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If you can dream it, you can do it?

Early thoughts on the New Pact on Migration, and the impact on frontline States

MIGRATION

Angeliki DIMITRIADI

Senior Research Fellow; Head, Migration Programme, ELIAMEP

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HELLENIC FOUNDATION FOR EUROPEAN & FOREIGN POLICY (ELIAMEP)
49 Vasilissis Sofias Ave., 10676, Athens, Greece
Tel.: +30 210 7257 110 | Fax: +30 210 7257 114 | www.eliamep.gr | eliamep@eliamep.gr

Angeliki DIMITRIADI

Senior Research Fellow; Head of Migration Programme, ELIAMEP

Summary

- The Pact promotes a future where Europe looks inward.
- Proposal is based on an integrated vision for returns but not for reception.
- Mandatory flexible solidarity is the new way forward.
- The Pact introduces critical changes to Dublin but responsibility remains with first country of arrival.
- Deterrence remains the norm.

Introduction

On September 8th, 2020 several fires broke out in the Moria camp on the island of Lesvos, destroying completely the Reception and Identification Centre (RIC) that sheltered approximately 3,000 migrants. The remaining 9,000 had spent the better part of the past year(s) in makeshift or bought tents on the olive groves surrounding the RIC.

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In the aftermath of the fire, a round of public condemnation ensued regarding the conditions of reception in Moria, calling for an end to the camps on the islands. The highly anticipated New Pact on Migration and Asylum, already postponed thrice, was touted as the beginning of a new pragmatic approach to European migration and asylum policy.

The Pact is neither new nor fresh, as suggested by the Commission. It is however pragmatic, in acknowledging that Europe does not have the willingness to embrace a true reform of its migration and asylum policy. In that, the Commission appears to have listened to the concerns of many Member States that wanted a tougher and stricter approach to asylum. The Pact promotes a future where Europe looks inward and promotes deterrence cloaked in humanitarian discourse.

To address this, the Vice President of the Commission Margaritis Schinas described the Pact as a house with three floors. The first floor is the external dimension; the countries of origin and transit seeking to prevent migratory movement and facilitate returns. The second floor are the front-line states that apply extensive border procedures seeking to identify those who can be returned to the first floor. For the few who succeed in staying, there is a possibility of reaching the third floor, where solidarity can take many forms, including relocation. Each floor stands separate but connected and in theory, ready to welcome those in need, if they can make it! Deterrence remains the norm.

The first floor: returns

Solidarity and trust are centred around returns, which remains one of the core weaknesses of the common migration and asylum policy. No Member State can claim efficiency with returns, for a variety of reasons. The Pact introduces **return sponsorship**, an entirely new element. Sponsorship usually has a positive connotation. Private sponsorship schemes allow for an individual or private institution to undertake the financial cost for bringing an individual or family to safety and facilitate settlement. In a rather cynical twist, the New Pact proposes that sponsorship should be offered for returns.

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Returns are linked with the external dimension. They require strong cooperation with third countries and the offer of incentives to counter the negative aspects of returns, such as the loss of remittances. The EU has thus far failed to incentivise most countries in partnering on returns. It is a sign of the unbounded and largely unfounded optimism of this Commission that returns are placed at the core of the Pact.

Member States who choose to sponsor returnees, will carry the administrative and financial cost as a way of showing solidarity. Failure to return the individuals to countries of origin and transit within 8 months means they will be relocated to the territory of the Member State and the process will continue from there.

However, not all Member States have the same level of cooperation with third countries. Some nationalities are easier to return than others. Some countries with which the EU has readmission agreements do cooperate extensively while others struggle. The Commission proposes to make the issuing of visas a condition of cooperation on returns. Whether this will be sufficient depends on what incentives will also accompany the partnerships. However, for those eight months, the individuals will remain in the territory of the first country of entry. Where will they stay during that time? Who undertakes the responsibility for their shelter, food, healthcare and hygiene? For countries like Greece the likely solution will be detention facilities and camps like Moria. Though the Commission stresses that detention should be a last resort, in practice this rarely happens.

The second floor: pre-entry screening and border procedure

To get to the border and asylum processing one must first be screened. The pre-entry procedure introduced serves as a staircase to the second floor. It will be applicable to all third-country nationals who reach the external border without fulfilling the entry conditions or after disembarkation, following a search and rescue operation. It includes a health and vulnerability screening, identity check, registration, security check (through SIS to ensure the person does not constitute a threat to internal security). The inspiration was the hotspots, replicated now across the EU as a best practice. The individual retains the right to apply for asylum but only after the screening concludes. Screening should be completed within 5 days. The experience in Greece suggests this is unattainable. For screening to take place in a manner that does not endanger the rights and needs of prospective asylum applicants, the presence of sufficient personnel is required, equipped and trained to complete the assessment. It is a capacity few Member States have.

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The pre-entry screening can result in border procedure for those applying for asylum. Border procedure is already applied across several EU members, optional rather than mandatory until now. The process has been severely criticised as reducing procedural safeguards for applicants. Those seeking international protection whose nationality has an EU-wide average recognition rate of less than 20% undergo an accelerated border procedure (Articles 40 and 41, new draft asylum procedure regulation). In essence, the nationality determines the likelihood of receiving protection, a practice largely applied in Greece and now replicated across the EU. More crucially during the screening procedure and accelerated border procedure they are considered as not having entered the country (Article 4, draft screening regulation, Article 40, new draft asylum procedure regulation). Countries that designate transit zones for pre-screening will likely do so before border areas or at the actual border, which raises the potential for many 'Moria' style camps to emerge. Similarly, a return procedure can only be initiated after the screening has concluded.

"In essence, the nationality determines the likelihood of receiving protection, a practice largely applied in Greece and now replicated across the EU."

For those deemed likely to receive asylum (nationalities with 75% and above recognition rate) a new mechanism kicks in departing from the traditional rules of Dublin. The responsibility for processing will depend on different criteria including family links in another EU Member State (extended to include siblings) and prior links with another country. This would be a significant departure from the current system and a positive development both for applicants and frontline States.

The third floor: mandatory flexible solidarity!

Solidarity requires trust. This has been acknowledged repeatedly by the Commission. The proposal was meant to create a streamlined process from the moment of entry all the way to the conclusion of the asylum application either via recognition or return. At its core though, the question of solidarity is about burden sharing. In 2016, when the Relocation mechanism was passed with qualified majority, a chasm was revealed. Member States defected on their obligations with some flat out opting out of implementation. The system unravelled also revealing the limits of the Commission in imposing the decision. The consultation process that took place this time around, was very much centred on the red lines that would not be crossed and what forms solidarity can take.

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The suggestion for a mandatory flexible solidarity incorporated in the Pact is first encountered on the German non-paper during the consultation process. It was a compromise between the mandatory relocation requested by front line Member States and the no relocation by the Visegrad four. Thus, solidarity acquires three forms per the Pact. It is mandatory, in that everyone must contribute. It is flexible in what everyone contributes. And it can be mandatory and without flexibility in times of crisis.

In regular circumstances, solidarity is flexible but mandatory. Member States can choose whether to relocate refugees, or to fund returns or offer operational support or capacity building on asylum procedures. The proposal by the Commission sets no limit, neither minimum nor maximum. This means in regular circumstances a Member State may choose to opt out entirely of relocation, which is the element most crucial to front line States. Even more worrisome is that the Member States with bad track record in treatment of migrants will have the delicate task of returning them home.

" …in exceptional circumstances solidarity becomes obligatory and is limited to relocation either for the purpose of asylum or return procedures."

In times of crisis solidarity is mandatory but not flexible. The Commission requests the power to adopt implementing acts in accordance with Article 291 TFEU. Mandatory relocation is part of the measures proposed either for those offered protection but also for those deemed eligible for return. In other words, in exceptional circumstances solidarity becomes obligatory and is limited to relocation either for the purpose of asylum or return procedures. Member States cannot contribute with equipment or capacity building.

What constitutes a crisis? This has been a key issue since before the 2015 influx. The new proposal attempts to grapple with the question and drawing from the Greek non-paper on migration, it incorporates the notion of *force majeure*.

It triggers derogations from the Asylum Procedures Regulations in two ways. Firstly, third country nationals and stateless persons whose nationality enjoys a 75% recognition rate or lower will be processed under the border procedure (exempt in normal circumstances). The duration of the examination extends by another eight weeks. Secondly, the return sponsorship during that period differs with the obligation to transfer the irregular migrant to the country undertaking the sponsorship is triggered if the person concerned does not return or is not removed within **four months** (instead of eight under normal circumstances).

It also proposes to allow Member States to derogate from the provisions of registering applications for international protection with a longer deadline of four weeks. The derogation is problematic since it prioritises the interests of front-line states over the legal obligation for access to asylum. One positive development is that it introduces the

option for the Member State to suspend the examination of applications for international protection made by third country nationals who are unable to return to their country of origin and grant them immediate protection status. Per proposal, Member States should resume the examination of their application one year at the latest from its suspension.

The danger however remains that in a crisis scenario we could see a repetition of 2016, whereby some Member States objected fully, while others simply hampered the relocation process to such an extent that less than half of those envisaged were transferred. For Member States who opt out of relocating refugees, forcing them to do so even in times of crisis, is unlikely to work. It will also be harmful to the individuals relocated in countries that neither want them nor seek to integrate them.

"The problem lies in the divergence between rhetoric and policy proposals, between theory and reality. The Commission has proposed a rather conservative, inward looking Pact grounded on returns, while suggesting that migration is a positive development. The two are contradictory and the balance appears so far to tip in favour of the conservative approach."

Concluding thoughts

Not all is wrong with the Pact. The strengthening of family unification, the incorporation of a new mechanism monitoring human rights violations, and the overall vision of a streamlined process from beginning to end are important steps forward. The Commission recommends that search and rescue by NGOs is not criminalised, a positive step forward. The problem lies in the divergence between rhetoric and policy proposals, between theory and reality. The Commission has proposed a rather conservative, inward looking Pact grounded on returns, while suggesting that migration is a positive development. The two are contradictory and the balance appears so far to tip in favour of the conservative approach.

More crucially, the proposed Pact does not guarantee 'no more Morias' nor an end to Dublin. It replicates the former and tries to alleviate the latter with partial improvements. Initial processing remains the responsibility of front-line states. Pre-screening and border procedure take place at the country of entry. While a claim is processed, or a Member State decides which kind of solidarity measure to apply (return, relocation, capacity building) the individual waits, likely in a designated centre near the border. If more opt for capacity building and fewer for relocation and return, the front line State continues to carry the responsibility.

On paper, the Pact is based on scenarios and different responses seeking to bridge the opposite sides. Its implementation remains unclear. Despite all the evidence of the past decade, the Commission continues to adhere to the principle that if it can dream it, Member States will do it. Only time will tell, but if past experience is any indication, it is unlikely that the system will work as designed to the detriment of front line States but above all, people in need of protection.