 TFEU) and therefore the EU's action will inevitably be very limited, at least until the Treaties are amended.

The time is ripe for a bolder initiative that radically changes the Union's (and national) policies through the implementation of new realistic and reasonable rules on legal immigration. In this way, it could be easier to manage migratory flows, as they would be regulated, rather than merely endured, by member States, as happened in the Italian case over the last two decades. Moreover, in this way it would be easier to develop a common policy more compatible with migrants' fundamental rights: in fact, this is certainly one of the major issues at stake for the European integration process in the years to come.

Prof Filippo Scuto is Associate Professor of Public Law at the University of Milan