

The Proposals beyond the New Pact on Asylum and Migration: Regulatory and Enforcement Challenges

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The new Pact on Asylum and Migration relaunches the reform of the Common European Asylum System (CEAS), which was lying in a stalemate. While building on the progress achieved in the negotiation of some of the 2016 proposals, the Commission adds new legislative items for a comprehensive package that complements the core building blocks of the CEAS with new specific measures. This paper aims to address the most relevant and controversial points from the perspective of the regulatory framework and the enforcement dynamics.

This position paper raises doubts on whether the Pact constitutes an effective paradigm shift in regulation and enforcement for EU asylum and migration law. As will be illustrated, the Pact reflects a regulatory framework that does not fix the existing divergences between the Member States, while at the enforcement level the approach is still precarious both as to the role of EU agencies and a strategy to ensure Member States compliance.

As to the regulatory framework, the major elements of novelty connect with the difficulties in finding a compromise on the reform of the Dublin regulation and its model of solidarity as well as the need ‘to close the gaps between external border controls and asylum and return procedures.’ For the first time, the Commission repeals, or better renames, the Dublin Regulation, as [Regulation on asylum and migration management](#), which designs a mix of flexible mandatory solidarity schemes. Moreover, the focus on procedures and enforcement is also expanded, as a new [proposal for a Regulation introducing a screening of third country nationals at the external borders](#) is added, complementing the amended proposal for the [Common Procedures Regulation](#) and the amended proposal for the [Return Directive](#).

With reference to solidarity, the Pact departs from the axiological view recently expressed by [Advocate General Sharpston](#), who emphasised that through their participation in the EU integration project, ‘Member States and their nationals have obligations as well as benefits, duties as well as rights.’ This ‘requires one to shoulder collective responsibilities and... burdens to further the common good.’ Instead, the Pact pursues a [pragmatic approach](#). According to the proposal for the [Regulation on asylum and migration management](#), Member States can choose either to relocate asylum seekers, either to sponsor returns to help another Member State repatriate irregular migrants or provide other types of support including external cooperation for migration management in countries of origin or transit. Such a model of solidarity can produce adverse effects, as it discourages Member States from prioritising the relocation of asylum seekers. Likewise, considering that every year, [only 40 % of third country nationals are effectively returned](#), little expectations are raised by the new tool of return sponsorships. Finally, this new framework instead of acting as a catalyst of a consensus, seems to rather contribute to further fragmentation in the effective management of the CEAS, neglecting that ‘[the enjoyment of equal rights and benefits stemming from membership in the EU carries equal responsibilities](#).’ While moving away from fully mandatory relocation schemes, **the proposal leaves solidarity to permanent negotiations between Member States on their possible contributions, and this can be detrimental to mutual trust.**

With reference to the need to close the gaps between external border management, asylum and return, the Pact introduces a screening procedure and a border procedure. The screening procedure would apply to: migrants who have entered in unauthorised manner, asylum seekers who entered without authorisation and persons disembarked after a search and rescue operation (Articles 3 and 5). It is striking that, pursuant to Article 4(1), during the screening process these persons would not be considered as being authorised entry into the Member State territory. **This is a flagrant contradiction of international law and other EU law obligations and should be remedied.** Asylum seekers’ need for protection, in fact, overrides the entry requirements, as confirmed by Article 6(5)(c) of the Schengen Borders Code. After the screening procedure, individuals are redirected to the border procedure, followed by an obligatory return border procedure, in case the asylum application is rejected. **There are**

risks that are to be avoided in connection to these procedures. A [Study of the European Parliament](#) has, in fact, highlighted ‘systematic and extended use of (de facto) detention in the context of border procedures.’

New legislative measures under the Pact, include a mix of fully harmonizing instruments as well as soft law measures, aiming at addressing situations of crisis, including those caused by search and rescue operations at sea. These encompass the proposal for a [Regulation addressing situations of crisis and force majeure](#), and two Recommendations respectively on the [Migration Preparedness and Crisis Blueprint](#), and on [cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities](#). **Particularly interesting is the new Regulation which establishes to extend immediate protection in situations of crises and alleviate the burdens of the affected Member State.** Although this proposal can be welcome is practical relevance is questionable, due the alleged political presumption that it will work as a pull-factor for migrants.

As to enforcement, the new legal design [misses the opportunity to properly embed the role of the EU Agencies](#) that, according to the Pact, should be involved in implementing the screening and border procedures. Despite creating the expectations of fully fledged agencies, the proposals underpinning the Pact, in fact, do not properly fix the conundrum of the legal mandate of these agencies and their executive powers that have been *de facto* expanding in the most recent years. The role of these agencies is ‘[largely unexplored](#)’ as regards their involvement in the screening procedures and maybe **it is worth considering what the added value can be in delegating certain tasks to the agencies**. This architecture, however, remains precarious in terms of procedural guarantees for migrants and coordination with the state authorities leaving accountability gaps open. It is crucial to have a more long-term view about the strategies to ensure the implementation of the current proposals, if adopted, as this certainly help solve future problems due, for instance, to the fact that some Member States do not have the necessary means and resources to fully implement the EU rules. In this connection, **it is necessary to take into account the capacity of each domestic asylum system in the allocation of the budget through the Asylum, Migration and Integration Fund.**

On an institutional level, it is worth considering that, according to Article 68 TFEU, ‘the European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.’ These proposals reflect a very little involvement of the European Council in the design of the new Pact. This can be problematic, because the negotiations depend also on the positions of the Member States governments and, therefore, a preliminary discussion by the Heads of State or governments could be needed for issues like solidarity between the Member States. The European Commission’s proposals are not the product of a European consensus, this is exemplified by the disagreement between Member States regarding the solidarity mechanism. **It is desirable that the draft strategic guidelines elaborated and discussed at technical level in Council’s working groups during the first months of 2020 can be detailed and agreed at the European Council’s level.**

To conclude, this new legal design raises doubts about the overall direction in regulation and enforcement for the CEAS. As to regulation, it is worth stressing that an overly articulated set of more than ten proposals certainly complicates the negotiations and may affect once again the effectiveness of the reform. This can be still impaired by the lack of policy coherence, because, in view of offering a pragmatic platform to accommodate the [diverging positions of the Member States](#), the new legal design misses the opportunity to operate a fundamental paradigm shift concerning the principle of solidarity. It is, therefore, crucial that a more strategic approach to the negotiations is agreed at the European Council’s level. This is all the more urgent, considering that the legislative package, which is supposed to go through the ordinary legislative procedure [for the end of 2021](#), has been already accumulating important delays.