

United against the Pact: The Fatal Flaws in the EU's Plans to Reform its Asylum System

Article by Francesca Spinelli

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Hailed as a “fresh start”, the European Commission’s Pact on Migration and Asylum promised to break the deadlock caused by previous legislation and provide a functional framework for migration in the Union that was both fair on member states and respectful of fundamental rights. Yet for all the rhetoric, six months after it was announced, negotiations in the European Council drag on. The pact is struggling to overcome the stumbling block that thwarted the previous attempt at asylum system reform in 2018: the challenge of reconciling the divergent interests of member states. Meanwhile, in the European Parliament, some hope to build a common front against a proposal that, if approved, would mark a serious step backwards for the right to asylum.

“The last time I was at the Montgenèvre border checkpoint, in the Alps, it was minus 18 degrees. I saw families arriving to claim asylum and police turning them away, saying: ‘You don’t have a PCR test’”. Damien Carême, a member of the Greens/EFA group in the European Parliament, is furious. For almost 20 years he served as mayor of Grande-Synthe, a small port town near Dunkirk in northern France, so he is well aware of the harsh reality for those seeking asylum in the European Union. The pushbacks in the Alps by French authorities, just like those carried out at sea by Greek and Maltese authorities, or the chain pushbacks along the Balkan route, are the result of a decades-old European migration and asylum system that is rigid, unjust, and incapable of real reform.

Elected to the European Parliament in 2019, Carême is fighting all out against the Pact on Migration and Asylum announced by the Commission on 23 September, 2020. Presented as “a fresh start”, this major package of proposals promised to break the stalemate in European asylum system reform by creating a “fair and effective” mechanism that protects those who need protection, rapidly removes those who are not entitled to remain in the EU, and respects the different needs of member states by offering various ways to contribute to the system. Carême’s assessment is terse: “This pact is terrible and won’t solve anything. I think it should be ditched completely.” He will be closely following discussions on one of the most significant – and criticised – proposals in the pact, the regulation on asylum and migration management, for which he has been appointed the Greens/EFA group’s shadow rapporteur (shadow rapporteurs are MEPs who work alongside the main rapporteur, representing the positions of other political groups).

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Over the past six months, numerous experts – not just academics but members of NGOs on the ground, too – have

looked in depth at the Commission's proposals and reached the unanimous conclusion that the pact represents anything but a fresh start. Rather, it will accelerate existing trends and procedures that are highly problematic. If approved, the pact would generalise the hotspot approach trialled in Greece and Italy, creating areas in which people entering the EU irregularly would be detained (mainly people arriving at borders, but also those stopped within the EU). Detention would last as long as necessary to conduct screening processes that are already part of current regulations but which would be governed by new legislation. These checks would determine the next step: return, fast-track asylum procedure at the border, or access to the normal asylum procedure. During screening, the border asylum procedure and preparations for return, migrants would not be "authorised to enter the territory of a Member State", based on a controversial concept known as "fiction of non-entry".

An ambiguous and dangerous proposal

Dutch MEP Tineke Strik, the Greens/EFA's shadow rapporteur for the proposal on screening, calls it "ambiguous and dangerous": "It gives a lot of leeway to member states, for instance on how to organise reception conditions or whether they should detain people. The European Commission says that the normal standards of the EU asylum law will not apply in these spaces, no directives or regulations, only the Charter of Fundamental Rights."

Another worrying element, according to Strik, is the absence of guidance on the qualifications required for those doing the screening by gathering personal data, including the reasons "for unauthorised arrival" and information "on routes travelled". The form completed at the end of screening will impact the rest of the procedure, but will not be challengeable, Strik says, adding that "there is no legal aid there nor any NGO that can inform the asylum seekers about the consequences of what they say."

The Commission requires member states to "establish an independent monitoring mechanism. This monitoring mechanism should ensure respect for fundamental rights at all times during the screening, as well as respect for the applicable national rules in the case of detention". "What I heard," notes Strik, "is that there is a lot of opposition from member states against this provision." This is hardly surprising given many states' reluctance to carry out this type of monitoring, which is already required in other contexts (for example, during forced returns).

In this sense, Croatia is a "testing ground" for the pact, observed Milena Zajovic, advocacy manager at the Border Violence Reporting Network, in a February 2021 interview with journalist Apostolis Fotiadis. Asked in November 2020 to create an independent border-monitoring mechanism, the Croatian government has so far proved extremely reluctant to do so. Zajovic raises two important points that have implications for the pact. The first is that Croatian NGOs are sceptical about the independence of a prospective monitoring system ("they are worried about being used"); the second is that "push-backs don't happen at border crossings" (which is where the monitoring proposed by the Croatian government would take place). "We know that pushbacks and other violations don't take place at formal border crossing points, but in other border zones like forests or the sea, where there is even less control on how border guards perform," agrees Strik. "This is why I am really going to try to expand the scope of this provision and make sure that there are clear criteria, not only on the independence but also on the resources and the mandate of such a body."

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Other than hostility towards independent monitoring, an obsession with deporting migrants, and a desire to collect even more information on those trying to enter the EU, there is not much else that member states agree on as they, along with MEPs, discuss the various documents that make up the pact. The main stumbling block, which sank the

previous attempt at asylum system reform and could well do the same to the pact, is the question of sharing responsibility for reception of asylum seekers and managing their asylum claims. On paper, the pact abolishes the much-criticised Dublin Regulation, but in practice leaves it intact, since the main criterion for determining the member state responsible for examining an asylum claim remains essentially the country of first entry. The Commission proposes to correct this imbalance by imposing a choice of different “solidarity” options: member states receiving fewer asylum seekers can accept relocation of recently arrived persons, “sponsor” the return of those present in another member state with no right to stay, or opt for other forms of “operational support”. The problem is that border states say a far more binding system is necessary – one that ensures less pressure on their reception capacities – while other states in Central and Eastern Europe consider this an unacceptable imposition.

A feeling of déjà-vu

When asked if she has a major sense of déjà-vu, German MEP Cornelia Ernst nods. Now in her third term as part of the European United Left–Nordic Green Left (GUE/NGL) group, she knows full well that attempts to reform the European asylum system, when they do not fail, tend to only make matters worse. Ernst recalls that during its last term, the Parliament managed to reach a common position on reforming the Dublin Regulation. In 2017, after months of consultation, Swedish MEP Cecilia Wikström presented an ambitious proposal that included a real mechanism for solidarity between member states. The proposal was approved by a large majority in the Parliament, only to be rejected by the Council. “Now the European Parliament is not so progressive,” notes Ernst. “There are right-wing parties who refuse to welcome even one asylum seeker. But we have to connect a lot of voices against this pact – also members from countries like Italy, Greece, Malta, and Spain, who will see that this deal is not in their interest. We have to mobilise all forces, because with the pact we see a new level of danger for the individual right to asylum.”

According to German MEP Erik Marquardt (Greens/EFA), the Commission seems to have deliberately ignored the facts in drawing up its proposal, especially when it comes to border procedures. Despite being required to present an impact assessment on these procedures by 2017, the Commission did not do so. It was the European Parliament that conducted the assessment, leading Marquardt to present a new resolution, which was approved in February 2021 with 505 votes in favour, 124 against, and 55 abstentions.

“We found in our implementation report that there are huge legal consequences to using the proposed border procedures. The European Commission says the border procedure will perform well, with fast decisions and alternatives to detention, and that children will never be detained. But if you look at how border procedures take place at the moment, there are no reasons to believe that it will work better just because the European Commission says so,” argues Marquardt. “There is not enough help for vulnerable persons, no real access to legal aid, in many states border procedure is connected to detention, and the reasons for detention are not justified. Member states currently do not care about legal safeguards. A huge increase in border procedures would lead to a situation where you just repeat problems that already exist, like on the Greek Islands.”

Marquardt hopes that the resolution vote is a sign of consensus in the European Parliament on the issues it will examine in the coming months. He acknowledges that different groups have different opinions on border procedures: while the liberal Renew and centre-right European People’s Party (EPP) are generally in favour, the Greens do not believe they are necessary for a fair and effective asylum system: “We should focus instead on fair and efficient asylum procedures in general, and on relocating people faster,” says Marquardt. There are also geographical divides: MEPs from border countries want the use of accelerated procedures to be left to the discretion of member states to avoid “congestion” in overcrowded reception centres, while others are keen for a procedure that stops asylum seekers before they officially set foot on EU soil. Nevertheless, Marquardt concludes that: “the European Parliament showed that it’s OK to have different opinions, but in the end in a democracy the task of politicians is to find common solutions to the challenges we have. For example, how to have faster

procedures while respecting fundamental rights and legal safeguards.”

Another encouraging vote was that held in December 2020 on a resolution about the implementation of the Dublin Regulation. In this case, too, the Commission failed to conduct an impact assessment. With 448 votes in favour, 98 against and 149 abstentions, the Parliament declared the Dublin system unworkable.

Facts versus ideology

To make up for the lack of data provided by the Commission, the European Parliament has now commissioned “a substitute impact assessment with a lot of questions to be dealt with horizontally in every file of the new pact, like for instance access to legal aid and the right to effective remedy,” explains Strik. “In the previous term, the European Parliament was united when it came to mandatory relocation of asylum seekers,” she adds. “I am not sure if we will still have a majority, but I sense that in most of the groups there is a lot of resistance against the permissive character of these proposals.”

These proposals reveal the ideological approach taken by the Commission and the Council towards migration and asylum issues – one that is permissive and not backed up by evidence. This approach is nothing new, contends Cornelia Ernst: “Until 2009 – the year I entered the European Parliament – the so-called Western Balkans were not considered safe for Roma communities living in Germany and in other countries. Then, in 2009, the European Commission and the member states said, from one day to another: ‘Kosovo, Bosnia and so on are all safe countries’. It was an ideological decision.”

As well as eroding the rights of asylum seekers and migrants in general, this ideological approach has led to the creation and constant strengthening of an agency like Frontex, whose annual budget keeps growing (544 million euros in 2021). The pact gives Frontex a central role in European border management and migrant returns, a role that was forcefully reiterated by Commission Vice-President Margaritis Schinas in an interview with Spanish newspaper *El País* in early 2021. “We must succeed in establishing tight control of European borders, like the United States does,” Schinas said, going on to cite the “massive presence of Frontex in the Aegean Sea” as a model for managing irregular arrivals of migrants.

Created to fight “a war against an imaginary enemy” (to use the slogan of the Frontexit campaign, launched in 2013), the agency has long been criticised for its opacity and lack of accountability when it comes to respecting fundamental rights. In the wake of investigations into its role in illegal pushbacks and its relationship with the arms industry, Frontex will now be closely scrutinised by the European Parliament, which in January 2021 set up a working group to investigate how it operates.

Damien Carême is glad that this group has been created but sees it as just the first step: “For over a year, I’ve been calling for a parliamentary committee with a broader remit to investigate respect for the rule of law within the EU and at its borders. The problem isn’t just Frontex. There are a certain number of member states who push back migrants, and this has been documented by journalist groups and NGOs. As I keep saying, France does not respect the rule of law.” That is why, together with other Green parliamentarians – both national and European – Carême has launched a solidarity initiative to support volunteers working with asylum seekers in Montgenèvre.

In an editorial published in February 2021, the director of the European Council on Refugees and Exiles (ECRE), Catherine Woollard, warned against complacency on the pact: although it is less talked about, negotiations are ongoing and it is not out of the question that the Council and Parliament reach an agreement on some issues, abandoning the idea of approving the whole package of proposals. Indeed, following the informal video conference of EU home affairs ministers which took place on March 12, the Commission and the Portuguese Presidency of the Council of the EU have stated that on two more technical (and less controversial) proposals, member states have

almost reached an agreement, and that there is a common will to now focus on the external dimension of migration policies (in other words, on how to push third countries, in particular North African countries, to cooperate on readmissions).

The pact clearly reflects a European Union that, to avoid calling into question the very foundations of its reception system, prefers to cling onto a vision of migration dictated by the far right.

Erik Marquardt is convinced that civil society has an important role to play during discussions on the pact: “These organisations are not just sitting in Brussels to do lobbying, they have an important role on the ground, they know what’s happening and they can really help us base our policies on evidence.” This is why it is vital to ensure they have access to border areas, as he stresses: “If you want to have an asylum system that works, you should create an environment where civil society can contribute and support the applicants.”

Whatever comes of this new attempt at reform, the pact clearly reflects a European Union that, to avoid calling into question the very foundations of its reception system, prefers to cling onto a vision of migration dictated by the far right. As Leila Hadj Abdou, a research fellow at the European University Institute, has written, the origins of the current status quo lie in the 1980s, when a dangerous spiral was set in motion: “Restrictive migration and asylum policy reforms across EU member states, and consequently at the EU level, initially aimed at containing the anti-establishment mood, and the rise of Eurosceptic, anti-immigrant parties. But by doing so they have further increased the prominence and visibility of the migration issue and, consequently, contributed further to its contestation. Put differently, these political developments have firmly consolidated ideas of migration as in need of more control, partly irrespective of the numbers or effects of migration.”

By abandoning the proposed reform of the Dublin Agreement approved by MEPs in 2018, the European Union has wasted an opportunity to change course. Over the next few months, we will learn just how steep this race to the bottom will be.



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