

The EU's Pact on Migration and Asylum: A Tsunami of Papers but Little Waves of Change

by Stefano Manservisi

Mamadou is an old friend of mine from Mali. When I asked him about the New Pact recently proposed by the Commission,¹ he replied, "I see you have a problem, brother. As we say: after being bitten by a snake, you will flee from a rope. You need to rebuild harmony. Do it and then let's talk."

Seen from this perspective, the reform of the EU migration and asylum system seems to be going in the right direction: an inclusive and comprehensive approach connecting migration, asylum and Schengen realities, offering options for all member states to be responsibly part of the scheme. Trust, if not harmony, must be rebuilt.

After the solidarity-building process that resulted in the Recovery Plan, it would have been politically surprising to see a proposal on migration and

asylum follow a different path. After different attempts based on mandatory quotas or coalitions of the willing, the Commission has opted to redesign the whole picture and confront every member state with its (affordable) responsibilities.

The Pact builds on present realities, a time when migration pressure and numbers are relatively small, but the topic remains toxic. It is not a quiet moment, but it is less radicalised than one year ago. There is therefore a window of opportunity, as also suggested by President Von der Leyen's announcement of the end of Dublin. This is obviously only partially true, but the message is important.

The package is filled with expressions evoking "a fresh start" and references to solidarity. The question here is not to judge whether all this is really fresh, as arguably it is not. The real issue is to see whether the package can credibly address the management of crises

¹ European Commission, *New Pact on Migration and Asylum* (COM/2020/609), 23 September 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0609>.

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(when they occur), frame a common migration policy based on predictability as opposed to hysteria, consolidate a crucial *acquis* requiring stability and trust necessary for the functioning of Schengen and ensure compliance with international protection obligations which are deeply rooted in European values.

The exercise is huge and complex, with numerous challenges ahead. Among these, is the time necessary to arrive at a political agreement, to be followed by the adoption of legislation. The link with the Multiannual Financial Framework cannot be missed and the window of opportunity will not last forever. The temptation to separate what are perceived as urgent short-term measures will be strong, but should be resisted. Instead, a fair sequencing should be pursued.

This sequence must be balanced and requires an assessment of how comprehensive and integrated the approach proposed by the Commission is. Such assessment necessitates a closer look at the Pact's three building blocks: managing migration and asylum; working with third countries; and setting up legal migration schemes.

Managing migration and asylum

The first block is the most detailed and operational, aiming to make the migration and asylum management system more effective, balanced and inclusive. It is the trust-building block, the test to eventually preserve Schengen.

Its most significant highlights include the screening of asylum seekers at the border in order to determine whether they will continue the asylum procedure or be directed to the return procedure (both to take place at the border).

This is not a new idea and, after all, is what the famous "hotspots" were supposed to do. Yet, it is important to codify this practice for clarity and to accelerate the validation process, reducing to the minimum the presence on EU territory of people with basically no chance to stay. Implementation has to ensure, however, that an asylum claim will not be assessed as a statistical figure, but on the basis of individual merits, to comply with the "*non-refoulement*" principle.

Then comes the mechanism supposed to replace, or rather reform, the current Dublin system. Here, responsibility continues to lie with the member state of entry, and to an even greater extent, as the current margin of shifting responsibility is further reduced. The proposal does introduce many elements to support the member state in question, notably but not exclusively when it is under migration pressure.

The most visible element is a compulsory but modular duty of solidarity. At its core sits a mechanism whereby all member states must contribute to help others under pressure, through relocation, supplying assistance or assuming the task of returning those with no right to stay, as foreseen by the innovative idea of "return sponsorship".

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There is not an obligation to relocate, but an obligation to contribute. If the pressure further mounts and turns into a declared crisis, the mechanism is accelerated and options are restricted only to relocation or return sponsorship, widening the categories of people involved. The Commission will trigger the procedure, to avoid possible blockages by member states and ensure quick reaction times.

In this context, the initiative to set up a common EU approach to search and rescue is also welcome. It recognises the need for a more predictable disembarkation mechanism based on solidarity, with the involvement of civil society. The recommendation against criminalising those providing humanitarian assistance at sea is politically important, although its enforcement will have to count on a strong legal standing from the Commission.

In addition, the Pact entails initiatives aimed at setting up a common approach to resettlement from transit countries and at opening humanitarian admission channels. However, this stops short of envisaging the implementation of asylum procedures in a third country.

Beyond detailed assessments, it should be underlined that the work done to formulate the proposals in this block and link them with the wider array of legislative and non-legislative pieces is impressive and shows real political will to take on the matter.

Yet, there are several questionable aspects, like for example designating

an EU Return Coordinator without re-establishing a stand-alone EU Anti-Trafficking Coordinator. Having two Coordinators on equal footing could have enhanced the complementarity as well as the efficiency of both positions, while the message would have been more balanced.

It is worth noting that the Commission stopped at the brink of some important lines, which could have been crossed to ensure more active engagement by member states.

Fundamentally, the Commission keeps working on an approach that shies away from setting up a single EU asylum area, built, for example, on the basis of rules on mutual recognition of decisions and/or a fully harmonised system. Such a single EU area for protection would also strengthen EU values, as it is hardly acceptable that under the current system individual cases are assessed differently because of the different criteria applied by member states on the risks linked to a given country of origin.

It would be time to realise that the fragmentation of the EU area and the discretion member states enjoy when deciding on individual applications constitute a pull factor and encourage refugees to try and move around within the Union.

A shift towards a single EU protection area is obviously very difficult and complex. Nevertheless, to start moving, the European Asylum Support Office could have been transformed into an agency truly empowered to *decide* on asylum and protection claims, and not

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merely to assist member states.

This would create a dynamic to harmonise criteria and significantly shorten decision-making times. It would subject candidates to objective decisions that, if positive, would also contain the condition to accept the destination decided by the Union. Finally, in such a system, instead of seeking and imposing solidarity duties on member states *ex post*, their involvement would be defined *ex ante* as a duty to implement an EU decision.

Working with international partners

This block represents a good attempt to add order and coherence to the various strands of EU and member state actions over the last years. It is a pledge for cooperation, somehow flexing muscles to get concrete results, notably on readmission and managing outflows. The intensity of the comprehensive and integrated approach, however, visibly decreases.

On the one hand, the Pact recalls the panoply of migration dialogues, mobility-migration-development schemes, experience with original funding mechanisms (e.g., EU Trust Fund for Africa, Facility for Refugees in Turkey), readmission agreements and some (light) commitments to facilitate legal mobility. It is generic and not particularly innovative, but it represents a good recollection. To regret, however, is the fact that the significant role played by diasporas is not strategically addressed, nor is that of remittances, still too costly and affected by the crisis.

On the other, it declares, in a worrying twist, the objective of setting migration as a core element of EU relations with many countries. This is understandable from an internal policy perspective that remains geared towards reducing migration flows. It is nevertheless doubtful whether this message positively supports the EU's action in the world and *vis-à-vis* the countries actually or potentially concerned.

EU external action is striving to integrate policies and instruments to build and implement complex and multi-layered partnerships under the strategic guidance of the EU Global Strategy. This is now also better supported by the newly established single implementing instrument, the Neighbourhood and Development International Cooperation Instrument.

What seems dominant instead is the old instinct of one approach (migration management) to drive other policies, which we know does not produce results. Integrated experiences linking humanitarian, development, security, border and migration management have proved to be more effective, going well beyond the oldish disputes between pro-development and pro-(our)security approaches. The paradox is that all that the EU and its member states have done during the last years is downplayed, with implications for what they can do in the future.

The original flaw is that this block is largely inspired by an inward-looking approach. It is a mere function to get what the EU supposedly needs to fix its problems. While this is obviously necessary, it weakens the EU's position

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to build strategic partnerships, or even alliances to deal with new challenges, for instance those created by COVID-19.

Partner countries are not called to define a common agenda, they are called to contribute to implement the one defined by the EU. Besides not contributing to addressing the issues at stake, this risks becoming a transactional approach, which is rarely a good fit for the EU since it does not allow it to fully display its assets.

It is very surprising to see that no reference is made to Sustainable Development Goals (SDGs) to set a more balanced framework and propose a real dialogue. This is an already existing common agenda and SDG-10 has been hailed – also by Europe – as an important step to link migration and development. This aspect will presumably reappear in the course of action, but not framing the chapter under this light is a political mistake. Such framing would have allowed the sought-after broad dialogue in a genuinely comprehensive way.

Another missing element is a reference to the two Global Compacts on Refugees and Migration,² adopted by the UN with the active support of the EU and all its member states in the former case, and the vast majority in the latter.

² UN General Assembly, *Global Compact on Refugees* (A/73/12 Part II), 2 August 2018, [https://undocs.org/en/A/73/12\(PartII\)](https://undocs.org/en/A/73/12(PartII)), adopted by the General Assembly on 17 December 2018, <https://undocs.org/A/RES/73/151>; and *Global Compact for Safe, Orderly and Regular Migration* (A/RES/73/195), 19 December 2018, <https://undocs.org/A/RES/73/195>.

This not only contradicts the EU's pro-multilateralism strategic standing, but is also another missed opportunity to anchor the EU approach to an existing international framework. Despite their so far limited impact, the two Compacts represent the first attempt ever to have an agreed policy line at the UN level with a central role for the UNHCR and the International Organisation for Migration, two agencies where Europeans have big stakes and in which they have significantly invested.

Legal migration

This block is still quite far from designing a truly comprehensive EU migration policy, something on which the Commission itself hesitates, caught between *Realpolitik*, an old-fashioned minimalistic reading of the Treaty and the complexity of the task.

Clearly, it would have been overambitious to try to achieve such a policy on this occasion. Nevertheless, the result is a mix of intentions not followed by immediate action. Despite being an indispensable component of an integrated migration policy – including in terms of countering irregular migration – the contribution of this block to the comprehensiveness of the package is quite limited.

Nonetheless, the reference to a common migration policy to match the integration of the EU economy is important. This points out the need to more effectively frame – and not only generically support – member state decisions to scale up legal migration. While visas are noted as greatly contributing to the objective, an

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explicit commitment to more robustly enforcing rules to limit discretionary and sometimes discriminatory practices and different standards among member states is missing.

Second, the emphasis put on talent and the link with the Skills Agenda for Europe³ are welcome. To openly admit that the EU is currently losing the global race for talents is courageous. To envisage Talent Partnerships to address this situation and to set up an EU Talent Pool is promising.

There is however little indication on how concretely this will be operationalised at the EU level. This is particularly needed when it comes to turning existing national initiatives into EU schemes managed and monitored at the EU level, which is where the real innovation and added value lies.

Finally, the few legal instruments referred to already exist and have a limited track record of success. The issue therefore is that the existing set of rules cannot deliver what is envisaged and definitely needed.

In conclusion, the package confirms the Commission's determination to be as comprehensive as possible and for this it deserves serious credit. Yet, a lot of work remains to be done to see the full picture. What cannot be done through legislation should materialise quickly, notably on the external dimension and on legal migration.

³ European Commission website: *European Skills Agenda*, <https://ec.europa.eu/social/main.jsp?catId=1223>.

The Commission's approach remains within a well-established territory. The legacy of the old "third pillar" mindset is visible. This leads to a self-imposed restraint vis-à-vis member state competences, which are largely overwhelmed by reality and no longer correspond to the challenges the EU has dramatically experienced.

Such an approach obliges complex exercises of fixing something that will inevitably be broken again. As we have seen during the peak of the pandemic, a stronger Schengen needs more management at the EU level, not less. To that end, the management of Schengen should be further decoupled from member state sovereignty and power over internal borders.

The Single Market and Schengen cannot be dissociated any longer. Setting up a common EU legal migration policy is a necessity and a challenge to both.

The point is not to "communitarise" the policy, but to be inspired by and to take advantage of the difficult process the EU has experienced to manage the pandemic and its impact. This has created consensus on unprecedented initiatives, positively combining EU and intergovernmental processes: from the Eurobond-based Next Generation EU Fund to the adoption of the SURE scheme, or from the proposal for a minimum wage, to the future reform of EU macroeconomic and fiscal rules.

Unfortunately, the Pact on Migration and Asylum is inspired by a more conservative vision and does not really take on the new wave. Curiously, while it acknowledges the full dimension

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of the problems, its proposals remain rather minimalistic or unspecified.

The hope is that there will be some room to address the more evident shortcomings. The fear is that in spite of the impressive volume of papers and documents associated with the Pact, its provisions remain too little and maybe too late.

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