The European Pact on Asylum and Migration: An Existential Challenge?

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On 10 April 2024, the European Parliament definitively adopted the final texts of the EU Pact on Migration and Asylum. This vote of approval was rather unexpected, given the depth of the disagreements between the Member States and also between the Council and Parliament. There was suspense right up to the last minute at the Council meeting on 4 October 2023, which endorsed the position of the Member States, at the trilogue negotiations on 18 December 2023 and, finally, at the 10 April 2024 vote, all the more so as this pact has become a political issue in the European election campaign. This vote was also *in extremis*, since it came during the last plenary session of this term of office and therefore just before some MEPs set off on the campaign trail. One of the challenges was to be able to demonstrate to European voters the European Union's ability to make decisions to control the migration situation.

The adoption of the Pact is the culmination of a long and difficult legislative process that began under the previous European Commission and was relaunched in September 2020. But the adoption of the Pact has highlighted the flaws and difficulties in the way the EU operates. And it is far from putting an end to the debates on European asylum and immigration policies.

"A Fresh Start" or a Last Chance?

In her first speech to the MEPs in 2019, Ursula von der Leyen presented the EU Pact on Asylum and Migration as "a fresh start" that would make it possible to overcome opposition between Member States and lay the foundations for a fairer balance between solidarity and responsibility (Udrescu, 2019). Finally presented on 23 September 2020, the Pact is the sum of several hundred pages comprising legislative proposals, communications and recommendations to the Member States, particularly on opening legal channels to the European Union for refugees and rescue operations at sea. Whether in terms of the method or the substance of the texts, the Pact cannot be described as "a fresh start," but can rather be considered a continuation of European asylum and immigration policies over the past 20 years.

Regarding method, the European Commission could not resist proposing a major new legislative reform. It is worth recalling that the Pact is the fourth legislative package on the conditions for exercising the right of asylum in the EU and, to a lesser extent, on European immigration policy since the beginning of this century. The previous legislative package, launched in July 2016 in response to the so-called "refugee crisis," failed to reach a successful conclusion due to a deadlock in negotiations on the principle of European solidarity, i.e. the distribution of asylum seekers among Member States (Tardis, 2019). Moreover, several of the 2016 proposals were taken up almost unchanged in the 2020 Pact, particularly on reception conditions for asylum seekers and on asylum procedures.

After the 2019 European elections, which did not fundamentally change the balance of political power in Europe, the new Commission embarked on a tour of European capitals to find areas of compromise between governments. These compromises turned out to be more like concessions made to Hungary and Poland, which categorically refused to accept a single asylum seeker. Indeed, these two countries rejected the outstretched hand of the Commission and a number of European countries, including those

in the south who had the most to lose from the lack of European solidarity.

Discussions on the Pact therefore got off to a bad start, but the French and Swedish EU Presidencies managed to reach an agreement between the Member States, which was confirmed by the Spanish Presidency. The fate of the Pact was not yet sealed, however, as Hungary and Poland voted against the agreement. It took a change of government in Poland, but also an almost generalized hardening of Member States' positions on immigration, to give a glimmer of hope for a constructive outcome to these seven years of negotiations. Above all, fears about the political costs in terms of public opinion and the results of the European elections in spring 2024 seem to have convinced many parliamentarians and the most progressive governments (Germany, Luxembourg and Portugal) to prefer a bad agreement – in their eyes – to another failure of the negotiations. Basically, the content of the Pact has changed only marginally, and more in the direction of a weakening of legal guarantees.

A New Stage in the Securitization of Migration Policies

The legislative component of the European Pact on Asylum and Immigration is primarily concerned with the management of irregular immigration at the EU's external borders. It offers Member States a uniform legal framework for managing irregular arrivals and, incidentally, for asylum and return procedures. The Pact proposes the establishment of a screening system for all third-country nationals who cross the EU's external borders irregularly, who have been disembarked after a search and rescue operation at sea, who apply for asylum at the border or who have been detained in a Member State without having passed through this prior control. They may be deprived of their liberty for five days for this individual assessment, which consists of identity, health and security checks.

The aim is to determine the person's status so that they can be directed towards the appropriate procedure. The competent authorities in the Member States have three options. The Pact provides for the introduction of an asylum procedure at the border for people who are considered to have little chance of being granted international protection. The criteria are relatively broad and sometimes unrelated to the substance of the asylum application. This is particularly the case when a person uses false documents, which will then be interpreted as a presumption of lying about their reasons for leaving the country of origin.

More surprisingly, asylum seekers from countries with an average recognition rate for international protection at first instance of less than 20% in the EU may be placed in the asylum procedure at the border. Apart from the fact that this 20% rate was set arbitrarily, this indicator has little meaning when recognition rates still vary greatly between countries. For example, an Afghan asylum seeker has a 16% chance of being granted protection in Switzerland, whereas this rate is 100% in Portugal (EU Agency for Asylum, 2023). If the person does not apply for asylum or if their application is rejected at the border, they may then be directed towards a procedure designed to organize their repatriation. Asylum procedures at the border and return procedures can each last up to 12 weeks, during which time people will be held in places where they are deprived of their liberty. The Council has added the concept of "adequate capacity," i.e. a target number of applicants to whom the border procedure should be applied at any one time during the year. This capacity should be at least 30,000 in the EU overall – with a distribution scale among Member States – and may reach a maximum of 120,000 within three years.

The third option is a conventional asylum procedure. Generally speaking, however, the procedural rights of asylum seekers have been weakened compared with the current system (legal aid, non-suspensive appeals, appeal deadlines, etc.). In addition to these procedural regulations providing for exemptions from the ordinary standards of asylum law, the Pact allows for the introduction of derogations in exceptional but broadly defined situations. In September 2020, the Commission proposed a so-called crisis regulation, which included "situations of instrumentalization in the field of migration and asylum." This regulation provides for derogations concerning the registration periods for asylum applications (four weeks), the periods for processing applications at the border (16 weeks), specific registration points for asylum applications and the material conditions of reception.

Strengthening of the Dublin System

Contrary to statements by the European Commission (*Le Grand Continent*, 2020), the Dublin system is not disappearing, even if the name of the Irish capital is no longer associated with this mechanism for determining the Member State responsible for processing an asylum application in the EU. While the Pact replaces Dublin with a new, more global instrument for managing asylum and immigration, the Dublin rules are maintained and even strengthened, in particular the criterion of the first country of entry into the EU. The new regulation extends the responsibility of countries of first entry to accept the transfer of an asylum seeker who has submitted an application in another country. The deadlines have been increased to two years, or even three if the applicant has evaded the transfer decision, or 15 months if the applicant has gone through an asylum procedure at the border. A "corrective" solidarity mechanism has been added to these responsibility regulations, which can be activated in accordance with the Member State's situation and the migratory pressure, but it is above all a system of flexible contributions from Member States on a voluntary basis. These contributions can take several forms. They may involve the relocation of asylum seekers from the country of first entry. The number of people relocated in the EU will have to be at least 30,000 per year. If a Member State does not accept its share of "relocated persons," it will have to pay €20,000 per person to the EU budget. Other various forms of operational support are also possible, such as long-term support to strengthen a Member State's capacities in the areas of asylum, reception or return, or support for the external aspects of asylum management.

The Reception of Displaced Persons from Ukraine: An Alternative Ignored

The negotiations surrounding the European Pact on Asylum and Migration are a perfect example of the impossibility of deviating from the lines on which migration policies are set in the European Union. The refugee crisis has revealed the divisions and even tensions between Member States. Immigration is perceived as the driving force behind the rise of parties described as right-wing populist across the EU. This electoral phenomenon is seen as a sign of the failure of migration policies that have been in place for decades. It has also made it clear that there is no alternative to policies that limit migratory flows by combining restrictions on the fundamental rights of exiles, tighter controls and restrictions on freedom at borders, and outsourcing the management of flows to third countries (Tardis, 2023).

However, the reception of displaced persons from Ukraine in 2022 provided an unexpected counter-example to these policies. In addition to the activation of the Temporary Protection Directive, the conditions for authorized, regular entry into the EU were eased and, above all, Ukrainians were given freedom of movement on European territory for three months, i.e. the freedom to choose their host country. In other words, they did not have to undergo border screening procedures – and restrictions on their freedom – or the Dublin system, which assigns exiles to the first host country. This framework, which is both protective and liberal, has helped to avoid a new migratory crisis. The Ukrainians spontaneously headed for the countries where they had the most support, in particular through their diaspora. The laissez-faire attitude of European governments and the free transport offered by many train companies meant that transit could be organized without seeing the images of migrants lost on Europe's roads.

The profile of displaced Ukrainians is regularly invoked to justify the difference in treatment with exiles of other nationalities. The vast majority are women and children, victims of the war. They are said to be better educated and therefore more easily "integrated" into the labour market and, more broadly, into European societies. The idea has also taken root that these refugees have no intention of settling down, but only of returning to Ukraine once the conflict is over.

It is true that, until 2022, refugee immigration to Europe was mainly male, unlike other categories of migrants. But this was a European bias, and more broadly from northern European countries, which were far from conflict zones and to which the migratory routes posed even greater dangers for women and children. On a global level, the reality is different. According to the UNHCR, 48% of refugees are women and girls and 41% are children. Similarly, the temporality of exile is a common feature of many refugee situations (UNHCR, 2023). Because of its ge-

ographical position, Europe constitutes a stage for secondary migration as the prospects of return become exhausted. In other words, and as mentioned above, the movements of Ukrainians to Europe are part of dynamics similar to those observed in other regions experiencing conflict.

On the ground, Ukrainians face the same obstacles as other exiles. Despite support from public authorities and tremendous solidarity from Europeans and diasporas, access to independent housing is a major challenge in a context of housing crisis in most Member States. Work, which, precisely, facilitates access to housing, is disappointing despite the mobilization of European companies. Poor command of the host country's language, the trauma of exile, family separation and the issue of childcare are all obstacles to professional integration that affect Ukrainians as much as other refugees.

The European Union Method at Issue

European co-operation on asylum and immigration is linked to the establishment of an area of free movement in Europe. The Maastricht Treaty of 1992 formally placed asylum and immigration within the institutional framework of the European Union, albeit on an intergovernmental basis. It was the Amsterdam Treaty of 1997 that brought asylum and immigration within the remit of the European Community.[1]

Alongside the construction of the institutional framework, the Heads of State and Government gave impetus to the political guidelines by adopting five-year programmes. At the Tampere European Council on 15 and 16 October 1999, the Member States set the goal of developing a common European policy on asylum and immigration. The implementation of this political programme has proven less ambitious. The conditions for exercising the right of asylum in the EU saw the most intense legislative activity with the adoption of three directives establishing minimum standards between 2003 and 2005.[2]

These difficulties have not deterred European countries from setting themselves more ambitious objectives. The Hague Programme, adopted by the European Council in November 2004, provided for the establishment of a common asylum procedure and a uniform status for people granted asylum by 2010, thus calling for a second wave of legislative harmonization. Negotiations on what was then called the "asylum package" got off to a late start in June 2008 and were even more laborious. The final texts were adopted in June 2013. The track record in terms of immigration policy is no better. Only one major text has emerged from the period following the Hague Programme. A directive establishing common standards and procedures for returning third-country nationals in an irregular situation was finally adopted in 2008, after lengthy negotiations between the Council and the European Parliament.

The EU method was already showing signs of fatigue when the so-called "refugee crisis" broke out. The common European asylum system did not stand up to the "crash test" of a million people arriving on Europe's borders. Nevertheless, it is wrong to think that the EU did not react to what was above all a humanitarian crisis. Councils and meetings followed one another at a frenetic pace, resulting in the adoption of measures designed to respond to the humanitarian emergency. However, with the exception of the reform of Frontex, these measures were adopted outside the ordinary legislative process, in particular the mechanism for relocating people from Greece and Italy and the establishment of hotspots.

The Commission tried to regain control by proposing a new legislative package in July 2016, but negotiations halted following a Council of Ministers in charge of immigration in June 2018. That month was also when the so-called Aquarius affair occurred, which caused tensions between France and Italy. Matteo Salvini, the Italian government's Interior Minister at the time, banned the ship chartered by the French NGO, SOS Méditerranée, from disembarking in Italy with the people rescued at sea. After several days at sea, Spain finally authorized the Aquarius to disembark in Valencia, following an arrangement between several Member States to divide up the migrants on board.

[1] However, it was not until 2009 that these issues came fully within the purview of the European Union. Qualified majority voting and co-decision powers for the European Parliament, i.e. the ordinary legislative procedure, did not come into force until 1 January 2005, and the Court of Justice of the European Union only acquired full jurisdiction over these matters with the Lisbon Treaty of 2008.

[2] Regarding conditions of reception, eligibility criteria for international protection and asylum procedures.

Subsequently, the summer of 2018 saw a succession of European "mini-crises" over the fate of these ships, which were settled by ad hoc arrangements between a few European countries determining the port of disembarkation and the distribution of the people on these ships. But these arrangements were neither lasting nor predictable. They were based on the goodwill of a few and ignored basic European regulations. They also excluded the European institutions, principally the European Parliament and, to some extent, the European Commission. After the League – and therefore Matteo Salvini – was ousted from the Italian government coalition, Germany, France, Italy and Malta agreed in September 2019 on a permanent mechanism for distributing migrants rescued in the central Mediterranean. The agreement was then presented to the other Member States at the European Council in October 2019. None of them followed up on it (Tardis, 2020).

This example demonstrates that the impossibility of agreeing on a common asylum and immigration policy prompted governments, alone or in coalition, to implement ad hoc measures that threatened the unity of the EU legal order. The Pact must therefore be seen as an attempt to bring the Member States back into the fold of the European institutional framework by putting in place regulations that are predictable and binding to all. Nevertheless, this new policy framework provides for so many exemptions and derogations that it cannot be described as a common policy but rather as an "à la carte" system.

Conclusion

Ultimately, the question that the European institutions have not wished to address is how to govern an EU with populist governments that proclaim themselves to be "illiberal" – i.e. opposed to the fundamental values of the EU – and reluctant to accept the rules of the European game. This matter goes beyond migration. But the migration issue is seen as a symbol of this failing Union. Firstly, because managing immigration is a terribly human issue and touches on the humanist, some would say founding, values of Europe. Secondly, because it is used as a symbol by political forces opposed to European integration.

Finally, the adoption of the Pact has not exhausted the debate on European asylum and immigration policies. On the contrary, from Denmark to Italy and Austria, a growing number of Member States are now calling not only for the management of migratory flows to be outsourced, but also for the processing of asylum applications to be outsourced to third countries, in contravention of European regulations and international law (Jacqué, 2024). Similarly, the proliferation of migration partnerships concluded by "Team Europe" with the EU's neighbouring countries, from Mauritania to Lebanon, thereby excluding any democratic control by the European Parliament, runs the risk of becoming the crucible for future "migratory crises," as well as existential crises for the EU. By entrusting third countries with the keys to Europe, the EU is also entrusting them with part of its sovereignty and placing itself in a vulnerable position when faced with regimes that are unreliable in terms of democracy and human rights.

References

European Union Agency for Asylum, *Asylum Report 2023*, July 2023

Jacqué, Philippe "Quinze pays de l'Union européenne réclament l'externalisation des demandeurs d'asile." *Le Monde*, 17 May 2024.

Le Grand continent, "La fin de Dublin III, avenir des migrations." 23 September 2020

Pascouau, Yves "Le pacte européen sur la migration et l'asile." In *Ramses 2024*, September 2023.

Tardis, Matthieu "L'UE est-elle prête pour les prochains défis migratoires ?" In *Politique étrangère*, autumn 2019.

Tardis, Matthieu "Asile et immigration en Europe, nouveau départ ou dernière chance?" *Ramses 2021*, September 2020.

Tardis, Matthieu "Politiques migratoires en Europe, quelles alternatives?" in *Politique étrangère*, September 2023.

Udrescu, Maria "La nouvelle Commission plaide pour 'un nouveau départ' sur la question migratoire: 'nous n'avons plus droit à l'échec'." *La Libre*, 2 December 2019.

UNHCR, *Global Trends – Forced Displacements in 2022*, June 2023.