

EU Pact on Migration and Asylum. Implementation, Impact and Consequences in the Euro-Mediterranean Context

Professor Steve Peers

Law School
University of Essex¹

In September 2020, the EU Commission tried again on the issue of immigration and asylum, publishing a new package of proposals on asylum and (non-EU) migration. This consisted of proposals for legislation, some “soft law,” attempts to relaunch talks on stalled proposals and plans for future measures. The following summarizes the new proposals, then examines some of the possible impacts on the Mediterranean region.

Background

A first phase of legislation to create a “Common European Asylum System” was passed between 2003 and 2005, followed by a second phase between 2010 and 2013. Currently, the legislation consists of: a) the Qualification Directive,² which defines when people are entitled to refugee status (based on the UN Refugee Convention) or subsidiary protection status, and what rights they have; b) the Dublin III Regulation,³ which allocates responsibility for an asylum seeker between Member States; c) the Eurodac

Regulation,⁴ which facilitates the Dublin system by setting up a database of fingerprints of asylum seekers and people who cross the external border without authorization; d) the Asylum Procedures Directive,⁵ which sets out the procedural rules governing asylum applications, such as personal interviews and appeals; e) the Reception Conditions Directive,⁶ which sets out standards on the living conditions of asylum-seekers, such as rules on housing and welfare; and f) the Asylum Agency Regulation,⁷ which set up an EU agency (EASO) to support Member States’ processing of asylum applications.

The EU also has legislation on other aspects of migration: (short-term) visas, border controls, irregular migration, and legal migration – much of which has connections with the asylum legislation, and all of which was covered in some form by the September 2020 package. For visas, the main legislation is the visa list Regulation (setting out which non-EU countries’ citizens are subject to a short-term visa requirement, or exempt from it),⁸ alongside the visa code (defining the criteria to obtain a short-term Schengen visa, allowing travel between all Schengen states).⁹ For border controls, the main legislation is the Schengen Borders Code,¹⁰ setting out the rules on crossing external borders and the circumstances in which Schengen states can reinstate controls on internal

¹ This paper is in part adapted from a blog post on the proposals: <http://eulawanalysis.blogspot.com/2020/09/first-analysis-of-eus-new-asylum.html>. I have worked as an independent consultant for the impact assessment regarding the background of some of these proposals. My views are, however, independent of any EU institution or Member State.

² Directive 2011/95, OJ 2011 L 337/9.

³ Regulation 604/2013, OJ 2013 L 180/31.

⁴ Regulation 603/2013, OJ 2013 L 180/1.

⁵ Directive 2013/32, OJ 2013 L 180/60.

⁶ Directive 2013/33, OJ 2013 L 180/96.

⁷ Regulation 439/2010, OJ 2010 L 132/11.

⁸ Codified in Regulation 2018/1806, OJ 2018 L 303/39, as amended by Regulation 2019/592, OJ 2019 L 103I/1.

⁹ Regulation 810/2009, OJ 2009 L 243/1, as amended by Regulation 2019/1155, OJ 2019 L 188/25.

¹⁰ Codified in Regulation 2016/399, OJ 2016 L 77/1, as subsequently amended.

borders, along with the Frontex Regulation,¹¹ setting up an EU border agency to assist Member States.

The EU's response to the perceived refugee “crisis” was both short-term and long-term. In the short term, in 2015 the EU adopted temporary laws, in theory relocating some asylum seekers from Italy and Greece to other Member States

For irregular migration, the main legislation is the Return Directive,¹² which the Commission proposed to amend in 2018.¹³ As for legal migration, the main legislation on admission of non-EU workers is the single permit Directive (setting out a common process and rights for workers, but not regulating admission);¹⁴ the Blue Card Directive (on highly skilled migrants);¹⁵ the seasonal workers' Directive;¹⁶ and the Directive on intra-corporate transferees.¹⁷ The EU also has legislation on: non-EU students, researchers and trainees; non-EU family reunion, and on long-term resident non-EU citizens.¹⁸ In 2016, the Commission had proposed revising the Blue Card Directive,¹⁹ but that proposal had still not been agreed at the time the 2020 Migration Pact was tabled.

Ireland and Denmark opted out of most of these laws, some of asylum laws applying to Ireland, and

Denmark being covered by the Schengen and Dublin rules. There are also several non-EU countries associated with Schengen and Dublin (Norway, Iceland, Switzerland and Liechtenstein).

The Refugee “Crisis”

The EU's response to the perceived refugee “crisis” was both short-term and long-term. In the short term, in 2015 the EU adopted temporary laws, in theory relocating some asylum seekers from Italy and Greece to other Member States.²⁰ A legal challenge to one of these laws failed,²¹ but, in practice, Member States accepted few relocations anyway. Although the CJEU subsequently ruled that several Member States had breached their legal obligations, by then it was a moot point.²²

Longer term, the Commission proposed overhauls of the law in 2016: a) a Qualification Regulation further harmonizing the law on refugee and subsidiary protection status;²³ b) a revised Dublin Regulation, which would have set up a system of relocation of asylum seekers for future crises;²⁴ c) a revised Eurodac Regulation, to take much more data from asylum seekers and other migrants;²⁵ d) an Asylum Procedures Regulation, further harmonizing the procedural law on asylum applications;²⁶ e) a revised Reception Conditions Directive;²⁷ f) a revised Asylum Agency Regulation, giving the agency more powers;²⁸ and g) a new Resettlement Regulation, setting out a framework of admitting refugees directly from non-EU countries.²⁹

¹¹ See most recently Regulation 2019/1896, OJ 2019 L 295/1.

¹² Directive 2008/115, OJ 2008 L 348/98.

¹³ COM (2018) 634, 12 Sep 2018.

¹⁴ Directive 2011/98, OJ 2011 L 343/1.

¹⁵ Directive 2009/50, OJ 2009 L 155/17.

¹⁶ Directive 2014/36, OJ 2014 L 94/375.

¹⁷ Directive 2014/66, OJ 2014 L 157/1.

¹⁸ See respectively Directives 2016/801, OJ 2016 L 132/21; 2003/86, OJ 2003 L 251/12; and 2003/109, OJ 2004 L 16/44.

¹⁹ COM (2016) 378, 7 June 2016.

²⁰ Decisions 2015/1523, OJ 2015 L 239/146, and 2015/1601, OJ 2015 L 248/80.

²¹ Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, ECLI:EU:C:2017:631.

²² Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v Poland, Hungary and Czech Republic*, ECLI:EU:C:2020:257.

²³ COM (2016) 466, 13 July 2016.

²⁴ COM (2016) 270, 4 May 2016.

²⁵ COM (2016) 272, 4 May 2016.

²⁶ COM (2016) 467, 13 July 2016.

²⁷ COM (2016) 465, 13 July 2016.

²⁸ COM (2016) 271, 4 May 2016.

²⁹ COM (2016) 468, 13 July 2016.

However, discussions on these proposals eventually ground to a halt – hence the eventual attempt to re-launch the process in September 2020. In particular,³⁰ although the EU Council Presidency and the European Parliament (EP) reached a provisional agreement on the proposals on qualification, reception conditions and resettlement in June 2018, Member States refused to support the Presidency's deal and the European Parliament refused to renegotiate.³¹

On the asylum agency, the EP and Council agreed on the revised law in 2017, but the Commission proposed an amendment in 2018 to give the agency more powers; the Council could not agree on this.³² On Eurodac, the EP and Council only partly agreed on a text.³³ On the procedures Regulation, the Council largely agreed its position, except on border procedures;³⁴ on Dublin there was never much prospect of agreement because of the controversy over relocating asylum seekers. (For either proposal, a difficult negotiation with the European Parliament lay ahead).

In other areas too, the legislative process was difficult: the Council and EP gave up negotiating amendments to the Blue Card Directive, and the EP had not yet agreed a position on the Returns Directive.³⁵ Having said that, the EU has been able to agree legislation giving more powers to Frontex, as well as new laws on EU migration databases, in the last few years.³⁶

The Attempted Relaunch

The Commission's proposed Pact on Asylum and Migration did not restart the whole process from scratch.³⁷ On qualification, reception conditions, resettlement, the asylum agency, the returns Directive and the Blue Card Directive, it invited the Council and Parliament to resume negotiations. But it tried to

unblock the talks as a whole by tabling two amended legislative proposals and three new legislative proposals, focusing on the issues of border procedures and relocation of asylum seekers.

Screening at the Border

These revised proposals start with a new proposal for screening asylum seekers at the border,³⁸ which would apply to all non-EU citizens who cross an external border without authorization, who apply for asylum while being checked at the border (without meeting the conditions for legal entry), or who are disembarked after a search and rescue operation. During the screening, these non-EU citizens are not allowed to enter the territory of a Member State, unless it becomes clear that they meet the criteria for entry. The screening at the border should take no longer than 5 days, with an extra 5 days in the event of a huge influx.

The 2020 proposal additionally provides for interoperability with other EU migration databases, taking of personal data during the screening process, including more data on the migration status of each person, and expressly applying the law to those disembarked after a search and rescue operation

At the end of the screening, the migrant is channelled either into the expulsion process (if no asylum claim has been made and the migrant does not meet the

³⁰ For a summary of the state of play in the negotiations, see Council document 6600/19, 26 Feb 2019.

³¹ For the agreed texts on reception and qualification, see Council documents 10009/18 and 10010/18, 18 June 2018.

³² See, respectively, Council document 14985/17, 4 December 2017 and COM (2018) 633, 12 September 2018.

³³ Council document 9848/18, 12 June 2018.

³⁴ Council document 7708/19, 22 March 2019.

³⁵ For the Council's negotiation position, see Council document 9620/19, 23 May 2019.

³⁶ On Frontex, see Regulation 2019/1896, OJ 2019 L 295/1. See also: Regulation 2017/2226 establishing an entry-exit system, OJ 2017 L 327/20; Regulation 2018/1240 establishing an EU travel authorization system, OJ 2018 L 236/1; Regulation 2018/1860 regarding returns and the Schengen Information System, OJ 2018 L 312/1; and Regulation 2018/1861 revising the Schengen Information System as regards borders, OJ 2018 L 312/14.

³⁷ COM (2020) 609, 23 September 2020.

³⁸ COM (2020) 612, 23 September 2020.

conditions for entry) or, if an asylum claim is made, into the asylum process – with an indication of whether the claim should be fast-tracked or not. To ensure human rights protection, there must be independent monitoring to address allegations of non-compliance with human rights. These allegations might concern breaches of EU or international law, national law on detention, access to the asylum procedure, or non-refoulement (the ban on sending people to an unsafe country). Migrants must be informed about the process and relevant EU immigration and data protection law. There is no provision for judicial review of the outcome of the screening process, although there would be review as part of the next step (asylum or return).

Asylum Procedures

The revised proposal for an asylum procedures Regulation would leave in place most of the Commission's 2016 proposal to amend the law,³⁹ adding some additional specific proposals for amendments, which either link back to the screening proposal or aim to fast-track decisions and expulsions more generally. The latter rules comprise a new border expulsion procedure, simultaneous expulsion and asylum decisions, fast-tracked decisions in the event of an asylum seeker coming from a country with a low recognition rate, a single level of appeal for some cases, and a short time limit to appeal for many cases.

Eurodac

The revised proposal for Eurodac would build upon the 2016 proposal,⁴⁰ which was already far-reaching: extending Eurodac to include not only fingerprints, but also photos and other personal data; reducing the age of those covered by Eurodac from 14 to 6; removing the time limits and the restrictions on using the fingerprints taken from persons who had crossed the border irregularly; and creating a new obligation to collect data of all irregular migrants over the age of six (currently fingerprint data for this group cannot be stored, but can be checked, as an option, against the data on asylum seekers and irregular border crossers). The 2020 proposal addi-

tionally provides for interoperability with other EU migration databases, taking of personal data during the screening process, including more data on the migration status of each person, and expressly applying the law to those disembarked after a search and rescue operation.

Dublin Rules on Asylum Responsibility

A new proposal for asylum management would replace the Dublin regulation (meaning that the Commission withdrew its 2016 proposal to replace that Regulation).⁴¹ The 2016 proposal would have created a “bottleneck” in the Member State of entry, requiring that state to examine first whether many of the grounds for removing an asylum-seeker to a non-EU country apply before considering whether another Member State might be responsible for the application (because the asylum seeker's family live there, for instance). It would also have imposed obligations directly on asylum seekers to cooperate with the process, rather than only regulate relations between Member States. These obligations would have been enforced by punishing asylum seekers who disobeyed: removing their reception conditions (apart from emergency health care); fast-tracking their substantive asylum applications; refusing to consider new evidence from them; and continuing the asylum application process in their absence.

Also, the 2016 proposal would have tackled the vexed issue of disproportionate allocation of responsibility for asylum seekers, by setting up an automated system determining how many asylum seekers each Member State “should” have based on their size and GDP. If a Member State were responsible for excessive numbers of applicants, Member States which were receiving lower numbers would have to take more to help out. If they refused, they would have to pay €250,000 per applicant.

The 2020 proposal drops some of the controversial proposals from 2016, including the “bottleneck” in the Member State of entry (the current rule, giving Member States an option to decide if a non-EU country is responsible for the application on narrower grounds than in the 2016 proposal, would still ap-

³⁹ COM (2020) 611, 23 September 2020.

⁴⁰ COM (2020) 614, 23 September 2020.

⁴¹ COM (2020) 610, 23 September 2020.

ply). However, the 2020 proposal also retains parts of the 2016 proposal, including the obligations for asylum seekers (redrafted slightly), some of the punishments for non-compliant asylum seekers (the cut-off for considering evidence would remain, as would the loss of benefits, except for those necessary to ensure a basic standard of living),⁴² and some curtailment of judicial review (the grounds would still be limited; the time limit to appeal would be 14 days; courts would not have a strict deadline to decide; suspensive effect would not apply in all cases); and the reduced time limits for detention.

The proposal tries to solve the underlying issue of disproportionate allocation of asylum seekers by means of a menu of “solidarity contributions”: relocation of asylum seekers; relocation of refugees; “return sponsorship”; or support for “capacity building” in the Member State (or a non-EU country) facing migratory pressure. Note that “return sponsorship” comes with a ticking clock: if the persons concerned are not expelled within eight months, the sponsoring Member State must accept them on its territory.

Other Measures

The 2020 package also includes a proposed Regulation on crisis management,⁴³ which replaces a Directive on temporary protection adopted back in 2001, but which was never used in practice.⁴⁴ There are also several “soft law” measures: a Recommendation on asylum crisis management;⁴⁵ a Recommendation on resettlement and humanitarian admission;⁴⁶ a Recommendation on cooperation between Member States on private search and rescue operations;⁴⁷ and guidance on the applicability of EU law on migrant smuggling.⁴⁸

There are longer-term plans on legal migration, including not only relaunching discussions on the amend-

ment of the Blue Card Directive, but also future proposals for amendments to the single permit and long-term residence laws referred to above – leading, respectively, to greater harmonization of the law on admission of non-EU workers and enhanced possibilities for long-term resident non-EU citizens to move between Member States.

There are longer-term plans on legal migration, including not only relaunching discussions on the amendment of the Blue Card Directive, but also future proposals for amendments to the single permit and long-term residence laws

Developments in Practice

In the nine months since the Commission tabled its proposals, two measures have been agreed. First of all, the EP and the Council agreed on the reform to the EU Blue Card proposal,⁴⁹ after a compromise on whether parallel national schemes will still exist: they can continue, but only if many of their benefits also apply to Blue Card holders. Secondly, Member States agreed to detach the proposed legislation on the EU asylum agency from the other asylum proposals, and it was quickly agreed between the EP and the Council.⁵⁰ Talks continue on the other proposals.⁵¹ In other developments, the Commission has proposed a new Regulation concerning surveillance of Member States’ application of the Schengen acquis,⁵² and the EU institutions have agreed on major changes to the Visa Information System.⁵³

⁴² See the judgments in Cases C-179/11, *CIMADE*, ECLI:EU:C:2012:594 and C-233/18, *Haqbin*, ECLI:EU:C:2019:956.

⁴³ COM (2020) 613, 23 September 2020.

⁴⁴ Directive 2001/55, OJ 2001 L 212/12.

⁴⁵ C(2020) 6469, 23 September 2020.

⁴⁶ C(2020) 6467, 23 September 2020.

⁴⁷ C(2020) 6468, 23 September 2020.

⁴⁸ OJ 2020, C 323/1.

⁴⁹ Council document 9042/21, 21 May 2021.

⁵⁰ Council document 10352/21, 30 June 2021.

⁵¹ Council document 7708/19, 22 March 2019.

⁵² COM (2021) 278, 2 June 2021.

⁵³ Council document PE-CONS 44/21, 7 July 2021.

Comments

It remains to be seen whether the attempt to re-launch reforms to EU immigration and asylum law will be successful, beyond the agreements on the Blue Card and the EU asylum agency in spring 2021. The Blue Card reforms are likely to lead to at least a modest increase in the numbers of highly skilled workers moving to and staying in the EU, including from Mediterranean states.

What impact would the other measures have? Taken together, the proposals on asylum procedures, screening, and the returns Directive would likely mean, if adopted, that there will be a greater number of fast-track refusals of entry and of asylum applications, with more limited appeal rights than at present. There will likely be an attempt to push back against this, through national courts, the CJEU and the European Court of Human Rights. Even if the new laws survive these challenges and result in more fast-track decision making in practice, an increased rate of issuing expulsion decisions and asylum refusals means nothing in practice without countries of origin or transit willing to accept back the persons concerned. The advocates of Brexit are also discovering this, now that they have achieved their objective of leaving the EU.

The countries likely to be particularly impacted by an increased return rate may well be the EU's neighbours, in the Western Balkans, the Eastern Neighbourhood and around the Mediterranean. Although the latter two groups of countries have largely signed readmission treaties with the EU, which also apply to non-citizens of the parties who have travelled across them, most southern and eastern Mediterranean states have not signed such treaties – other than Turkey.

Refusing more applications quickly without an increased capacity for removals may have several different consequences. One – again paralleled by plans in Brexit Britain – is increased detention. On that point, the reception conditions proposal would add a new ground for detention, while the proposal to amend the return Directive proposal would inevi-

tably increase detention due to curtailing voluntary departure (despite the Commission's false claim in its new communication that its 2018 proposal is "promoting" voluntary return).

Another consequence is finding a way to encourage non-EU countries to take back more people, without dropping the visa requirement that applies to most Mediterranean (and sub-Saharan African) states – as that has been the incentive to sign up to readmission treaties with the EU for some nearby states. An alternative, less far-reaching approach is readmission in return for visa *facilitation* (i.e., the fast-tracked issue of visas, for lower application fees). Some EU neighbours have been willing to sign up to such a package, but not all.

An increased rate of issuing expulsion decisions and asylum refusals means nothing in practice without countries of origin or transit willing to accept back the persons concerned

In light of this deadlock, the EU has acted unilaterally: the recent amendments to the visa code, which was mentioned above, contain both "carrots" and "sticks" for countries which do not cooperate with the EU on readmission. In the event of non-cooperation, as regards readmission, the EU can punish countries with *slower* issue of visas and *higher* fees; in the event of satisfactory cooperation, it can facilitate the issue of visas, without the need for a treaty to that effect. With movement of travellers sharply reduced due to the Covid-19 pandemic, it is too early to tell whether this change in the law is effective at achieving its objectives. Whether the EU goes as far as the UK government plans to go – possibly suspending visa applications entirely for certain countries in the event of non-cooperation – would depend on whether the political willingness is there to amend the visa code again to this end.