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Solidarity between Member States in the New EU Pact on Migration and Asylum

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INTRODUCTION

Migratory fluxes have significantly impacted European Union's policies in the last years. Since the advent of the migratory crisis of 2015, migration has become an essential point of discussion for Member States and European institutions. Border countries like Greece and Italy became overflowed with migrants and asylum seekers escaping from both the Syrian conflict, and the general instability of their economic and political systems. As a consequence, because many countries (i.e., Hungary or Austria) reacted by heightening checks and security measures at their frontiers, polarization between the Southern States in need of aid and those unwilling to concede it inevitably increased too. As a result of this climate of diffidence between Member States, the concept of solidarity in migratory issues has been deprived of its importance. This phenomenon is also fostered by the expanding wave of populism throughout the European continent and the persistent blaming by populist political parties towards migrants.

For this reason, this thesis examines one of the most pressing topics in European Union Law and for the European Union as a whole: a solidarity framework between Member States for a more efficient migration and asylum management. On one hand, this new solidarity mechanism could potentially relieve the border countries of the migratory pressure they are sustaining, while also freeing those asylum seekers who, after confronting many dangers, are still enclosed in detention centres awaiting a verdict on their asylum request. On the other hand, it could also represent a double-edged sword if, for it to be applied, it would need to be as accommodating as possible to those Member States that are not keen on implementing solidaristic measures.

Before examining the new potential framework, the development of the European Union's definition of solidarity must be explained. The first chapter will discuss how the concept of solidarity in the realm of the European Union has evolved thoroughly over time, starting from the Schuman Declaration up until the Lisbon Treaties. It will accurately study the evolution of cooperation in the Area of Freedom Security and Justice contained in Title V of the Treaty on the Functioning of the European Union and its most relevant articles, together with the role of the European institutions in forming and defending solidaristic action.

Furthermore, considering that an actual change in giving significance to solidaristic measures for migration management could be the new European Commission proposal on a new Pact on Migration and Asylum, the second chapter will aim to investigate its contents and potential reforms.

The objective of this section will additionally be that of illustrating what the equitable share of responsibilities would entail. According to the new definition of solidarity proposed by the European Commission, solidarity

should be obligatory, constant, but also flexible, depending on the commitments that the States prefer to adopt. These commitments can be chosen among the possibilities that allow Member States to participate in the sharing of the burdens. Namely, it would be necessary to determine the extent to which the Member States should collaborate in managing the migratory phenomenon in a situation of migratory pressure, or in crisis situations deriving from an influx of third-country nationals or irregular stateless incomers.

Flexible options include the relocation of newly arrived persons or a sponsorship of return, by which a Member State would assume responsibility for returning an irregular migrant on behalf of another Member State. Another alternative includes immediate, long-term operational support to strengthen the various aspects of this new system; for example, by providing help in handling reception or return, assistance, or cooperation with third countries. However, as it can be observed, this is an “à la carte” system, the implementation of which seems rather complex and would test the EU's ability to oblige States to comply with the provisions and, in particular, to respect the fundamental rights of these persons.

As far as the new Pact is concerned, the primary responsibility of migratory flows remains in the hands of the Member States of first entry, which was the main element contested by the Southern countries. Indeed, the existing allocation system in the EU, established by the Dublin Regulation, burdens the Southern Member States that find themselves at the maritime borders of the continent. Another damaging effect of the Dublin Regulation is its failure to recognize that asylum provisions should be a common and public good, whereas instead, responsibility for the management of refugees is entirely allocated in the hands of the receiving Member State.

Moreover, refugees cannot move from the first country of entry, leading to a stiffening of the phenomenon of non-redistribution between countries, even if alternative methods and criteria to help the countries in question are implemented by the new provision contained in the 2020 Pact. The principal one is the mandatory requirement of all countries to sustain the States under migratory pressure or under those considered “crisis situations”. Discretion to decide which model is to be applied in which situation is left extensively to the Commission and EU Agencies. This can happen through a number of options that will be further elaborated in the second chapter.

As a direct consequence of the Commission’s proposal, many Member States did not find its content acceptable. As it will be explained in the third chapter, the first countries that opposed it were the ones forming part of the Visegrad Group. They had already proven their inflexibility in not wanting asylum seekers within their borders in the past. Simultaneously, the southern Member States are not satisfied with the solidaristic measures involved in the Pact.

According to them, alternative methods of redistribution of responsibilities would only complicate the fragile state in which their reception systems of refugees and people requesting international protection already are. Lastly, Non-Governmental Organizations call for an urgent revision of the proposal before it is approved. They fear that these new “solidaristic” measures would do nothing more than enhancing the formation of “hotspots” in the Mediterranean area, causing even more violation of human rights (i.e., freedom of movement). Another dreaded aspect is that it could legitimise and encourage the repatriation of individuals. The consequent processes of repatriation or expulsion may hinder the principle of non-refoulment.

Despite the urgency to find an agreement on the proposal of the Pact between the many parties involved, many questions remain unanswered. Because of the spreading of the COVID-19 pandemic, the European Union and its institutions have set the resolution of the economic and health crises as a priority, meaning that negotiations on the proposals of the new Pact have been delayed time and time again. As of September 2021, indeed, not a single proposal concerning solidaristic measures has been adopted.

CHAPTER 1: SOLIDARITY IN EU LEGISLATION ON MIGRATION AND ASYLUM

1.1 THE PRINCIPLE OF SOLIDARITY IN EU LAW: ORIGINS AND EVOLUTION

The term solidarity is rooted in the Roman law of obligations. More specifically in the *obligatio in solidum* which implied the right of each creditor to request the payment of the entirety of the debt¹. From the start of the 19th century, its terminology was commuted closer to the concept of kinship that originated from the influence of the Christian notion of “thou shalt love thy neighbor as thyself”. This was demonstrated at the time with the upsurge of the French revolutionaries’ motto of “*liberté, égalité, fraternité*” that expressed the human right to be treated equally and as free individuals. Furthermore, between the 19th and the 20th century, it can be encountered the evolution of social solidarity with the birth of the welfare State, where solidaristic mechanisms are put in place for its citizens. It is through this concept of welfare that many Constitutions develop and establish democratic governments throughout Europe. Nonetheless, this model of solidarity based on the mutual safeguard of certain group’s interests is not valid only at the national level anymore. Indeed, over the last decades, there has been proof of a growing trend of international solidarity in terms of cooperation for the benefit of the entire international community. The main recognition of international solidarity as a central value for international relations in the 21st century is covered in the United Nation’s Millennium Declaration² where the text explicitly states that: “Global challenges must be managed in a way that distributes the costs and burdens fairly following basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most”³. In this particular chapter, it will be explained how the concept of solidarity was translated and introduced into the realm of European Union law and how it gained fundamental importance within it.

The concept of solidarity within the realm of the European Union is recognized as a fundamental value for the success of European integration in Robert Schuman’s Declaration of the 19th of May 1950. In his speech, Schuman recognized that “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity”⁴. He emphasized the attainment of a *de facto* solidarity for the realisation of cooperation in the European Coal and Steel

¹ BAYERTZ (1999: 3).

² Resolution of the General Assembly of the UN, 18 September 2000, A/RES/55/2, *United Nations Millennium Declaration*.

³ Ibid, para 6.

⁴ Declaration of Robert Schuman, 9 May 1950.

Community (ECSC) that with time and collaboration between Member States will further develop into the institution that we know today as the European Union. Indeed, the notion of solidarity can be easily associated with the notion of loyal collaboration and assistance between Member States enclosed within the original European treaties⁵. However, loyal cooperation and sustainability do not have the same meaning *per se*, although they have similar connotations.

With the Treaty of Rome of 1957 establishing the European Economic Community, the signatories of the Treaty established their determination “to lay the foundations of an ever-closer union among the peoples of Europe”⁶. Therefore, solidarity was understood as comprehending exclusively the “peoples of Europe”⁷. At the time, the purpose of the Treaty was to enhance the economic relationship between the Member States, and the concept of social solidarity was not envisioned yet. The consideration of solidarity between Member States is stated clearly in the Maastricht Treaty of the 7th of February of 1992. It is explicitly prompted the will of the signatories “to deepen the solidarity between their peoples while respecting their history, their culture, and their traditions”⁸. Moreover, in the same text, there is the stipulation of the Union’s task “to organize, in a manner demonstrating consistency and solidarity, relations between Member States and between their peoples”⁹ and for the Member States to “support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity”¹⁰. This is an evident representation of the highlighting of the Treaty of Maastricht for what concerns the different facets of solidarity.

Indeed, solidarity has an important role between the Member States and their citizens, between the Union and other international organizations or private entities. In the following Treaty of Amsterdam of the 2nd of October of 1997, enacted the 1st of May 1999, it is reiterated the same concept of solidarity. Differently from the Maastricht one, it added a declaration on voluntary work and its “important contribution [...] to developing social solidarity”¹¹. The creation of the Treaty establishing a Constitution for Europe multiplied the mentions to the conception of solidarity. Regrettably, it was never enacted. However, its contents on solidarity were reintroduced in the Treaty of Lisbon of the 13th of December of 2007, enacted from the 1st of December of 2009, which was even more noticeable for his variety of references to the topic of solidarity¹².

⁵ MORGESE (2017: 15).

⁶ Treaty establishing the European Economic Community, 25 March 1957, Preamble, para 1.

⁷ CLEYNENBREUGEL (2018: 18).

⁸ Treaty on European Union, 7 February 1992, 92/C 191/01, Preamble, para 4.

⁹ Ibid. art. A, para. 3.

¹⁰ Ibid. art. J.1, para. 4.

¹¹ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2 October 1997, 97/C 340/01, Declaration on voluntary service activities, para 1.

¹² MORGESE (2017: 18-20).

Following the Lisbon amendments, solidarity concerning the relationships between Member States took hold as a prerequisite of the Union's functioning and success. In the Treaty on European Union, it is expressly written that the Union "shall promote economic, social and territorial cohesion, and solidarity among Member States"¹³. This statement finds its maximum expression in other articles of the amended Treaties such as Article 174 of the Treaty on the Functioning of the European Union (TFEU) in which it is held that the Union is compelled to adopt procedures endorsing sustainable development, especially of its least advantaged areas¹⁴. Furthermore, solidarity between Member States is a requirement for the framing of a Union's common policy on asylum, immigration, and external borders as stated in Article 67 TFEU.

What is relevant in the TFEU for what concerns the management of migrants and asylum seekers is Article 80. Indeed, this article provides that the Union policies set out in the chapter regarding migration and border checks "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States"¹⁵. Alas, it does not bind States to enact this solidarity even if it does bind the Union whenever it possesses the authority to legislate in the area of asylum, immigration, and border checks. This conclusion should determine the duty of the Court of Justice of the European Union (CJEU) to privilege the principle of solidarity, as formulated in the article aforementioned, for what concerns the interpretation of the Institutions' acts and States' behaviours. However, as it will be discussed further down below, the Court did not prove at first its active role in directing the interpretation of the Union's acts and Member States' behaviours towards the sense of solidarity.

1.2 EVOLUTION OF SOLIDARITY IN EU ASYLUM AND MIGRATION LAW

The following pages will present how solidaristic dispositions are put in place inside the legal framework of the migration and asylum system of the European Union, with special attention to three main articles in Title V of the TFEU: Articles 67(2), 78(2) and 80 TFEU. Yet, these norms were not the first ones to underline the importance of the equitable sharing of responsibilities connected with migration and asylum management. Actually, Article 63(2) of the Treaty establishing the European Community, introduced with the Treaty of Amsterdam of 1997, entailed the possibility for the Council to adopt measures on asylum towards refugees and displaced persons and minimum

¹³ Consolidated version of the Treaty on European Union, 26 October 2012, 2012/C 326/01, art 3, para. 3.

¹⁴ KÜÇÜK (2016: 970).

¹⁵ Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, 2012/C 326/01.

standards “for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection”¹⁶. However, with the entry into force of the Treaty of Lisbon in 2009, the need for solidarity between Member States is concretized with the establishment of the Treaty of the European Union and the Treaty on the Functioning of the European Union. Solidarity concerning asylum, immigration, and judicial cooperation can be identified in the Area of Freedom, Security and Justice (AFSJ) contained in the Treaty on the Functioning of the European Union.

1.2.1 EUROPEAN UNION’S AREA OF FREEDOM, SECURITY AND JUSTICE (AFSJ)

The two main provisions which explicitly place the principle of solidarity within the matter of migration are Articles 67(2) and 80 TFEU. They can be found in Title V, called “Area of Freedom, Security and Justice”. In Title V of the TFEU, the main tackled topics are the norms that relate to the principle of solidarity between Member States on asylum, migration, and borders’ control. It is obvious that in the articles included in this Title there is the expression of mutual aid and cooperation between Member States with the aim of creating a common framework for what concerns migratory and asylum issues in the European Union. As mentioned before, Article 67 TFEU demands the Union to “frame a common policy on asylum, immigration, and external border control, based on solidarity between Member States”. The article establishes the objective that envisions the AFSJ’s creation. As it can be found in paragraph 2 of the same article, there is the guarantee that no internal border control of the flow of people will be allowed. While for what concerned the external borders, there must be a common policy that also must be equal for all third countries’ citizens. This last recommendation can also be found in Article 79 TFEU, where equal treatment of third-country citizens that are residing in the Member State is requested. However, this will not mean equal treatment to the EU’s citizens even if basilar necessities and rights are covered by the Treaties and some more recent norms adopted by the EU¹⁷.

Moreover, in Article 78 TFEU third-country nationals requiring international protection have to be guaranteed rights and treatment in an equal manner in every Member State as provided in the different directives. Indeed, the concept of mutual support between Member States in this area is reiterated in many elements of secondary law and not just in the Treaties, as in the Temporary Protection Directive. This Directive was created to set minimum standards that all Member States had to respect in case there was a massive

¹⁶ Amsterdam consolidated version of the Treaty establishing the European Community, 10 October 1997, 97/C 340/03, art. 63, para. 2.

¹⁷ E.g., Council Directive 2003/86/EC, Directive 2011/98/EU, Directive 2014/36/EU.

incoming flow of displaced persons. These mechanisms of “soft” solidarity¹⁸ are an example of how the sharing of responsibilities can be facilitated in the event of a “mass influx”¹⁹. Still, this Directive has never been applied.

Article 80 TFEU is the second provision which is as important as Article 67(2) TFEU. Differently from the previous one, this article has more legal connotations, hence the complexity of its legal content. As stated before, the article in question envisions that the Union’s policies pertaining to the AFSJ are to be governed according to the principle of solidarity and of the fair sharing of responsibilities between Member States, including financially. However, the article leaves it open to interpretation of what kind of solidarity and what that solidarity may imply. In the past, neither the Court of Justice of the European Union nor other European institutions have given an indication towards what it may signify in the specific. They have just listed the kind of measures or specific acts that can easily be referred to this principle. Until now, the vagueness of the article has left many States under migratory pressures, or in need because of special circumstances, without a clear procedure to follow to request assistance. For this reason, each case has been dealt individually without uniform request. Consequently, leading the other Member States to have suspicion towards them and an overall closedness, as demonstrated in the occasion of the relocation of persons seeking international protection in 2015²⁰.

Although, Article 80 TFEU is necessary in virtue of the mutual trust that must be present between Member States for what regards the AFSJ. This could be easily translated into help for strengthening borders’ checks in the Southern States that are more prone to massive fluxes of migrants. Therefore, being beneficial also to the other Member States that would be ensured that there would not be irregular crossings of third-country citizens in their territories as well given the lack of intra-European Union’s frontiers due to the Schengen agreement. Other than the preventive function, the article has a regulatory function that is based on the balancing of the distribution of the common responsibilities. If some Member States find themselves burdened with being in the external EU borders, and subsequently likely to have an incoming number of migrants and persons requesting international protection, those States that are not in the same situation must contribute to the accommodation, the management of asylum requests, or by assisting the main European agencies operating in this sector. To a greater extent, the article has assumed most value in emergency circumstances. In fact, in cases of emergencies

¹⁸ MORANO-FOADI (2017: 231).

¹⁹ Directive of the Council, 20 July 2001, 2001/55/EC of 20 July 2001, *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*.

²⁰ See p. 11.

operational deployments of the EASO²¹ and temporary derogations to the Dublin III Regulation are put in place by the European Union and Member States²².

This is also reaffirmed in Article 78(3), as mentioned before, which states that “In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned”. It is clear that crises’ responses have been promoted at the expense of a structural view of solidarity, such as envisioned in Article 80 TFEU. Despite the presence of this article in the Treaties, the Common European Asylum System (CEAS) has not promoted enough the necessary sharing of responsibilities and tasks among Member States. To make matters worse, the latter are at the forefront of opposing the implementation of a Common European Asylum System in order to maintain their sovereignty on asylum affairs²³.

1.2.2 DUBLIN III REGULATION

The main root cause of the problem with the implementation of the principle of solidarity is the architecture of the CEAS and, with it, the equitable distribution of tasks between Member States. The CEAS was first intended to create common practices and standards for asylum between Member States. The most significant pieces of legislation that constitute it are the Reception Conditions Directive, the Qualification Directive, the Asylum Procedures Directive, and the Dublin Regulation. The distribution of responsibilities and tasks is managed by Regulation 604/2013, the so-called Dublin III Regulation. Birthed from the rationale of the Dublin Convention of 1990, the Dublin Regulation establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection by a third-country citizen placed in one of the Member States. Therefore, it redacts the hierarchy of responsibility for managing asylum requests. The core principle is that the Member State responsible for examining the asylum claim and providing with the reception of asylum seekers is the one in which the asylum seeker first entered in the EU area. The State of first entry will also be the one responsible for the assessment of the irregular third-country citizen’s application.

The Dublin Regulation should make it possible to identify the State responsible for examining applications for international protection lodged in one of the Member States by a third-country national, a third-country national or a stateless person, in order to avoid the so-called “asylum shopping”, i.e.,

²¹ See p. 13.

²² MORGESE (2017: 81-86); TSOURDI (2017: 675).

²³ NATO (2020: 198).

the freedom to choose the country with the most favourable legislation, and to prevent “orbiting”, i.e., a person being in the territory of the EU without any Member State being responsible for examining his or her asylum application. Considering that the applications can only be examined by one Member State²⁴, the State of initial entry will inevitably be also the one that has to analyse all the applications. This resulted in a distribution of responsibility based on geographical criteria which does not lead to the fair sharing of responsibilities between Member States²⁵. Moreover, each State has its own asylum system that could differ significantly from the others. For example, the terms of recognition and the way asylum seekers are treated could vary, leading to additional problematics.

Although the criterion of “first entry” according to the Regulation was only supposed to be secondary to the hierarchy, it became the most relevant one given the fact that most entries of migrants in the EU are done irregularly. As stated in Article 13 of the Dublin Regulation: “Where it is established [...] that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection”. As a consequence, the Southern States of the Union, such as Greece and Italy, are in disadvantage because of their position in the continent and the current migration patterns²⁶. These countries are also among the least wealthy in the Union, adding to the socio-economic burden that they have to face in receiving the migratory flows. Undoubtedly this mechanism was never intended to equitably share responsibilities for the examination of asylum claims and allocation of asylum seekers. In none of the essential provisions of the Regulation, there is a mention to solidarity and fairness. Therefore, the Dublin III Regulation provides an example of an approach that entirely counteracts the principle of solidarity, because it shifts responsibility towards bordering Member States. Also, this limiting regulation negatively affect asylum seekers, whose preferences are not considered²⁷.

On account of this unfair burden on the peripheral States of the Union, the European Commission proposed a reform of the regulation stating the necessity “to simplify it and enhance its effectiveness in practice, and to be equal to the task of dealing with situations when Member States’ asylum

²⁴ Regulation of the European Parliament and of the Council, 26 June 2013, Regulation (EU) No 604/2013, *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, art. 3, pa. 1.

²⁵ Ibid.

²⁶ MIGLIO (2018: 40-41).

²⁷ TSOURDI (2017: 376).

systems are faced with disproportionate pressure”²⁸. And with the 2015 migrant crisis, the need to find a solution was ever more urgent. However, the Dublin IV Proposal still lacked a fair sharing of responsibilities considering that it maintained the provision that put the obligation of processing the asylum seekers’ application onto the States of first entry. In the end, some countries, some of which notably compose the Visegrad group (Hungary, Czech Republic, and Poland), affirmed their opposition to the revision of the Regulation, that was withdrawn with the new European Commission’s proposal of the 23 September 2020, part of a wider New Pact on Migration and Asylum.

1.2.3 SOLIDARITY IN EU MIGRATION AND ASYLUM CASE LAW

Critical issues regarding the founding elements of the European Common Asylum System are not the only ones that affect the proper application of the principle of solidarity under Article 80 TFEU. For these reasons, it is necessary to analyse some aspects of the recent jurisprudence of the Court of Justice. Solidarity can be observed in the early jurisprudence of the Court of Justice of the European Union²⁹. One clear example is the judgment in the case *Commission v. France*, where solidarity is “the basis of [...] the whole of the Community system”³⁰. In this case, the CJEU declared that France was guilty of not respecting the loyalty principle when it did not follow the regulations on state aid. This was suggested by the fact that Member States were bound to observe fundamental laws of the EU, even at their own expense. Similarly, in *Commission v. Italy*³¹, the Court stated once again Italy’s obligation to indiscriminately apply Community’s regulation. According to the Court, Member States’ national interests had to be put aside to protect solidarity between Member States, and therefore the functioning of the Community legal order³².

The Court of Justice is one of the main forces that have evolved the process of European integration and its legal activism³³ has shaped many areas of the European Union. However, in the context of the Common European Asylum System, the CJEU has been very cautious in applying its interpretation. The

²⁸ Proposal for a Regulation of the European Parliament and of the Council, 4 May 2016, COM/2016/0270 final - 2016/0133 (COD), *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*.

²⁹ KÜÇÜK (2016: 977).

³⁰ Judgment of the Court of Justice of the European Union, 10 December 1969, Joined Cases 6/69 and 11/69, *Commission v. France*.

³¹ Judgment of the Court of Justice of the European Union, 7 February 1973, Case 39/72, *Commission of the European Communities v. Italian Republic*.

³² KÜÇÜK (2016: 977).

³³ HORSLEY (2013: 941).

cautious approach of European judges in asylum matters derives from the close connection that this realm has with the sovereignty of Member States. As already stated before, Article 80 TFEU cannot on its own create a legal obligation for Member States to enact a mechanism of solidarity in the field of migration and asylum. And the Court has never tried to create legal implications from it.

However, as reflected in the judgment on the case of *Council v. Slovak Republic and Hungary*³⁴ and that on the joined cases of *Commission v. Poland, Hungary, and Czech Republic*³⁵, the Court of Justice has slowly begun to clarify the importance of the principle of solidarity. In *Council v. Slovak Republic and Hungary*, the two countries requested the annulment of the Council Decision 2015/1601. Among other conditions, the decision established provisional measures to relocate forty thousand people in need of international protection from Italy and Greece to the other Member States over two years. The Council decided to strengthen the concept of solidarity in the area of border checks, asylum, and immigration, as stated in Article 80 TFEU, due to the migrant crisis that was affecting especially Italy and Greece and the recent deaths in the Mediterranean Sea. Hungary and the Slovak Republic found this request inapplicable and contested its content given the fact that its application would be based on Article 78(3) TFEU that would illegitimately revise the criteria and mechanisms for determining the Member State responsible for examining an application for international protection, accounted for in Regulation 604/201.

Furthermore, the applicant Member States claim that the declaration did not respect the principle of proportionality taking away even more legitimacy to the Council's demands. However, the Court will challenge their explanations stating that the adoption of these new measures is to be accepted because it would be a provisional measure during a limited period. And paragraph 3 of Article 78 clearly states that: "In the event of one or more Member States being confronted by an emergency characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned"³⁶. Given the exceptional characteristic of the measure, it is not a legislative act that perpetually modifies the legal framework of the European Union, but it simply adds concessions to special circumstances, such as a migratory crisis. The Court then did not recognize that there was any infringement of the proportionality principle given the fact that the decision did not go beyond what is necessary to achieve its objectives. Indeed,

³⁴ Judgment of the Court's Grand Chamber, 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union*

³⁵ Judgment of the Court's Third Chamber, 2 April 2020, Case C-897/19 PPU, *European Commission v. Republic of Poland and Others*.

³⁶ Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, 2012/C 326/01, art 78, para 3.

according to the Slovak Republic the relocation mechanism was not an appropriate response to the problem because, according to the Member State, the main problem was the structural defects in the management of asylum seekers in Italy and Greece. While Hungary argued that the relocation quotas that were to be allocated in the country exceeded what was needed for the objective's achievement.

The same problem will be presented in the case *Commission v. Poland, Hungary, and Czech Republic* that sees involved those Member States that refuted the temporary relocation mechanism. As a result of their failure to comply with the obligations stipulated in the Council Decision 2015/1523 and Decision 2015/1601, the European Commission activated the infringement procedure that leads to the appeal to the Court of Justice. More specifically, Poland, Hungary, and the Czech Republic failed to specify how many persons requesting international protection were going to be immediately relocated on their grounds³⁷. When the case in question arrived under the revision of the Court, the ECJ found that:

“[...] it is not permissible, if the objective of solidarity inherent to Decisions 2015/1523 and 2015/1601 and the binding nature of those acts is not to be undermined, for a Member State to be able to rely, moreover without raising for that purpose a legal basis provided for in the Treaties, on its unilateral assessment of the alleged lack of effectiveness, or even the purported malfunctioning, of the relocation mechanism established by those acts [...] in order to avoid any obligation to relocate people incumbent upon it under those acts”³⁸

In the Court's findings, the concept of solidarity is reiterated as the objective of the Commission's decisions. The Member States are not allowed to act solely based on their evaluation of a situation, more so without a reliable legal basis that can be found in the Treaties, in order to avoid any obligation. These would defeat the purpose of the principle of solidarity and of the fair sharing of responsibilities between Member States which, in conformity with Article 80 TFEU, dominate the Union's asylum policies.

1.3 SOLIDARITY OF EU AGENCIES IN MIGRATORY AND ASYLUM OPERATIONS

Preventive solidaristic action can be also drawn from the technical assistance operated by EU agencies, of which the two most important ones are the European Asylum Support Office (EASO) and Frontex. EASO is the EU's asylum agency, while Frontex is the EU's external border control agency.

³⁷ NATO (2020: 206-209).

³⁸ Judgment of the Court's Third Chamber, 2 April 2020, Case C-897/19 PPU, *European Commission v. Republic of Poland and Others*.

They both act as indirect vessels of solidarity through EU financing³⁹. As a result of their operational deployments, they assure and improve the implementation of communal norms and prevent complications in the management of the EU external border, the examination of asylum seekers' application, and to counteract irregular migration⁴⁰. The creation of these agencies was due to the incapacity of cooperation between Member States for the implementation of the EU asylum policy.

1.3.1 EUROPEAN ASYLUM SUPPORT OFFICE (EASO)

In 2010, the European institutions created the European Asylum Support Office (EASO) in order to facilitate administrative cooperation on asylum between Member States, ensuring the implementation of the CEAS. The EASO finds its legal basis in article 74 and 78 (1) and (2) TFEU. This office takes on numerous tasks involving measures of administrative cooperation such as analysis, training, information or, more concretely, operational support. With the former activities the EASO provides technical assistance to help Member State redact scientific reports and training modules, which can be helpful for national authorities to use in the making and implementation of policies. While with the latter function, the provision of operational support, the EASO is able to help those Member State whose asylum and reception system suffer migratory pressure.

The EASO Regulation, establishing the agency in question, provided that when a Member State requests the EASO intervention in its territory, the agency can coordinate actions to facilitate an initial analysis of asylum applications under examination by the competent national authorities, actions designed to ensure that appropriate reception facilities can be made available (especially emergency accommodation, transport, and medical assistance) and Asylum Support Teams (ASTs)⁴¹. In the regulation there is the listing of other relevant activities in the organization, promotion, and coordination of exchange of information and best practices in asylum and reception management between Member States⁴²; in the gathering, elaboration and analysis of data about countries of origin of the migrants⁴³; in the organization and development of training modules for the administration and other national juridical entities answerable for international protection matters⁴⁴; and finally in the organization, coordination and promoting of information exchanges between national authorities and between them and the European

³⁹ TSOURDI (2020: 378).

⁴⁰ MORGESSE (2017: 138).

⁴¹ Regulation of the European Parliament and of the Council, 19 May 2010, Regulation (EU) No 439/2010, *establishing a European Asylum Support Office*, art. 10.

⁴² *Ibid.*, art. 3.

⁴³ *Ibid.*, art. 4.

⁴⁴ *Ibid.*, art. 6.

Commission⁴⁵. Between 2011 and the summer of 2021, the Office has provided its support to Greece, Luxembourg, Sweden, Italy, Bulgaria, Cyprus, Malta, and Spain. For instance, in the asylum processes in Greece, EASO has had direct involvement in the interviews to the applicants of international protection or in the issuing of non-binding opinions. Consequently, having a great impact on the outcome of the application to the country's asylum system. However, its participation in the process is regulated by Greek state law and the final decision is still determined by the Greek Asylum Service⁴⁶.

Starting after the “refugee crisis” of 2015, the EASO covered an increasing operational role. Due to the structural deficits of the national asylum systems, faced with insufficient economic and human resources, the agency started to coordinate more actions on the ground, sending its functionaries and experts to help with more practical tasks. However, these measures remain emergency-driven responses⁴⁷. In May of 2016, the European Commission has drawn up a proposal aimed at transforming the EASO into an official agency called European Union Agency for Asylum (EUAA). The intention was to strengthen the instruments of both practical and scientific collaboration, endorse the legal norms on asylum, and monitor and examine the CEAS performance more attentively. Additionally, the new EUAA provides a greater operational assistance for the management of asylum and reception systems, by deploying its personnel more quickly and reserving a pool of 500 Member State experts in case of emergencies. As part of its September 2020 proposals concerning the Migration and Asylum Pact, the European Commission preserved its 2016 proposal on the Regulation on the EU Asylum Agency and discussions on this topic have ultimately resulted in an agreement on the EASO reform and the establishment of the asylum agency. However, consistent with the Southern border's countries' request, this will be fully implemented on condition that the rest of a migration package will be approved⁴⁸.

1.3.2 FRONTEX

Another unit that offers operational assistance is the European agency Frontex. Established with Regulation 2007/2004 in 2004, Frontex has been officially nominated as the European Border and Coast Guard Agency in 2016 in Regulation 2016/1624, following the European migrant crisis of 2015. Before 2016, Frontex had an auxiliary function for what concerned Member States' activities of control of their borders. Namely, it provided technical support and information that, together with the operations of cooperation in the management of the external borders, boosted the ability to supervise the

⁴⁵ Ibid, art. 11.

⁴⁶ TSOURDI (2020: 518).

⁴⁷ TSOURDI (2017: 678).

⁴⁸ BARIGAZZI (2021).

frontiers and “promote solidarity between Member States, especially those facing specific and disproportionate pressures”⁴⁹. Technical and operational support was expressed in terms of helping with the training of the national border and coast guards, risks’ analysis, stronger operational support for those Member States in need, organization of joint actions of borders’ surveillance, training and deploying rapid response teams in case of exceptional pressure in a Member State and backing the organization of joint return operations⁵⁰. Frontex duties have since been reinforced with the establishment of the Border and Coast Guard⁵¹ and with the latest reform of 2019⁵². The European integrated border management presented in Regulation 2019/1896 of 13 November 2019 on the European Border and Coast Guard, repealing Regulation 2016/1624, operates through the work of the Border and Coast Guard which consists of the European Agency of Border and Coast Guard and the national authorities responsible for borders’ control, including coast guards.

As a matter of fact, Article 7 of the regulation ascertain the concept of shared responsibility while reminding that Member States hold primary responsibility for the management of their sections of the external borders. And, as stated in the same article, Member States shall do so, together with the enforcement of return decisions, “in their own interests and in the common interest of all Member States”⁵³. At the same time, national authorities have to follow the multiannual strategic policy for European integrated border management established by Frontex, when redacting their own national strategy for the same purpose⁵⁴. The strengthening of the Agency’s powers in the external borders’ control sector can be linked to the necessity to centralize the processing and application of integrated border control measures. In this way, making it easier to identify and solve States’ needs in cases of emergencies or migratory pressures⁵⁵. Furthermore, functions of search and rescue for persons in distress at sea were added in the reforms, even though the main aim of the agency remains the coordination of EU’s external borders’ control activities.

Other key roles which the Agency covers are

⁴⁹ Regulation of the European Parliament and of the Council, 25 October 2011, Regulation (EU) No 1168/2011 *amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, art. 1, pa. 1.

⁵⁰ EKELUND (2014: 101).

⁵¹ Regulation of the European Parliament and of the Council, 14 September 2016, Regulation (EU) 2016/1624, *on the European Border and Coast Guard*.

⁵² Regulation of the European Parliament and the Council, 13 November 2019, Regulation (EU) 2019/1896, *on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*.

⁵³ *Ibid.*, art. 7, para. 3.

⁵⁴ *Ibid.*, art. 8, para. 6.

⁵⁵ MORGESE (2017: 140).

“[...] to provide increased technical and operational assistance to Member States and third countries through joint operations and rapid border interventions; to ensure the practical execution of measures in a situation requiring urgent action at the external borders; [...] and to organise, coordinate and conduct return operations and return intervention”⁵⁶.

About the return operations and return intervention cited above, Frontex's strategy is to implement an approach that relies on the cooperation of third countries, such as Turkey, or agencies of third countries, such as the Libyan coastguard. This is done in order to send back and blocking migrants heading for the European Union, limiting as much as possible the direct intervention of national agencies or of Frontex itself. Therefore, the Agency has tried not to carry out rejections directly but has actively collaborated by offering logistical support and cooperation to the "pull-back" activities carried out by the agencies of the third countries with which the Union cooperates. This is an overall strategic design on which all Member States more or less agree on⁵⁷ and which Frontex helps to implement.

⁵⁶ Supra footnote 52, preface, para. 3.

⁵⁷ BRANDARIZ, FERNANDEZ-BESSA (2020: 25).

CHAPTER 2: THE NEW SOLIDARITY MECHANISM IN THE NEW PACT ON MIGRATION AND ASYLUM

2.1 THE NEW PACT ON MIGRATION AND ASYLUM

Now than ever before, one of the most pressing issues in the domestic realm of the European Union is the management of migrants and asylum-seekers. It is becoming increasingly difficult for the European community to ignore the migrant crisis that has emerged in recent years. Recent developments in this juncture have led the European Commission to propose a New Pact on Migration and Asylum.

First of all, before examining the Pact on Immigration and Asylum, presented on 23 September 2020 by the European Commission, it would be helpful to go back in time and give a brief overview of the original Pact that it is aimed at substituting. In 2008, the European Council adopted a Pact on Immigration and Asylum. This pact was the result of months of negotiations, debates, and suggestions by civil society. Rereading the five main objectives of that pact allows us to see the difference that European policies on migration and asylum have changed drastically just in twelve years. In 2008, the first objective was to “organise legal immigration to take account of the priorities, needs and reception capacities determined by Member States and encourage immigrants’ integration”⁵⁸. The following objectives were to “control irregular immigration and encourage voluntary returns to the countries of origin or of transit of immigrants”⁵⁹, “make border controls more effective”⁶⁰, “build a European framework for asylum”⁶¹, and finally, “create a comprehensive partnership with non-EU countries in order to encourage the synergy between migration and development”⁶².

As Commission Vice-President Margaritis Schinas said, legal immigration has become an issue to be addressed later in time with the proposed 2020 pact. The European migration and asylum framework now lies on two pillars: stopping and repatriation. Furthermore, the global partnership with third countries no longer pretends to be on an equal footing. In fact, in order to force countries of origin and transit of people headed to the European Union to detain them, any means of pressure is legitimate. On 23 September 2020, the European Commission presented the Pact on Immigration and Asylum, which

⁵⁸ European Pact on Immigration and Asylum of the European Council, 24 September 2008, 13440/08.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

was anticipated by statements by its President Ursula von der Leyen. This new proposal was in conjunction with the fire that destroyed Europe's largest refugee camp on the Greek island of Lesbos. The president announced the abolition of the Dublin Regulation that in recent years has created many problems in the process of welcoming asylum seekers, especially for border countries such as Italy and Greece. In the following pages, the Pact's main pillars and consequent problematics will be presented.

2.1.1 FOUR PILLARS

The proposal of the Pact could be considered to be composed of four main pillars: a mandatory solidarity mechanism, more comprehensive security procedures, new criteria for the distribution of migrants, and increased cooperation with third countries⁶³. The mandatory solidarity mechanism will be discussed in more detail in the following pages. For now, it suffices to say that the new system will try to prevent the failure of some Member States in fulfilling their commitments in solidaristic asylum measures. In fact, the failure of commitment by Member States in migratory issues already happened in the past, and it resulted in the ECJ ruling that all Member States shall contribute to receiving migrants⁶⁴ in the already mentioned case *Commission v. Poland, Hungary, and Czech Republic*⁶⁵.

For what concerns the new security procedures, they shall entail a more comprehensive screening at the border of people upon arrival. Specifically, these people are third-country citizens or stateless persons that have crossed the EU border without authorization or have disembarked after search and rescue operations in EU territory. The screening at issue will consist of a series of tests and controls that aim to identify everyone and possibly detect terrorists or fleeing people. These tests are composed of health, identity, and security checks, registration (in addition to the taking of fingerprints) in the new European Dactyloscopy Agency (Eurodac) database, and debriefing forms to fill. The screening process can last a maximum of five days. Depending on the screening result, applicants' status will be determined and consequently the process they will be channelled to.

The first possible process is when a migrant declares that they are not applying for international protection or applied, but their request has been rejected. In this case, an EU return border procedure is activated instantly. The second one is when the migrant has applied for international protection, and their claim has been accepted, leading to the regular asylum procedure. The new set of rules of the pact alter only part of the asylum procedure, adding the criteria

⁶³ MANCHON (2020: 9-11).

⁶⁴ Judgment of the Court's Third Chamber, 2 April 2020, Case C-897/19 PPU, *European Commission v. Republic of Poland and Others*.

⁶⁵ See p. 10.

that have to be met to access it. Typically, the process will apply to those persons that are residents from countries with a high recognition rate, that are the “share of positive decisions at first instance resulting in the granting of refugee status or subsidiary protection status over the total number of asylum decisions at first instance”⁶⁶. In the case of unaccompanied children or children who are under twelve years old accompanied by their family, there is the exemption from the border procedure with direct entry into the asylum one. Naturally, it does not apply in the instance that they could represent a risk for public security⁶⁷. Border procedure is not applicable also in the case there are medical reasons, special procedural needs of the applicant which cannot be provided, where border procedure grounds are lacking, or detention conditions are not met when the border procedure requires so⁶⁸.

Finally, the third possible outcome is the asylum border procedure. This procedure will apply for all those people that did not meet the criteria of the other two, or for those that one of the following grounds apply: applicants that are a risk for national security, applicants that presented false information or documents or withheld information and documents that could prevent them from being accepted into the EU, or applicants from a country with recognition rates lower than twenty per cent⁶⁹. This entails a fast-track process that would accelerate the execution of returns. The asylum border procedure would last a maximum period of twelve weeks, comprehending the application’s outcome and a potential appeal. If it is not completed in time, the Member State would have an obligation to complete the asylum procedure with the applicant in its territory. In the event that the application’s outcome is negative, an act of return decision has to be emanated together, or in parallel, with the decision rejecting an application for international protection. Then, asylum seekers will have one possibility to appeal. However, the applicants cannot remain on the Member State’s grounds while waiting for the result of the appeal procedure unless national laws provide that the authorized body can decide whether the person concerned can stay or not. At the same time, the two acts, the return decision and the decision rejecting the application for international protection, can be suspended by the applicant for the period of time permitted for them to remain in the Member State. After this time, there

⁶⁶ Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and the Council, 23 September 2020, SWD/2020/207 final, *on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]*, note 17.

⁶⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 23 September 2020, COM/2020/609 final, *on a New Pact on Migration and Asylum*, chapter 6.2.

⁶⁸ Amended proposal for a Regulation of the European Parliament and of the Council, 13 July 2016, COM/2016/0467 final - 2016/0224 (COD), *establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, art.41, para. 9.

⁶⁹ *Ibid*, p. 14.

is the activation of the border procedure for carrying out the return, for which the maximum time permitted is twelve weeks as well⁷⁰.

The responsible national authorities will carry out all these procedures with the aid of European agencies, such as Frontex and EASO, that can support Member States with their staff and operational assistance. In this regard, the proposal envisions a reform of Frontex's scope of action, enhancing it. One thousand staff members will be added with the objective of allotting responsibility of the monitoring of the external borders in a consistent manner, independently of national authorities and aims. The proposal also establishes to create a new authority figure that should back and support the agency in the matter of returns: the European coordinator for returns. Furthermore, as already mentioned, the Commission is planning to transform EASO into a new European Asylum Agency in order to have a reference institution for the homogenization of national and community policies.

The third pillar of the proposal is a set of new criteria for the distribution of migrants. At last, the first Member State of arrival will not be considered the sole responsible for the processing of asylum applications. As already mentioned, the abolishment of the Dublin Regulation (Dublin III) criterion of the State of first entry was promised by the President of the Commission, Ursula von der Leyen. A new Regulation on Asylum and Migration Management would enter into force, substituting it. Other measures will be taken as priority elements to assign migrants to specific countries. However, the first country of entry would remain as one of the main fundamental criteria for arriving at the final decision of assignment. Yet, the prioritization of the elements determining which country is in charge of conducting screenings of asylum applications would be different.

For instance, family reunification would be prioritized, and it will modernize and expand the current strict definition of "family" contained in Dublin III. At present, "family members" are represented by the spouse, unmarried partner, or minor unmarried children of the applicant, and the parent or the first caretaker in case that the applicant is an unmarried minor⁷¹. Though, there are two main exceptions. In the eventuality of unaccompanied minors, these applicants can be reunited with their sibling or relative, so long as it is proven that it is in their best interest. Concurrently, applicants that find themselves in a status of dependency because of pregnancy, a new-born child, serious illness, severe disability, or old age can be equally reunited with their child or parent already residing in a Member State if that relationship was already formed and existed in the primary country and if the child or parent that the

⁷⁰ Ibid, art. 54.

⁷¹ Regulation of the European Parliament and of the, 26 June 2013, Regulation (EU) No 604/2013, *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, art. 2, case (g).

applicant is going to be reunited with is able to take care of the dependent person in question and expressed such request in writing⁷². Another limitation of the Dublin III definition of family is that it recognises only the one that was formed in the country of origin, even if family members that benefit from international protection can be considered so regardless of the bond's inception in the country of origin. Now in every case, family member definition would include relationships formed during the migration journey and siblings⁷³. In this way, a more considerable number of people can be more easily integrated into the Union thanks to these familial linkages⁷⁴.

Another relevant criterion would be the one referring to the educational qualifications. Supposing an applicant obtained a diploma, or another kind of qualification issued by an educational institution of a Member State. In that case, the Member State in which it was issued will become the one responsible for handling the asylum seeker's application. Notwithstanding that the application must be submitted after completing the study period and leaving the Member State. In addition, the new regulation would preserve the possibility of applying for international protection in a Member State that already granted that person a residence permit or a visa. Although the Member State ceases to be responsible for the asylum application if it was registered three years after the date on which the person entered the country. In case that none of these aforementioned criteria apply, the condition of first entry remains the main reason for giving the responsibility for the asylum procedure.

The last pillar provides a more significant direct help on the ground through increased cooperation with third countries. A total of €70 billion would be devoted to boosting the cooperation with developing countries. The countries most concerned would be those from which most migrants come. In order to achieve this, the Union should create partnerships affecting subjects like economy, science, and education, or digitisation and energy in these States. By building communication channels through bilateral agreements with the countries of the South and their populations, the Commission is aiming at building the foundations for legal channels of entry into Europe and visa policy, also to attract potential foreign talent. More precisely installing:

“mutually-beneficial partnerships and close cooperation with relevant third countries, including on legal pathways for third-country nationals in need of international protection and for those otherwise admitted to reside legally in the Member States addressing the root causes of irregular migration, supporting partners hosting large numbers of migrants and refugees in need of protection and building their capacities in border, asylum and migration management,

⁷² Ibid, art. 16, para. 1.

⁷³ Supra footnote 59, art. 2, case (g).

⁷⁴ Comments, 2 March 2021, *on the Commission Proposal COM(2020) 610 2020/0279 of the European Council on Refugees and Exiles for a Regulation on Asylum and Migration Management*, p. 30.

preventing and combatting irregular migration and migrant smuggling, and enhancing cooperation on readmission”⁷⁵

Another important task that would be fundamental for the proposed EU Asylum Agency is the collaboration in the judicial and law enforcement realm with third countries in order to retaliate against human trafficking and terrorism. Other agreements will be focused on making more efficient returns and readmission of irregular migrants into their country of origin as set out in Article 7 in the Regulation on Asylum and Migration Management. These instruments of cooperation are non-binding arrangements with non-EU countries focused on the “externalisation” of migration management. Some of these readmission agreements have already been concluded with 18 countries⁷⁶, together with six readmissions “schemes”⁷⁷. However, one must consider the difficulties that these agreements could encounter. Governments in most of these countries are not very cooperative, and they could refute or obstruct the facilitation of their nationals’ return⁷⁸.

2.1.2 MAIN PROBLEMATICS

The elements of the Pact that were just examined do not lack problematics, other than the fallacies that could result from the new mechanism of solidarity which will be discussed in the following pages.

One of the main problems concerning the envisaged screening process of migrants is its prioritization of speed. Swift pre-entry checks that are put in place in territories that are not considered part of the EU, thereby not legally letting in individuals who crossed the external border and that do not comply with the conditions of entry. Thus, reducing the legal and constitutional responsibility of the receiving Member State towards them. These territories promoted by the proposal could lead to further deterritorialization, that is to say, the unlawful naming of border areas as “non-territory”. These territories would then be very similar to the much-criticized “hotspots”. As a matter of fact, assessing applications without giving authorization of entry into the Union territory is the primary purpose of the border procedure. Moreover, it is clear that in order to speed up the process, it is given priority to the securitisation of refugees and asylum seekers rather than giving them actual international protection.

⁷⁵ Proposal for a Regulation of the European Parliament and of the Council, 23 September 2020, COM/2020/610 final, *on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]*, art. 3, case (a).

⁷⁶ Albania, Moldova, Armenia, Montenegro, Azerbaijan, Pakistan, Bosnia and Herzegovina, Russia, Cape Verde, Serbia, Georgia, Sri Lanka, Hong Kong, Turkey, Macao, Ukraine, Macedonia, Kazakhstan.

⁷⁷ Afghanistan, Guinea, Bangladesh, Ethiopia, Gambia, Ivory Coast.

⁷⁸ BLOJ, BUZMANIUK (2020).

Overall, there is no consideration for the negative impact that these screening procedures and the indefinite boundary between asylum and expulsion can have. At the same time, it is evident that they could only instigate more irregularities in the entering and mobilities within the Union. Arbitrariness and discrimination are predominant in border procedures due to the lack of safeguards, along with freedom deprivation for individuals that find themselves in borders or in-territory detention facilities during the screening or while waiting for the appeal against a decision rejecting an application for international protection's result or the implementation of the return procedure.

Furthermore, the provision that describes the inadmissibility of an applicant's asylum claim if the country of origin has a lower than twenty percent of recognition rate is contrary to the principle of individual assessment for each request, in addition to ignoring the possible disparities of Member States in their practices and on the matter of recognition rates. For example, Germany considers Turkey to be a safe country, in clear juxtaposition with France and Italy. The Proposal also aims at finding common ground to establish which countries could be referred to as "safe" for the migrants to go back to so as to quicken applications' assessment. Nevertheless, by doing this, many legitimate asylum seekers would be expelled preliminarily, leaving them without a chance to make their case for entering the Union and with possibly dangerous consequences when they go back to their country, going against the principle of non-refoulement. Besides, the pact seeks to legitimize already tested illegal practices. For instance, it provides that a Member State can suspend the registration of asylum requests for four weeks in a crisis situation. This suspension is what Greece did precisely in March 2020, and instead of condemning this behaviour, the Commission is now proposing to turn it into a possible derogation ⁷⁹.

With respect to the setting of new criteria of migrants' distribution, it was already mentioned the broadening of the definition of "family members" within the proposal, which would include siblings and newly formed familial relationships. On the other hand, when talking about dependent persons⁸⁰, the Proposal for a Regulation on screening at the external borders rules out siblings and spouses as family. It leaves dependent applicants with the possibility to reunite exclusively with their child or parent, depriving them of extended reunification opportunities as opposed to the rest. Furthermore, while other standards should subsist before the country of first entry criterion, it remains the primary option in some cases. For example, in the event of unaccompanied minors where the family criterion cannot be used, then the

⁷⁹ CARRERA (2020: 5).

⁸⁰ See p. 18.

claim must be examined by the Member State in which the child is and has applied, usually being the first State of entry⁸¹.

When it comes to the externalisation of migration management through the relationship with third countries, the Pact puts focus on readmission of migrants in these countries. The pledge of cooperation with third countries contained in the Pact seems to be instrumental for the Union to attain what it wants, and it is not done in the spirit of genuine developmental cooperation. Partner countries in these strategic migration agreements are mere contributors to the European agenda, becoming simple transactions characterized by an EU-centric approach. For instance, in the Pact, there is no mention of the Sustainable Development Goals set out in the common agenda of the United Nations, which links in a critical way migration with development. This is in apparent contradiction with the Union multilateralist stance and fails to establish it in the international framework even more successfully. Albeit, in the text, there is mentioning of the creation of Talent Partnerships and an EU Talent Pool that would attract skilled third countries migrants. Even if in the proposal there is no specific indication of how this will be operationalised⁸².

Another point of concern is that the Pact pays no attention to the failures of past partnerships and the priority given to EU's external relations. The Union does not consider the socio-economic differences that this externalized migration management and policing might encounter in non-EU countries. This could likely lead to the infringement of human rights, economic disparities, and political uncertainty⁸³. The countries of origin and transit, particularly African countries, will probably frown on the Pact. According to Alberto-Horst Neidhardt and Olivia Sundberg Diez in a commentary on the pact in preparation in April, "the growing use of conditionality to accelerate returns may harm the Union's relations with third countries"⁸⁴.

Thoroughly examining the content of all the documents that make up the Pact will require time and numerous jurists' contributions. Dozens of associations and experts had sent recommendations to the Commission before the publication of the proposal, which was postponed for months. Catherine Woollard, Director of the European council on refugees and exiles (ECRE) at the time, wrote a very harsh article: once again, the Commission "consolidates the strategy of preventing arrivals rather than aiming to make asylum work in Europe"⁸⁵. She wrote that European law is ignored with such impunity and in such a systematic way in a few other areas. The Pact now has to be examined by the European Parliament and the Council. However, the decision was

⁸¹ MAIANI (2020).

⁸² MANSERVISI (2020: 5-6).

⁸³ CARRERA (2020: 10).

⁸⁴ NEIDHARDT, SUNDBERG DIEZ (2020: 6).

⁸⁵ WOOLLARD (2020).

pushed back due to the COVID-19 pandemic, the European recovery, and the Brexit aftermath. The two institutions will likely start in opposite directions in revising the proposals, as it happened with the proposed reform of the Dublin Regulation. Member States will try to make the text's provisions even more flexible and adaptable to their needs, while the Members of Parliament will try to restore some dignity to the right to asylum. Finally, the people who experience the degradation of European asylum and migration policies on their skin are absent in the debate. The same people that should be the first ones allowed to have a say in the making of the Pact because they would be the first ones impacted by the enactment of its content. People such as the refugees from Lesbos who set their detention center on fire to get out of it or those that have not been able to move freely or to build a future for themselves for years because they are detained in detention and repatriation centers in Italy and other European countries. People who will continue to risk their lives to circumvent the increasingly violent and automated controls at European borders and, once inside, to build a life while knowing they risk repatriation at any moment. There are between four and five million people living without documents in order in the territory of the European Union, but the Pact does not mention it.

2.2 THE NEW MANDATORY FLEXIBLE SOLIDARITY

The Pact of the 23 September 2020 encompasses a new compulsory solidarity asylum mechanism regimented by the Proposal for a Regulation of the European Parliament and the Council on asylum and migration management⁸⁶ and the Proposal for a regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum⁸⁷. With this mechanism, a Member State can decide if it wants to accept a relocation quota (with ten thousand euros per person and twelve thousand for each unaccompanied minor, provided from the EU budget) or if it wants to pay an economic contribution to expel irregular migrants. It is necessary that all Member States participate in this system and share burdens and responsibilities in solidarity and equitability. Unfortunately, the new pact has decided to adopt a debatable compromise approach in an attempt to please those States most opposed to the construction of a standard system, eliminating quotas and proposing a new, albeit controversial, declination of the concept of solidarity.

The new system provides that a State of the European Union can request the intervention of the Commission for three reasons: migratory pressure or anticipation of migratory pressure, migratory severe crisis, or the landing of people rescued at sea. At that point, the Commission will have an obligation to intervene in support of the government that has asked for help.

⁸⁶ COM/2020/610 final.

⁸⁷ COM/2020/613 final.

Nevertheless, the twenty-seven countries of the Union will have the possibility to choose how to intervene. They will be able to offer hospitality to a certain number of asylum seekers who have arrived in the border country, or they will be able to join what has been defined as a “return sponsorship” program. The return sponsorship program involves the financing of the repatriations that the border country will carry out. Hence, the new system does not institute established compulsory relocation quotas for asylum seekers within the European Union, quotas that were created in the 2015 European Immigration Agenda and which were suspended two years later, in 2017. Nor does it set up sanctions for those who do not join the system. Finally, there are no long-term strategies to regulate legal entry into Europe from non-European countries for humanitarian, economic, or educational reasons. Although arrivals to Europe have decreased by ninety-two percent compared to 2015, the year of the so-called refugee crisis, Brussels has definitively renounced adopting a border sharing mechanism. As already stated before, the European Union has decided to invest all its resources in strengthening the borders, repatriation, and agreements with countries of origin and transit to block people trying to reach Europe.

2.2.1 SOLIDARITY MODEL IN SITUATIONS OF MIGRATION PRESSURES

In situations of migration pressure or of a significant flux of disembarkations at sea, the solidarity mechanism envisioned in Article 45 of the Proposal for a Regulation on Asylum and Migration management is activated. The situation can be considered as such after an assessment of the Commission that can be originated from a Member State request or from the personal consideration of the Commission after processing the available information on the Member State condition. The Asylum Agency and Frontex should help the Commission with the preparation of the written assessment.

The assessment should describe the migratory situation in the Member State compared to the other ones and to the general one of the EU in the six months preceding its redaction. It would be based on: the total number of asylum claims from third-country nationals and their nation of origin; the number of third country citizens who do not satisfy the requirements for entering, staying, or residing in the country, including those who exceed the duration of their authorised short stay in the Member State; the number of return decisions; the number of third-country citizens subject to the return procedure that have been successfully expelled by the Member State; the number of third-country citizens lawfully admitted in the Member State; the number of incoming and outgoing take charge and take back notices of detention and transfers demanded; the number of transfers of those people who have been indicated to be under the responsibility of the Member State in question; the number of those individuals who have irregularly crossed or disembarked into

the Member State; the number of those individuals who have been refused entry to the territory of the Member State; the number and nationality of those third-country citizens who have landed in the Member State as a result of search and rescue operations and the number of their asylum claims; and the total number of unaccompanied minors⁸⁸.

The final report of the Commission should be submitted to the European Parliament and to the Council within one month from the date of the assessment notice to the latter European institutions. While where a quickened response should be needed, the Commission should submit the resulting report within two weeks from the date of notification. In this document, the Commission should declare if the Member State is under migratory pressure, and if it is, it should classify in the report the ability of the Member State to manage migratory events, especially apropos of returns and asylum and what it would need. In the report, the required actions must be identified to face the situation of stress in which the Member State is in. These methods encompass solidarity measures taken by those Member States that are not under the reported migratory pressure and procedures of migration management that the Member State under consideration should take.⁸⁹

When activated, the solidarity mechanism comprises all Member States that have to contribute through the already mentioned solidarity measures, also called “solidarity contributions” in the Proposal. The types of solidarity contributions comprise:

- (a) the relocation of asylum seekers who are not subjected to the border procedure;
- (b) “return sponsorships” of those third-country citizens that are staying irregularly;
- (c) relocation of those individuals who have been granted the refugee status less than three years from the adoption of the implementing act issued by the Commission establishing these solidarity contributions;
- (d) and capacity-building measures for asylum, reception and return matters, joint with operational supporting measures for those Member States affected by unmanageable migratory trends.

⁸⁸ Proposal for a Regulation of the European Parliament and of the Council, 23 September 2020, COM/2020/610 final, *on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]*, art. 50.

⁸⁹ *Ibid.*, art. 51.

Such backings may be supplemented by two other measures: the relocation of asylum seekers subject to the border procedure or the relocation of those third-country citizens that are staying irregularly on European grounds⁹⁰.

Relocation of asylum seekers not subject to the border procedure, return sponsorships, and relocation of refugees should be regulated by a personalized calculated share of solidarity for each Member State. The formula that should estimate the amount of share of responsibility for each State should be based on the size of the population and the total Gross Domestic Product of the Member State, each weighing fifty percent of the total⁹¹. However, Member States which present these same measures may demand a ten percent subtraction of their total share of responsibility if they prove that in the preceding five years, they received the double amount, or more, of asylum claims with respect to the EU's average per capita⁹².

Member States may choose which solidarity measure they prefer to adopt, and they have the liberty to participate in the relocations of persons requesting international protection. However, in Article 52, para. 1, of the Proposal states that Member States should give precedence to unaccompanied minors' relocations. In the already referred Article 52, there is the laying out of the solidarity response plans that can be activated depending on the choice of the helping Member State, on which solidarity contribution it decided to use. Those Member States that choose to contribute through capacity-building measures and operational support, and if permitted so by the report, may do so unless these methods adopted lead to a thirty percent decline of the total contributions to the disadvantaged Member State in relation to the other measures aforementioned. In two weeks' time from the adoption of the report, Member States are bound to submit to the Commission a Solidarity Response Plan, which has to list the preferred type of contributions. If they list more than one option, they should indicate the portion that each will have in the State's response.

In the instance in which the Plan of countries included return sponsorships, then those countries must specify the nationalities of those individuals who are subject to the return procedure that they wish to sponsor. At the same time, those countries which put in their Plan the adoption of capacity-building measures and operational support must specify the target period in which they will implement them and a comprehensive description of how they will be applied. The Proposal envisions the contestation of the Member States' Solidarity Response Plans from the Commission. In such events, the Commission should convene a Solidarity Forum. It will invite those countries whose Response Plans did not meet the criteria to face migratory pressure to

⁹⁰ Ibid, art. 45.

⁹¹ Ibid, art. 54.

⁹² Ibid, art.52, para. 5.

correct the type of unfitting measures to more proper ones. The Solidarity Forum would be presided by the Commission and formed by all Member States. This should result in revised Solidarity Response Plans that have to be released during the course of the Forum⁹³.

Always within two weeks' time, either after the submission of the plans or after the Solidarity Forum would have gathered in case of contestation, the Commission should execute an act which implements the solidarity contributions offered by the other Member States towards the beneficiary Member State and the planned time frame that their implementation will cover. When a Member State refuses to submit its plan to the Commission, it would be the latter institution's duty to decide which solidarity measures the refusing Member State should implement considering the focus emergency area that the report on migratory pressure pinpointed. The Commission should give special attention to capacity-building and operational measures in the field of asylum, reception, and return, especially if they are proportionally functional in comparison with the other possible measures. If the Commission does not consider them in proportion, it would have the permission to adjust the level of the proposed measures to one conceived as more appropriate for the situation at hand. Therefore, the implementing act should overall contain the total cipher of people to be relocated and returned to their country of origin, the distribution of these people among the States of the Union, and the type of measures chosen by Member States. Nevertheless, the distribution of people destined to be relocated or returned to their country of origin should consider the deduction of the percentage of those justified States which legitimately requested the ten percent reduction in their share of responsibility.

If in the preceding year, Member States already complied with the needy Member State request to be helped in migratory issues, then the measures adopted previously will be detracted from the solidarity contributions of the implementing act. As provision for emergencies, as drafted in Article 8 of Regulation 182/2011, "the Commission shall adopt an implementing act which shall apply immediately, without its prior submission to a committee" and in this case, the time period that the implementing act should remain in force cannot last more than one year. A report about the outcomes of the implementing act must be written one month after its termination with a subsequent inquiry on the utility of the employed measures⁹⁴.

The Proposal also envisions measures of solidarity related to Search and Rescue operations (SAR operations). These operations can burden a Member State with additional frequent arrivals of third-country citizens or stateless persons. The Migration Management Report is fundamental to set out which States are faced with this kind of situation. The Report is a document that the

⁹³ Ibid, art.52.

⁹⁴ Ibid, art. 53.

Commission should stipulate each year, and which should indicate the possible development of migratory events and the expected preparedness of Member States and the Union⁹⁵. In the Report, it should be listed correspondingly the number of asylum seekers who are not subject to the border procedure and should be promptly relocated in order to give relief to the State in distress, and those capacity-building measures that are needed to be implemented.

As a result of a Commission's request made within two weeks after the adoption of the Migration Management Report, these solidaristic actions should be implemented by all those Member States that are not subject to arrivals of persons rescued through SAR operations. In it, the Commission should specify how many applicants for international protection not subject to the border procedure should every Member State receive following the calculation of the distribution key setting out each Member State's share of solidarity contributions⁹⁶, including the share of the assisted Member State. In alignment with the Solidarity Response Plan, particular SAR Solidarity Response Plans, which should be submitted to the Commission by each Member State within one month after the Report's implementation, should specify which solidarity contribution they will adopt between asylum seekers and vulnerable people's relocation or capacity-building and operational support. And always in alignment with the examination of Solidarity Response Plans, a Solidarity Forum should be summoned to adjust and revise Member States' SAR Solidarity Response Plan. This would happen in case the Commission considers the chosen solidarity aids not enough to help the Member States in need⁹⁷.

Finally, if the total of the solidarity contributions matches the ones set out by the Member States, then the Commission will issue an implementing act adopting those measures which will constitute a preventive solidarity pool for any Member State that may need it in the following year due to possible disembarkations of people in its territory in a very short period of time. The issuing of the implementing act establishing a solidarity pool should take place either within two weeks from the SAR Solidarity Response Plans or within two weeks after the conclusion of the Solidarity Forum. However, under notification of the Asylum Agency, the Commission becomes aware that the equivalent of eighty percent of the solidarity pool has been utilized for one or more Member States already; it could require additional contributions from part of the other Member States. These additional contributions may be supplemented in the implementing act by the Commission once the Solidarity Forum has ended and Member States have confirmed their availability to increase their contributions. The benefitting Member State should receive the

⁹⁵ Ibid, art 6, para. 4.

⁹⁶ Ibid, art. 54.

⁹⁷ Ibid, art. 47.

increased contributions which are indicated in the amended implementing act establishing the solidarity pool. Supposing the solidarity pool still falls short in supporting the beneficiary Member States compared to the expected measures contained in the Migration Management Report, at that point, the Commission should implement personalized solidarity pools for each Member State which is expected to have a significant influx of people to manage following SAR operations⁹⁸.

Henceforth, the Member State which finds itself in the abovementioned situation can then request solidarity support to the Commission within two weeks after the implementing act setting out solidarity measures listed in the Member States' SAR Solidarity Response Plans or the implementing act establishing a solidarity pool. Subsequently, the Commission would activate the solidarity pool and organise the execution of solidarity measures for each disembarkation, or group thereof, for a period of two weeks in total. The cataloguing of those individuals eligible for relocation and those individuals destined for the return procedure would also happen under the coordination of the Commission through the Asylum Agency and Frontex. The resulting lists would have to contain the distribution of these individuals among Member States "taking into account the total number of persons to be relocated or to be subject to return sponsorship by each contributing Member State, the nationality of those persons and the existence of meaningful links between them and the Member State of relocation or of return sponsorship"⁹⁹. The Asylum Agency and Frontex would also sustain the Commission in the monitoring of the solidarity pool. Particular attention and priority would be given to minors and vulnerable persons¹⁰⁰.

2.2.2 SOLIDARITY MODEL IN CRISIS SITUATIONS

As presented in the Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum COM (2020) 613 final, during crises or in cases of force majeure, the second type of solidarity model between Member States is activated. The Regulation complements a Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint).

The Migration Preparedness and Crisis Blueprint would be the coordination system for migration management at any time, even in exceptional cases. Member States, the Council, the Commission, and other related European

⁹⁸ Ibid, art.48.

⁹⁹ Ibid, art.49, para. 2.

¹⁰⁰ Ibid, art. 49.

agencies in the field of migration and asylum¹⁰¹ should collaborate to form an EU Migration Preparedness and Crisis Management Mechanism Network, which could also be referred to as “the Network”. The aim of the network would be to back the implementation of the Migration and Preparedness and Crisis Blueprint and to guarantee the correct interchange of helpful information for the Blueprint’s progression. The blueprint in question would develop in two separate stages. The first one would envision the Network providing essential information to update the knowledge on the current migratory situation and to alert on possible future complications increasing the Union’s resistance. It would be activated to last even during the second stage. The latter has the objective to coordinate crisis situations and migration management practices. The actors involved should also appoint a Point of Contact to exchange information on a regular basis in order to help the Commission with the periodic issuing of migration management reports. The Network should establish implementation guidelines to exchange these data in the most efficient way.

The Crisis and Force Majeure Regulation would entail the ensemble of specific rules to apply in cases or risks of crisis. The crisis, or risk thereof, that would activate the solidarity measures provided within it is defined as

“[...] an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State, or an imminent risk of such arrivals, being of such a scale and nature that it renders the Member State’s asylum, reception or return system non-functional, and which risk having serious consequences for the functioning of, or result in the impossibility of applying, the Common European Asylum System and the migration management system of the Union [...]”¹⁰².

To apply the solidarity contributions, any Member State that considers itself in the situation abovementioned could request the Commission to review its case. If the Commission finds the State’s request to be in the right, then it should authorise, within ten days from the request, the asylum crisis management procedure¹⁰³, the return crisis management procedure¹⁰⁴, and the registration of applications for international protection in situations of crisis¹⁰⁵ in the Member State concerned. The former two measures should be implemented for a period of six months, with a maximum extension of one

¹⁰¹ The European External Action Service (EEAS), the European Asylum Support Office (EASO), the European Border and Coast Guard Agency (Frontex), the European Union Agency for Law Enforcement Cooperation (Europol), the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) and the European Union Agency for Fundamental Rights (FRA).

¹⁰² Proposal for a Regulation of the European Parliament and of the Council, 23 September 2020, COM/2020/613 final, *addressing situations of crisis and force majeure in the field of migration and asylum*, art. 1, para. 2.

¹⁰³ Ibid, art. 4.

¹⁰⁴ Ibid, art. 5.

¹⁰⁵ Ibid, art. 6.

year in total; while the latter would not be applied beyond four weeks of time, except for supplementary Member State's request for which it may be extended for a maximum of twelve weeks. The asylum crisis management procedure would extend the standard asylum border procedure from twelve weeks to a maximum of twenty weeks and would increase the recognition rate up to seventy percent. Likewise, the return crisis management procedure would be extended from twelve to a maximum of twenty weeks. At the same time, the screening procedure would be prolonged to a maximum of ten days instead of five¹⁰⁶. This process could entail severe consequences to migrants' human rights. For instance, an individual could request international protection and become subject to the asylum border procedure. In case their claim is rejected, they would be subject to the return border procedure. Subsequently, this individual could be detained in border detention centers or facilities up to a period that could surpass nine months.

The Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum stipulates that in case of a migratory crisis caused by constant flows of incoming migrants or other kinds of pressures that the receiving country may suffer from, the mechanism of solidarity is speeded up. In contrast, the other Member States, even the opposed ones, have to choose between relocation or return sponsorships without further options. Therefore, this time, the mandatory options do not include capacity-building measures and operational support. They should submit the chosen measure in Crisis Solidarity Response Plans to be presented to the Commission within a week from the crisis situation assessment. This quickened procedure has to be initiated by the Commission where a crisis situation has been detected whether it is a political, migratory, or other force majeure induced crisis. The Commission is in charge of deciding how many people are to be relocated and how many are to be subjected to return sponsorships, coinciding with the distribution key¹⁰⁷. This will happen through an implementing act containing those measures presented in the Crisis Solidarity Response Plans. If return sponsorship is chosen as the solidaristic measure, Member States are to complete the irregular migrants' removal in four months instead of eight months. This time could be prolonged to six months in case of force majeure for the sponsoring State.

Lastly, individuals from third countries “who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed

¹⁰⁶ Ibid, preface, para. 15.

¹⁰⁷ Proposal for a Regulation of the European Parliament and of the Council, 23 September 2020, COM/2020/610 final, *on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]*, art. 45.

conflict, and who are unable to return to their country of origin”¹⁰⁸ have the right to immediate protection status. By granting this status in crisis situations, it would prevent the overload of asylum assessments, especially in the case in which the Commission establishes such status to a specific group of people¹⁰⁹.

2.3 SOLIDARITY MEASURES

As already described in the preceding pages, the three elements that together constitute the framework of solidarity contributions that Member States could choose from are relocation procedures, return sponsorships, and capacity-building and operational measures in the field of asylum, reception, and return. The following sub-chapters will analyse more in-depth what these contributions consist of.

2.3.1 RELOCATION PROCEDURE

The relocation mechanism would apply to asylum seekers who are not subject to the border procedure during the examination of their claim and refugees who have obtained their status less than three years before the adoption of the Commission’s implementing act setting out the measures of solidarity. It would also include those individuals who are illegally staying in a Member State and are subject to the return sponsorship, but the Member State that is in charge of the sponsorship did not remove them within the planned period of eight months. If Member States are offering to do so, it may also apply to asylum seekers subject to the border procedure and illegally staying third-country citizens. Before the relocation procedure takes place, Member States should verify that the individuals who should be relocated are not a potential threat to national security or public order, in which case they should be removed from the list of eligible persons to be relocated.

The articles containing the relocation procedure have many elements referring to security checks in order to push those States maybe usually reluctant in disposing of migrants for fear for their public order. Still, these reluctant States could refuse to relocate many individuals on fictitious security grounds without any proof from any relevant database and abusing this justification. An example of this already happened in 2017 when Finland, Norway, and the Netherlands objected to the relocation of a group of Eritrean nationals for security reasons because they served in the army. But the Eritrean government forces people to go through military service, and it is the main reason why Eritreans leave the country in the first place. Therefore, the vague definition

¹⁰⁸ Proposal for a Regulation of the European Parliament and of the Council, 23 September 2020, COM/2020/613 final, *addressing situations of crisis and force majeure in the field of migration and asylum*, art. 10, para. 1.

¹⁰⁹ *Ibid.*, art. 10.

of security and national threats allows for arbitrary and widened interpretations by Member States¹¹⁰.

Granting that individuals are not deemed as security threats, the Member State receiving assistance should compile a list of people who could be relocated. If these people are asylum seekers, they may be relocated to the Member State where they may be linked with. The proposal does not require the candidates of relocation's permission who could be relocated at any moment even if they are not willing to do so. While if they are refugees, they have to write an authorization consenting to the relocation. Then, those that are already beneficiaries of international protection would have to be relocated within a span of three years from the moment they have been granted their status of refugees even though this would mean that after three years that they have settled in a country, they could be abruptly eradicated from what has been their homes for the last years. They would be dislocated to another country where, in contrast, they have not learnt the language or have a job or interpersonal relationships. Therefore, it would represent an additional obstacle to these individuals' integration and potential contributions to the relocating country's society and economy.

However, this does not apply to unaccompanied minors (except those who do not have any family member or relative who is legally present in the Union's territory), family members who are beneficiaries or applicants of international protection, those subject to the family procedure, those for which a valid visa or residence permit was already issued, those that are in possession of a diploma or educational qualification issued by a Member State, or those defined as dependent persons. The reason behind this is the fact that they are not eligible for relocation. Within one week after the security check that confirmed the nonthreatening nature of the persons to be relocated, Member States of destination should confirm the relocation and reception of the concerned individuals. Under the request of the Member State of relocation and under exceptional cases, the one-week time mark can be extended to two weeks in total. Failure to comply with the set deadline would result in the obligation of relocation of that individual without the possibility of refusal. Conditionally to the positive response from the relocation State, the benefitting Member State would then notify the transferral to the concerned person after taking a transfer decision within one week. At the latest, the transferral would have to be concluded in four weeks after the confirmed approval of the Member State of destination¹¹¹.

¹¹⁰ PORTOGHESE (2018: 17).

¹¹¹ Proposal for a Regulation of the European Parliament and of the Council, 23 September 2020, COM/2020/610 final, *on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]*, art. 57.

The Member State in charge of relocating should also be in charge of informing the sending Member State about the successful or unsuccessful completion of the transferral. In some cases, Member States would not be the ones responsible for those relocated persons who have not yet been assigned a Member State accountable for them. Such cases include when a Member State is the one in which the asylum claim was registered. Alternatively, it could be where the person requesting international protection first arrived in. Or even it could be the State in which a residence permit or visa was first delivered to the asylum claimer. The same would apply in cases of unaccompanied minors who do not have any family member or relative possessing guardianship over them. In these instances, the Member State of relocation would become the one holding the obligation to review the application of international protection. At the same time, if the relocated person's responsibility falls within the competencies of the benefitting Member State because the applicants comply with the criteria of being either an unaccompanied minor (except in the case there is no family member or relative who is legally present in the Union's territory), a family member who is a beneficiary or applicant of international protection, someone subject to the family procedure, someone for which a valid visa or residence permit was already issued, someone that is in possession of a diploma or educational qualification issued by a Member State, or a dependent person, the responsibility to review the asylum claim would be transferred to the receiving Member State regardless. In case the relocated applicant has already been granted international protection, the Member State of relocation would equally grant that individual refugee status. Finally, where the relocated person is an irregular third-country citizen, then a return procedure should be activated by the Member State of relocation¹¹².

In 2015, the Council decided that asylum seekers stationed in Italy and Greece would have to be relocated to the other Member States. As already mentioned, Hungary, Poland, and the Czech Republic failed to comply with such a request and were just reprimanded by the CJEU to fulfil it¹¹³. Equally, other countries which did not meet the relocation quota, such as Austria, Bulgaria, or Slovakia, did not suffer any consequence. This may raise the question of whether making relocation an option rather than a mandatory measure would be functional. The events clearly show that a system with optional relocations would doubtfully work, where even when it was mandatory, countries did not satisfy the requirements in the matter. What is more, the expected recompense for relocation would be the same as the return sponsorship, giving even less relevance and appeal to choosing it¹¹⁴.

¹¹² Ibid, art. 58.

¹¹³ See p. 10.

¹¹⁴ EUROMED RIGHTS (2021: 26).

2.3.2 RETURN SPONSORSHIP

In the last decade, the repressive nature of migration and asylum policies that have been in the works for some time has never changed. Depending on the moments or crises, the emphasis was placed on one or the other priority: controlling the borders, fighting the smuggling of migrants, increasing expulsions, and other similar tasks. However, the instruments and assets at the service of these policies have multiplied, as the increasing power of Frontex demonstrates. For example, a new figure is established in the pact presented by the Commission, that of the European Coordinator for Returns. Together with a new measure of solidarity called return sponsorships. This new term in the Union realm is provided in Article 55 of the Proposal for a Regulation on asylum and migration management. The article presents the sponsorship as a support to the benefitting State, in close coordination with it, to return or deport illegally staying third-country citizens from the territory of the Member State in disadvantage towards another country, usually the country of origin. Such actions of support would be:

- “ (a) providing counselling on return and reintegration to illegally staying third-country nationals;
- (b) using the national programme and resources for providing logistical, financial, and other material or in-kind assistance, including reintegration, to illegally staying third-country nationals willing to depart voluntarily;
- (c) leading or supporting the policy dialogue and exchanges with the authorities of third countries for the purpose of facilitating readmission;
- (d) contacting the competent authorities of third countries for the purpose of verifying the identity of third-country nationals and obtaining a valid travel document;
- (e) organising on behalf of the benefitting Member State the practical arrangements for the enforcement of return, such as charter or scheduled flights or other means of transport to the third country of return.”¹¹⁵

The sponsor State would have to complete the removal of the irregular migrants within eight months, starting from the adoption of the Commission’s implementing act establishing the solidarity contributions of those Member States that are not under migratory pressure. If those irregular third-country citizens are not recognized as subject to the return procedure in the benefitting State at the date of the act’s implementation, then the eight months’ period would start from the date of issuing the return’s decision. At the expiry of the provided eight months and these persons have not yet been deported outside of the Union, the Member State responsible for the return procedure would have to transfer them into its borders, abiding by the relocation procedure. Despite this, it is unclear if the individuals concerned would find themselves once again in a situation of confinement also in the sponsoring State. As a

¹¹⁵ Proposal for a Regulation of the European Parliament and of the Council, 23 September 2020, COM/2020/610 final, *on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]*, art. 45., art. 55, para. 4.

result, they would be victims of a prolongation of their detainment outside of the already lengthy period of eight months. This could happen even if the differences in handling this kind of situation between member States and the lack of a monitoring mechanism are not considered.

This should allow a Member State unwilling to welcome asylum-seekers to do so as long as it organizes the repatriation of people who have been refuted asylum. As claimed in the proposal, the Member State would undertake to repatriate irregular migrants on behalf of another Member State, carrying out all the necessary activities for this purpose directly from the territory of the beneficiary Member State. Necessary activities may include offering advice to people to be repatriated, conducting dialogue with third countries, and providing support for assisted voluntary returns and reintegration. Namely, a country like Hungary would find itself managing the repatriation of a person from Italy. It does not seem a totally reasonable idea, considering that it would require a high level of coordination and additional effort for those Member States which are already in difficulty. Not only that: the sponsoring Member State would also have the right to choose the nationalities whose repatriation it wishes to support¹¹⁶. So, Hungary could tell Italy that it is okay to repatriate Iraqis, but not Afghans. Evidently, this scenario would be impracticable other than illegal under EU law on the grounds of the principle of non-discrimination even if it would facilitate the returns by those States that hold bilateral agreements with third countries even if they are countries of transit. This, however, would create chains of returns without even monitoring the actual risk that that person may encounter going back to the country of transit. Not to mention that these bilateral agreements have often been made without national parliaments scrutiny and, in an informal way, missing transparency and accountability. Therefore, return sponsorships would be an unsatisfactory source of solidarity and would only represent a turnaround for those Member States that have already proven their opposition in receiving migrants in their territories.

In the past, there have been serious accusations of violations of human rights linked to return procedures. As already said, detention times and usage are highly broadened. At the same time, the principle of non-refoulement is often dismissed or not considered enough. People are sent back to territories that do not provide effective remedies to their troubles or even worsen them. Monitoring would be provided in the screening procedure. However, the same cannot be said for all the steps of the return procedure, especially for the post-return phase.

2.3.3 CAPACITY-BUILDING MEASURES, OPERATIONAL SUPPORT, AND MEASURES IN THE EXTERNAL DIMENSION

¹¹⁶ Ibid, art. 55.

The last possible options as solidarity measures are capacity-building, operational or external dimension measures in the field of asylum, reception, and return. These measures would be taken in case a Member State would not opt for relocation or return sponsorship. The Pact does not explain in specific what these measures may imply, leaving a wide range of interpretations to Member States. Namely, such contributions could take the form of assistance to improve reception conditions and capacity providing infrastructures or other reception systems, or direct financing or infrastructural support, including providing helpful material or transports, for return operations¹¹⁷. The EASO already provides such assistance but not always with relevant results for the benefitting Member States. Caseworkers deployed by the agency for practical assistance in asylum procedures and systems do not always have the most suitable qualifications and expertise to improve and facilitate the amount of work. The addition of unqualified personnel to train would become a further burden for the benefitting country¹¹⁸.

In the external dimension sponsoring States may implement agreements with third countries of origin or transit to block or reduce the flux of migrants and preventing them from entering the EU. In 2017, a clear example of this happened between Italy and Libya with the signing of a Memorandum of Understanding which was later reconfirmed in 2020. Italy directly funds and offers operational support to the Libyan Coast Guard force. Evidence emerged that migrant and asylum seekers who are impeded from reaching Italy and who are stranded in Libya are suffering numerous abuses, even from the Coastguards, and are found in poor health and living conditions. Therefore, this mechanism would be problematic, to say the least, promoting agreements that would eventually violate human rights and endanger those individuals that find themselves stuck in transit countries in deplorable conditions or are sent back to their country of origin. The vague wording of the Pact would permit many actions of the Sponsoring Member State to be classified as solidarity measures, facilitating questionable choices over proper supporting measures destined for those Member States in distress. Outsourcing asylum and migration responsibilities to third countries through bilateral agreements would ultimately undermine solidarity in the true sense of the word, further encouraging restricting policies on migration and asylum and the tightening of the Union borders¹¹⁹.

The rationale behind the setting of this mechanism is dubious. There is no apparent reason why certain Member States would have to take full responsibility for relocations and to manage every asylum procedure. In contrast, others may do half of what they do and limit themselves in financing or engaging in external relations with third countries. Especially when

¹¹⁷ Ibid, Explanatory Memorandum.

¹¹⁸ ECRE (2021: 53).

¹¹⁹ EUROMED RIGHTS (2021: 29).

countries like Hungary or Poland have already proven their unreliability and, if given the space to do so, would relentlessly close their borders due to xenophobia and discrimination towards refugees. No attention is given to solidarity towards individuals in need or already in possession of international protection. Relocations and return sponsorships provide the unrequested person's movement from one Member State to another without their consent.

CHAPTER 3: PERSPECTIVES AND POSSIBLE FUTURE IMPLICATIONS OF THE NEW SOLIDARITY

3.1 THE VISEGRAD GROUP PERSPECTIVE

The Visegrad Four (V4) is a group composed of the Czech Republic, Hungary, Poland, and Slovakia that decided to form a political and cultural alliance in order to achieve full integration into the European Union. These countries were a by-product of the disintegration of the Eastern Block and wanted to join the Union, which they all did by the beginning of May of 2004. As time went by, especially in the last decade, the group became the most prominent objector to European solidarity in terms of immigration and asylum policies. Tensions on the issue were raised with the upheaval of the migration crisis of 2015 and with the Commission's approval of mandatory relocation quotas of refugees from Italy and Greece¹²⁰. The V4 countries did not support this decision, but their votes of disagreement were eventually overruled. Hungary and Slovakia requested the CJEU to review the deal arguing the presence of technical mistakes and therefore rejecting the relocation of their quotas. In the end, this rejection has caused that the system put in place for the crisis to work solely on a voluntary basis. This procedure was not reliable or functional to manage the crisis, and for this reason, a new system was to be set in place. The question still remains if this Pact will be the answer to their problems or it will be just another way to defer the European commitment and responsibility to the issue. For now, the prime ministers of Poland, Hungary, Slovakia, and the Czech Republic rejected the Commission's proposal and proved their unanimity in their view on migration and asylum once again¹²¹.

Hungary is the country that is the most opposed to the proposal among the other Member States. According to Georges Károlyi¹²², the Ambassador of Hungary in Paris, the Hungarian Prime Minister Viktor Orban finds the most troubling aspect of the Pact to be the mandatory sponsorship of returns. The reasoning behind this is the impossibility for smaller countries, such as Hungary or Poland, to put pressure onto the countries of origin of migrants in order to make them return rejected migrants. This would result from a lack of means of these countries to put pressure or relevant influence on the countries of destination for rejected migrants. Furthermore, the Ambassador reiterates, the main point is that Hungary does not want to "manage" migration, but it wants to stop it in its entirety. Evidently, the proposed plan of the Commission does not have the same aim. Although Hungary's Prime Minister recognized that the proposal does seem to be more favourable than the preceding ones, it

¹²⁰ GOTEV (2015).

¹²¹ HINTERMAYER (2021: 2).

¹²² BERRETTA (2020).

does not envision the possibility of outside hotspots, where migrants would not officially enter the Union's territory¹²³. In order to stop migration, the Hungarian government would prefer to aid where the problem originates and, on the other hand, only to allow the entering of those migrants whose applications have been already accepted and confirmed by one of the Member States. In this manner, returns to the country of origin would not be a problem anymore, and for this reason, Orban does not deem this proposal as an adequate resolution to counteract these issues. After discussions with von der Leyen, the Hungarian Prime Minister assessed the proposal in a critical tone. He discussed that the basic approach has not changed because European institutions still want to manage migration, and they have no intentions of stopping it. He further added that the Commission is too focused on handling refugees arriving in Europe and not better preventing them from doing so¹²⁴.

At the same time, Polish Prime Minister Mateusz Morawiecki reiterated the fact that the Visegrad group has an unambiguous view of border control. There are specific rules that these countries stick to. Especially those rules regarding the need to ensure the most stringent and effective policies for border control, together with their possible assistance to places from which potential emigrants can migrate to Europe. Evidently, the Polish government is opposed to the request for more solidarity with the migration problem that Spain, Greece, Italy, and Malta have launched, and its government has rejected any potential mechanism for automatic distribution of refugees within the EU. The Polish government indicated that Poland is on the eastern side of the EU and that it fulfils its obligation to protect the external borders, which are "sealed", and argued that the southern countries should do the same. The country's stance on this matter is justified by the belief that if other countries in Western Europe have problems with migration, they should also satisfy their obligations to control borders. Poland is reluctant to host refugees also because the country takes in people from countries entangled in political instability, such as citizens of the neighbouring States of Ukraine and Belarus¹²⁵. As his country has been doing since the migrant crisis of 2015, its Prime Minister stresses that Warsaw will not accept any compulsory mechanism of sharing refugees from the southern borders. He claimed that neither migrants want to go to Poland nor his country is ready to take them in¹²⁶.

In response to the drafted migration package, Slovak Prime Minister Igor Matovič said that Slovakia disagreed with mandatory quotas for the redistribution of refugees among EU Member States. However, according to him, Slovakia wants to be in solidarity and intends to help the countries affected by the migration wave. He said that the country would not have a role on the ground, and while it fundamentally disagrees with the mandatory

¹²³ BRZOZOWSKI (2020).

¹²⁴ HINTERMAYER (2021: 4).

¹²⁵ WANAT (2021).

¹²⁶ STOLAREK, RÖHRBORN (2020).

quotas, at the same time, it will offer solidarity in those countries that suffer significantly due to illegal migration. This was stated by the Prime Minister of the Slovak Republic in his profile on its social network's profiles. However, Matovič did not further specify what a possible Slovak contribution to the solution would consist of. It should be remembered that during the previous migration crisis, Slovakia was one of the loudest critics in the EU of these mandatory quotas. It did not change its mind even after the CJEU dismissed its actions against the decision of the EU on the redistribution of refugees on the basis of mandatory quotas. According to the Slovak Member of Parliament Lucie Ďuriš Nicholsonová, the Pact raises a number of questions. According to her, this Pact should represent a comprehensive reform of the EU's migration policy and bring new solutions compared to the 2016 package of proposals, which also included mandatory quotas¹²⁷. The previous reform proposal caused a political rift in the EU due to the rise of extremism and failed because of the reluctance of Member States in the EU Council. The deputy further stated to the media outlets that even the new migration Pact did not "bury" the topic of pan-European redistribution of migrants, as hoped by the leaders of the blocking minority of States, including Slovakia. According to her, even the new proposal from the European Commission cannot wholly detach itself from the obsolete and non-functioning concept of quotas, even though it contains several improvements over the old proposal. Already during the initial examination, this proposal raised a number of questions about how specifically relocations would work in practice and when voluntary redistribution would become mandatory¹²⁸.

Czech Prime Minister Babiš spoke about the fact that also the Czech government does not agree with the commission's proposal, as it does not pay enough attention to the need to combat the issue of human smuggling. After meeting with the Head of the Commission von der Leyen, he softened his words. According to him, the Czechia continues to strive for greater emphasis on the protection of external borders and will try to guarantee that the EU evaluates refugees before their entry into Europe. The Czech Prime Minister did not explicitly express Prague's intention to organize the return of migrants, for example, from Greece, in order to avoid the long-rejected option of accepting asylum seekers¹²⁹. As already previously explained, according to the Commission's proposal, rejected migrants could stay in the territory of the countries to which they came and from where they would be returned for up to eight months. Only then, if the deportation efforts failed, would the organizing countries have to take over and place them temporarily on their territory. Babiš assured that the Czech Republic has always participated financially and will continue to participate in this manner. According to him, the Czechia would continue to prefer, for example, financial support to

¹²⁷ EURACTIV NETWORK (2020).

¹²⁸ HINTERMAYER (2021: 5).

¹²⁹ EURONEWS STAFF (2020).

African countries, or assistance to southern European countries in the form of dispatchments of police officers¹³⁰.

3.2 THE SOUTHERN MEMBER STATES' PERSPECTIVE

The Pact of the Commission in the coming months will have to be examined and approved by the European Parliament and finally by the Council, that is, by the heads of state and government of the 27 countries of the European Union, and it was to be expected that the southern and border countries like Italy, Spain, Malta, Cyprus, and Greece are attacking its contents. For the moment, the five southern European Member State warned through a letter that this proposal would only hurt the detention centers of migrants and asylum-seekers in the long run, only increasing their size and, with it, their difficulties. Together with France and Portugal, they formed the EuroMed 7 group, an alliance of the Mediterranean Member States created to strengthen cooperation and dialogue between them. The last meeting of the Ministers of European and Foreign affairs of the group was held in Athens on June 11, 2021. They discussed extensively, among other issues, the situation in the Eastern Mediterranean and the management of the COVID-19 pandemic. The joint statement of the five southern European countries underlines that the Athens meeting has served to further consolidate the common negotiating position towards the European Pact on Migration and Asylum. The “front-line States” fear that they will be left with most of the migrants because the redistribution or repatriation will not work out after all.

It must be noted that they were not too pleased with the new meaning attributed to the word “solidarity”. After the migration crisis in 2015, these countries were on the frontline in asking for a fair redistribution of migrants’ quotas. The document was addressed to the President of the European Commission, Ursula von der Leyen; to the President of the European Council, Charles Michel; and to German Chancellor Angela Merkel, as the latter was the holder of the rotating presidency of the European Council. The document stressed the need to find coordinated solutions to the Member States’ shared challenges. The four leaders argued in the letter that the application or not of border procedures, as well as the categories of persons to which they should apply, should be the prerogative of the concerned Member States. From their perspective, this would be justified by the fact that they are the best qualified to decide on these affairs given their specific circumstances. Furthermore, they stated that the creation of large closed centers at external borders is not acceptable and that asylum management must fully respect human rights¹³¹.

The document clearly states that “six months after the official presentation of the negotiation of a new European Pact on Migration and Asylum and after

¹³⁰ ATLAS (2020).

¹³¹ SMITH (2021).

several common position papers of our countries, our main concerns persist”¹³². The five Ministers of the Interior and Migration agree in stressing that they continue to observe “considerable imbalances in the proposed legislative texts, which are still far from being fully governed by the principle of solidarity and fair sharing of responsibility, as set out in Article 80 of the Founding Treaty of the European Union”¹³³. In this regard, the joint declaration reiterates the urgent request of Spain, Italy, Greece, Cyprus, and Malta for a “true and necessary balance between solidarity and responsibility”¹³⁴ and underlines that, “in its current format, the Pact does not offer sufficient guarantees to the frontline Member States”¹³⁵. The ministers note in the statement that Member States “[...] must guarantee effective European solidarity with regard to all migrants and asylum seekers irrespective of the way they have reached EU territory, having in mind the need for an automatic and mandatory relocation mechanism to be put in place”¹³⁶.

The Greek Minister of Migration and Asylum at the time, George Koumoutsakos, stated in this regard that in order to effectively address the common migration challenge today and in the future, a coherent and integrated European policy is needed. He stated that this policy should apply to all Member States, but it has even more relevance for those countries that, like Greece, are on the Union’s external borders and are faced with the direct consequences of the migration phenomenon. That is why his country was, is, and will be regularly and actively involved through proposals and initiatives in the negotiations of the new Pact¹³⁷. As far as Greece is concerned, the texts presented will be the subject of intense negotiations. During such negotiations, Greece will actively and decisively support its fundamental positions. As stated by the Greek deputy, the fundamental positions are:

- (a) mandatory solidarity and equitable burden-sharing between all Member States, which will balance the responsibility of the first host countries;
- (b) enhancing returns to countries of origin of those not entitled to international protection, through a substantial common European return system;
- (c) the operation of a mechanism for the effective response to emergencies and crises, with the speedy and tangible support of the Member States called upon to deal with them;
- (d) to effectively promote its positions, the Greek government will continue to talk and seek common ground with all

¹³² Common Statement of the Inter-Ministerial Meeting MED5, 19-20 March 2021, Athens.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ PARAVANTES (2020).

partners, but especially with front-line countries, with which they face common challenges and share similar perceptions, concerns, and priorities¹³⁸.

With the involvement of the Ministries of Immigration and Asylum, Foreign Affairs, Citizen Protection, as well as Shipping and Island Policy, an inter-ministerial working group has already been set up for the strategy and tactics to be followed and the specific positions that will be supported during the forthcoming negotiations¹³⁹.

The Spanish Minister of Interior, Grande-Marlaska, has advocated increasing the solidaristic cooperation at the informal meeting of the Council of Ministers of Home Affairs of the European Union, held by videoconference under the German presidency. In addition to the ministers, the Vice-President of the European Commission, Margaritis Schinas, and the Commissioner for Home Affairs, Ylva Johansson, have also participated. At this meeting, the EU Ministers of Interior discussed the migration Pact, the external dimension of the migration phenomenon, and progress towards strengthening a European partnership on the police force. The Spanish Minister declared that no European migration and asylum policy would be truly effective without a broad and lasting partnership with key third countries. Therefore he is convinced on the fact that the effectiveness of our European migration and asylum policy depends on this external dimension. Grande-Marlaska has given the Spanish model as an example, based on practical cooperation with the countries of origin and transit of immigration and the fight against organized crime groups involved in human trafficking. Indeed, the Spanish formula allowed to reduce irregular arrivals in Spain by 50 percent between 2018 and 2019, a decrease consolidated in 2020 with a reduction of 17 percent. Based on this experience, the Minister has stressed the importance of specifying this cooperation with African countries since, according to him, it is the only way to fight against the networks that traffic migrants¹⁴⁰.

Commissioner Johansson accompanied him on a trip to Mauritania on September 18 of 2020. During the visit, the Minister and the Commissioner held several working meetings, including with the country's President, Mohamed Ould Cheikh El Ghazouani, in which they discussed, among other issues, cooperation in migration management based on these arguments. When addressing the text of the Pact presented at the abovementioned meeting of Ministers of Interior, Grande-Marlaska pointed out that this external dimension cannot be forgotten. The Minister proposed that the Pact should include as an essential axis the improvement of cooperation with the countries of origin and transit, both from the EU and bilateral perspectives. As stated by

¹³⁸ EKATHIMERINI STAFF (2021).

¹³⁹ ATHINA984 STAFF (2020).

¹⁴⁰ EFE (2021).

the Spanish deputy, the challenge that concerns the European Union right now is to make the guiding principle of solidarity and equitable sharing of responsibility a reality. He avowed the effort that Spain will implement to do its utmost to reach a reasonable agreement for the EU and its Member States. Undoubtedly, the Minister underlined the need for a common European migration and asylum policy to his European counterparts. In the text presented by the European Commission, Grande-Marlaska has valued the fact that it contemplates mandatory solidarity but has stressed the need to provide greater clarity and breadth to the mechanisms for its implementation. He pointed out that a system in which the pressure is concentrated only in five Member States would not work. He also highlighted as a positive element the recognition of the work of those States that comply with their international obligation when carrying out maritime rescues. Lastly, he said that the text does not include concrete measures to conceive channels for legal migration¹⁴¹.

Beyond the usual declarations in which they thank the Commission for having thought of a new pact on migration, the Italian, Spanish, Maltese, and Greek governments pointed out the imbalance in the mechanisms of solidarity and responsibility. Indeed, they feel extremely penalized by the proposed rules, with which they would be left without the backing of the rest of Europe. The most crucial point of contention is always the same: the mandatory relocation of migrants in all EU countries, which must be pursued as the main instrument of solidarity. This is also due to the fact that the other measures, envisaged by the Commission precisely to avoid compulsory quotas, appear vague and complex to them. At the same time, there is the already explained compulsory mechanism of when an EU country is under pressure or at risk of being under pressure. Here, the quotas of migrants to be distributed can be converted into people to be received, to be repatriated, or even in logistical aid. The main principle of the Dublin Regulation is being softened but not removed: in principle, most people arriving on European soil will only be able to apply for asylum in the country of first entry. This method has the risk of proving ineffective to these countries because of such tortuous conditions¹⁴².

The Commission's proposal insists heavily on the idea of barring the way quickly and effectively to those not considered eligible for international protection. However, for the countries of southern Europe, which have experienced the difficulty of access control in recent years, this would be concretely impossible to apply. Spain, Greece, Italy, and Malta also do not like the pre-entry screening procedure, one of the pillars of the Pact on Migration, which provides for the identification of all persons who have arrived irregularly at European borders within five days and near the borders themselves. The risk, already underlined by several observers and NGOs, is

¹⁴¹ MONCLOA PRESS (2020).

¹⁴² EURACTIV STAFF (2020).

that of replicating immense refugee camps like the one in Moria¹⁴³. In fact, the need to invest in political relations with potential external partners in migration is highlighted in the letter. That means, in essence, more resources on the other side of the Mediterranean to control departures and accept repatriations.

In addition to the points to be modified, Southern Europe also suggests that the approach to negotiations should be conducted with the same stubbornness that led to the agreement on the Next Generation and the EU budget in July 2020. The axis formed by Spain and Italy, governments now similar in political orientation, aims to be the nucleus of a bloc resolute in its demands to Brussels on the issue of migration. On the other side, as already noted, in Northern Europe and the Balkans, there does not seem to be too much willingness. The last meetings of the European leaders on the topic did not leave encouraging signals, so much so that it could be referred to as a “return to the starting point” on the migration issue. Council sources indicate that the scaffolding of the Pact on Migration does not satisfy the Eastern European countries either. Nevertheless, for opposite reasons: the Visegrad bloc, supported by Austria, believes that the solidarity mechanism that allows for the repatriation of migrants instead of welcoming them could turn into a boomerang. In fact, if they are unable to complete the repatriation process, these countries would have to agree to relocate the people taken into their care on their own territory, an eventuality that the eastern governments do not want to consider. The trench warfare between the southern and eastern blocs does not suggest the possibility of progress in negotiations, at least in the short term¹⁴⁴.

3.3 THE NON-GOVERNMENTAL ORGANIZATIONS’ PERSPECTIVE

The Commission’s proposal, a three-hundred-page document that will influence European policies over the next five years, has already been criticized by many immigration organizations in Europe. The NGO Oxfam accused the Commission of kneeling before the sovereign governments. “It’s a compromise between pragmatism and xenophobia”¹⁴⁵, commented Belgian researcher François Gemenne. While for the NGO EuroMedrights, the European Union will become a travel agency for repatriation¹⁴⁶. According to Gianfranco Schiavone of the Association for Legal Studies on Immigration (Asgi), the proposal is a highly vague document, whose only thing clear is the emphasis on collaboration with third countries to prevent arrival or to encourage returns, and the increased load on border countries that will have

¹⁴³ BARIGAZZI (2020).

¹⁴⁴ BARIGAZZI, HERSZENHORN (2021).

¹⁴⁵ WALLIS (2020).

¹⁴⁶ EUROMED RIGHTS (2021).

to adopt new procedures. However, it must be noted that the text encourages the preparation of a common EU tactic for the saving and searching of dispersed people at sea with also the possible contribution of civil society. This would prominently condemn the penalization of those that offer humanitarian assistance in these cases¹⁴⁷.

For Cécile Duflot, Executive Director of Oxfam France, NGOs have been calling for a change in the European asylum system for a long time so that it would genuinely protect those seeking international protection and would stop leaving on their own those in need of protection. The treatment of asylum seekers at the European border and the most tragic fires in refugee camps are just reminders of the failure of European migration policies. For years European countries have witnessed the unsustainable and bewildering situation directly that the “hotspot” approach is causing on the Greek islands. According to Duflot, more than ever, other fires and unacceptable scenes have already been witnessed on the European territory¹⁴⁸. Therefore, to propose to reproduce this approach is would just be unworthy and unbearable. This approach, which has been established since 2015, has clearly failed and should be abolished, not expanded or encouraged. With this proposal, it could be reproduced and justified even on a bigger scale. For this reason, Duflot asked for France and the other Member States to show courage and consistency with European values and not to abandon either the countries of the Southern border or people seeking protection. She then recalled the fact that instead of offering a fair and rapid asylum process, accelerated procedures would lead to enormous suffering in overcrowded refugee camps. As it happens, in camps on the Greek islands, entire families have been placed in temporary, or de facto detention, and those seeking asylum have limited or no access to health care and other essential services. The individuals that are disproportionately affected by the lack of organization in this realm are primarily women: only a minority of single women can access the protected areas of the EU camps, including pregnant women and mothers with new-borns who sleep in unstable tents¹⁴⁹.

On the proposal to relocate asylum seekers from southern EU Member States to other EU countries, Jon Cerezo, Oxfam France's Migration Campaigner, states that geographical location should not be the determining factor to decide where most asylum seekers end up. All EU Member States must show solidarity with countries on Europe's borders and share the responsibility of protecting asylum seekers rather than sharing the burden of forced returns. On the proposal to use development aid for migration control, he added that it is worrying that the EU continues to push for its development aid to be used to control or even curb migration. The priority of aid should remain the reduction

¹⁴⁷ SCHIAVONE (2021).

¹⁴⁸ OXFAM FRANCE PRESS (2020).

¹⁴⁹ OXFAM FRANCE PRESS (2020).

of inequality and poverty, and it should not be used to control migration. The EU's extreme focus on migration management has yielded few positive results and has undermined its credibility as a partner of African countries. As the entire globe is facing the social and economic impact of the coronavirus pandemic, Cerezo emphasises the point that Europe should seize this opportunity for change and use development aid to overcome poverty. These emergency funds should not be invested in training and supporting security forces and border guards that often only increase the danger for migrants and the local population. As stated by the Migration Campaigner, the coronavirus pandemic has highlighted the value of migrants in our societies. This has been proven by the fact that many of them have been at the forefront of the fight against the COVID-19 pandemic. In order to enable Europe to recover from the crisis successfully, the EU must now recognize the crucial role of migrants in the economic and social survival of our societies and allow their participation in the economy. He then finally recognises that this challenge is left in the hands of Member State's governments¹⁵⁰.

¹⁵⁰ OEL (2020).

CONCLUSION

The poor administration of the 2015 migration wave remains one of the most significant failures of the European Union in the recent years, and a political trauma that has left permanent traces on a continental scale. The world is still reminded of when some central European countries, such as Hungary, erected barricades, whereas Germany welcomed roughly one million migrants.

Today, the crisis may be slightly less acute, but the tragedy in the Moria camp on the Greek island of Lesbos, where 15 thousand people were crowded in prohibitive conditions, shows that a solution to the problem has not yet been found. Despite the European Commission's attempt to tackle this extremely delicate issue by means of the new Pact on Migration and Asylum, however, the reform proposal presented by President Ursula von der Leyen has only been the result of a compromise between the various European sensitivities. Consequently, its major risk is to disappoint everyone involved in the matter, an outcome which is likely to be inevitable since Europe has recently been compelled to take action based only on weak solutions. The proposal contains what the President of the Commission described as a fair balance between solidarity and responsibility.

It can be affirmed that improvements have been made to a system that no longer worked, particularly for those first-arrival countries that used to be left alone in dealing with the strain caused by migration fluxes in the past. The new Pact should enable them to find new ways to be supported by the other Member States and overcome frequent challenges in the process of managing asylum seekers and migrants. For example, if the plan were to be approved, asylum applications from newcomers would have to be processed more quickly, both at the national and European levels.

Nevertheless, the corollary of this acceleration is the equally rapid expulsion foreseen for those whose asylum applications will be rejected. This aspect has prompted those parties that are critical of the plan to argue that Brussels has not abandoned the principle of a "fortress Europe". Xenophobia and nationalism are not decreasing, and populist parties are scapegoating migrants and the European Union in favour of their political gains. This reform would not affect the roots of the problem.

First of all, the plan aims to improve the migration management system by lightening the burden on the countries of arrival and bring more humane and equitable solutions for the men and women who arrive in Europe after having experienced an ordeal. Naturally, this is no easy task. Unfortunately, the reform does not alter the basic equation, neither for what regards the countries of departure nor for those who play the role of barrier on the path to Europe (i.e., Turkey or Libya). Sadly, the fate of people who will be sent back to a

horizon from which they were desperately trying to escape will not change either. Secondly, the text addresses an even more sensitive issue: that of solidarity between European countries, which would become “mandatory” in the event of a new mass influx of migrants and would be linked to incentives and financial sanctions. It is a question of overcoming the ever-present refusal of many countries regarding the possibility of welcoming refugees. The 2016 discussions over quotas have been substituted by debates around strict and necessary aid from everyone.

In conclusion, the Europe that flaunts its values and opposes them to authoritarian regimes at its borders has allowed blatant violations of human dignity to continue for far too long. The real test of this initiative to reform migration policy will at least be the possibility of never seeing inhuman places on the old continent like the Moria camp or the "jungle" of Calais in France.

However, little has changed since the proposal. One year after the fire that devastated the Moria refugee camp on the Greek island of Lesbos on the night of 8-9 September 2020, the situation of refugees on Greek islands has remained dramatic or has even worsened. Forty-five NGOs and civil society groups have published a report urging the EU and the Greek government to abandon plans to build closed camps on five islands and further restrict access to asylum, initiated to further limit the movement of refugees in Greece. According to Konstantinos Psykakos, head of the Médecins Sans Frontières' mission in Greece, it is tragically ironic that while the whole world keeps its eyes on the Afghan situation, the EU and Greece are opening a new prison-like camp to trap refugees on the island of Samos. He also stated that this is the ultimate demonstration of the cruelty of the EU's migration policies¹⁵¹.

Evidently, solidarity from the other Member States is essential for keeping the European Union a valid and acknowledged supporter and promoter of human rights worldwide. Even if the concept of solidarity was not comprehensive of migratory issues at the beginning of the European community, it evolved to be one of the most crucial and controversial elements of the Union. For this reason, it can be concluded that the outcome of the parties' negotiations aimed at finding a common solution in favour of a solidaristic migratory system, in the creation of a new Pact on Migration and Asylum, could either mark the beginning of a new era for the institution or the beginning of the collapse of the concept of European solidarity in its entirety.

¹⁵¹ MEDECINS SANS FRONTIERES PRESS (2021).

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ABSTRACT

L'aumento esponenziale dei flussi migratori ha avuto un impatto significativo sulle politiche dell'Unione Europea negli ultimi anni. Dall'avvento della crisi migratoria del 2015, la migrazione è diventata un punto di discussione importante per gli Stati membri e le istituzioni europee. Paesi di confine come la Grecia e l'Italia sono stati messi in difficoltà dall'arrivo dei migranti e richiedenti asilo in fuga dal conflitto siriano o dall'instabilità generale dei sistemi economici e politici dei loro Paesi, mentre Stati come l'Ungheria o l'Austria hanno aumentato i controlli e le misure di sicurezza alle loro frontiere. Di conseguenza, la polarizzazione tra gli Stati del Sud che hanno bisogno di aiuto e quelli che non vogliono prestarlo è aumentata. Purtroppo, in questo clima di diffidenza tra gli Stati membri, il concetto di solidarietà nelle questioni migratorie è stato privato della sua importanza. Questo fenomeno è anche causato dall'espansione dell'ondata di populismo in tutto il continente europeo e dalla persistente colpevolizzazione da parte dei partiti politici populistici nei confronti dei migranti.

Per questo motivo, questo elaborato discute uno dei temi più urgenti nel diritto dell'Unione Europea e per l'Unione Europea nel suo complesso: un meccanismo di solidarietà tra gli Stati membri per la gestione della migrazione e dell'asilo. Un meccanismo che, a seconda di come viene utilizzato, potrebbe alleggerire i paesi di frontiera dalla pressione migratoria e allo stesso tempo liberare quei richiedenti asilo che, dopo aver affrontato molti pericoli, sono ancora rinchiusi in centri di detenzione in attesa di un verdetto sulla loro richiesta di asilo. Tuttavia, questo meccanismo potrebbe anche risultare svantaggioso sotto certi aspetti se, per essere applicato, dovesse essere il più accomodante possibile per gli Stati membri non propensi a stabilire misure solidaristiche.

Prima di discutere il nuovo potenziale meccanismo, è necessario illustrare lo sviluppo della definizione di solidarietà dell'Unione Europea. Il concetto di solidarietà nell'ambito dell'Unione Europea è riconosciuto come un valore fondamentale per il successo dell'integrazione europea nella dichiarazione di Robert Schuman del 19 maggio 1950. Nel suo discorso, Schuman riconosce che "l'Europa non sarà fatta tutta in una volta, o secondo un piano unico. Sarà costruita attraverso realizzazioni concrete che creano prima una solidarietà di fatto". Ha sottolineato il raggiungimento di una solidarietà di fatto per la realizzazione della cooperazione nella Comunità Europea del Carbone e dell'Acciaio (CECA) che con il tempo, e la collaborazione tra gli Stati membri, si svilupperà ulteriormente fino a diventare l'istituzione che oggi conosciamo come l'Unione Europea. In effetti, la nozione di solidarietà può essere facilmente associata alla nozione di leale collaborazione e assistenza tra gli Stati membri racchiusa nei primi trattati della Comunità Europea. Tuttavia, la

leale collaborazione e la sostenibilità non hanno lo stesso significato di per sé, anche se hanno connotazioni simili.

Con il Trattato di Roma del 1957 che istituisce la Comunità Economica Europea, i firmatari del Trattato stabilirono la loro determinazione a “porre le basi di un'unione sempre più stretta tra i popoli d'Europa”. Pertanto, la solidarietà era intesa come riguardante esclusivamente i “popoli d'Europa”. All'epoca, lo scopo del trattato era quello di rafforzare le relazioni economiche tra gli Stati membri, e il concetto di solidarietà sociale non era ancora previsto. La considerazione della solidarietà tra gli Stati membri è affermata chiaramente nel Trattato di Maastricht del 7 febbraio 1992. Viene esplicitamente richiamata la volontà dei firmatari di “approfondire la solidarietà tra i loro popoli nel rispetto della loro storia, della loro cultura e delle loro tradizioni”. Inoltre, nello stesso testo, si stipula il compito dell'Unione “di organizzare, in modo coerente e solidale, le relazioni tra gli Stati membri e tra i loro popoli” e che gli Stati membri “sostengano attivamente e senza riserve la politica estera e di sicurezza dell'Unione in uno spirito di lealtà e di solidarietà reciproca”.

Il concetto di solidarietà ha un ruolo importante tra gli Stati membri e i loro cittadini, tra l'Unione e altre organizzazioni internazionali o entità private. Nel successivo Trattato di Amsterdam del 2 ottobre 1997, entrato in vigore il 1° maggio 1999, viene ribadito lo stesso concetto di solidarietà. A differenza di quello di Maastricht, aggiunge una dichiarazione sul lavoro volontario e il suo “importante contributo [...] allo sviluppo della solidarietà sociale”. La creazione del trattato che istituisce una Costituzione per l'Europa ha moltiplicato le menzioni alla concezione della solidarietà. Purtroppo, non fu mai promulgato. Tuttavia, i suoi contenuti sulla solidarietà sono stati reintrodotti nel Trattato di Lisbona del 13 dicembre 2007, entrato in vigore il 1° dicembre 2009, che è stato ancora più evidente per la sua varietà di riferimenti al tema della solidarietà.

In seguito alle modifiche di Lisbona, la solidarietà relativa alle relazioni tra gli Stati membri ha preso piede come un prerequisito del funzionamento e del successo dell'Unione. Nel trattato sull'Unione Europea, è espressamente scritto che l'Unione “promuove la coesione economica, sociale e territoriale, nonché la solidarietà tra gli Stati membri”. Questa affermazione trova la sua massima espressione in altri articoli dei trattati modificati, come l'articolo 174 del Trattato sul funzionamento dell'Unione Europea (TFUE), in cui si afferma che l'Unione è obbligata ad adottare procedure che favoriscano lo sviluppo sostenibile, soprattutto delle sue zone meno favorite. Inoltre, la solidarietà tra gli Stati membri è un requisito per l'elaborazione di una politica comune dell'Unione in materia di asilo, immigrazione e frontiere esterne, come indicato nell'Articolo 67 del TFUE.

Ciò che è rilevante nel TFUE per ciò che riguarda la gestione dei migranti e dei richiedenti asilo è l'Articolo 80. In effetti, questo articolo prevede che le politiche dell'Unione enunciate nel capitolo sull'immigrazione e i controlli alle frontiere “sono rette dal principio di solidarietà e di equa ripartizione della responsabilità, comprese le implicazioni finanziarie, tra gli Stati membri”. Nondimeno ciò non vincola gli Stati a mettere in atto questa solidarietà, bensì vincola l'Unione ogni volta che possiede l'autorità di legiferare in materia di asilo, immigrazione e controlli alle frontiere. Questa risoluzione dovrebbe determinare il dovere della Corte di giustizia dell'Unione Europea di privilegiare il principio di solidarietà, come formulato nell'articolo citato, per quanto riguarda l'interpretazione degli atti delle istituzioni e dei comportamenti degli Stati. Tuttavia, come sarà discusso in questo testo, la Corte non ha dimostrato sin dal principio il suo ruolo attivo nell'orientare l'interpretazione degli atti dell'Unione e dei comportamenti degli Stati membri verso il senso di solidarietà.

Nel primo capitolo di questo elaborato viene discusso come le disposizioni solidaristiche siano messe in atto all'interno del quadro giuridico del sistema di migrazione e di asilo dell'Unione Europea, con particolare attenzione a tre articoli principali del Titolo V del TFUE: gli Articoli 67(2), 78(2) e 80 del TFUE. Tuttavia, queste norme non sono state le prime a sottolineare l'importanza di un'equa condivisione delle responsabilità legate alla gestione della migrazione e dell'asilo. In realtà, l'Articolo 63(2) del trattato che istituisce la Comunità europea, introdotto con il trattato di Amsterdam del 1997, comportava la possibilità per il Consiglio di adottare misure in materia di asilo nei confronti di rifugiati e sfollati e norme minime “per dare protezione temporanea agli sfollati di paesi terzi che non possono tornare nel loro paese d'origine e alle persone che necessitano altrimenti di protezione internazionale”. Tuttavia, con l'entrata in vigore del trattato di Lisbona nel 2009, la necessità di solidarietà tra gli Stati membri si concretizza con l'istituzione del trattato dell'Unione Europea e del trattato sul funzionamento dell'Unione Europea. La solidarietà in materia di asilo, immigrazione e cooperazione giudiziaria può essere identificata nello Spazio di libertà, sicurezza e giustizia (SLSG) contenuto nel trattato sul funzionamento dell'Unione Europea.

L'azione solidaristica preventiva può anche essere tratta dall'assistenza tecnica gestita dalle agenzie dell'UE, di cui le due più importanti sono l'Ufficio europeo di sostegno per l'asilo (EASO) e Frontex. L'EASO è l'agenzia dell'UE per l'asilo, mentre Frontex è l'agenzia dell'UE per il controllo delle frontiere esterne. Entrambe agiscono come vasi indiretti di solidarietà attraverso il finanziamento dell'UE. Come risultato dei loro dispiegamenti operativi, assicurano e migliorano l'attuazione delle norme comunitarie e prevengono le complicazioni nella gestione della frontiera esterna dell'UE, per l'esame della domanda di asilo e per contrastare l'immigrazione irregolare. La creazione di

queste agenzie è stata dovuta all'incapacità di cooperazione tra gli Stati membri per l'attuazione della politica di asilo dell'UE.

Tuttavia, un effettivo cambiamento nel dare significato alle misure solidaristiche per la gestione delle migrazioni potrebbe essere la nuova proposta della Commissione Europea su un nuovo Patto sulla Migrazione e l'Asilo. Il 23 settembre 2020, la Commissione europea ha presentato il Patto sull'immigrazione e l'asilo, anticipato dalle dichiarazioni della sua presidente Ursula von der Leyen. Questa nuova proposta era in concomitanza con l'incendio che ha distrutto il più grande campo profughi d'Europa sull'isola greca di Lesbo. La presidente ha annunciato l'abolizione del regolamento di Dublino che negli ultimi anni ha creato molti problemi nel processo di accoglienza dei richiedenti asilo, soprattutto per i paesi di confine come Italia e Grecia. Nel secondo capitolo sono esposti i principali pilastri del Patto e le conseguenti problematiche.

La proposta del Patto potrebbe essere considerata composta da quattro pilastri principali: un meccanismo obbligatorio di solidarietà, procedure di sicurezza più complete, nuovi criteri per la distribuzione dei migranti e una maggiore cooperazione con i paesi terzi. Il meccanismo di solidarietà obbligatoria è discusso in dettaglio nella seconda parte del secondo capitolo. Per ora, è sufficiente dire che il nuovo sistema cercherà di prevenire il fallimento di alcuni Stati membri nell'adempimento dei loro impegni nelle misure solidaristiche di asilo. In effetti, il fallimento dell'impegno da parte degli Stati membri nelle questioni migratorie è già accaduto in passato, e ha portato alla sentenza della Corte di giustizia europea che ha stabilito che tutti gli Stati membri devono contribuire all'accoglienza dei migranti nel già citato caso Commissione contro Polonia, Ungheria e Repubblica Ceca.

Si illustra inoltre cosa comporterebbe l'equa ripartizione delle responsabilità. Come si svilupperà ulteriormente nel testo, secondo la nuova definizione di solidarietà proposta dalla Commissione Europea, questa dovrebbe essere obbligatoria e costante, ma anche flessibile a seconda degli impegni che gli Stati preferiscono adottare. Questi impegni possono essere scelti tra le possibilità che permettono agli Stati membri di partecipare alla condivisione degli oneri. In altre parole, bisognerebbe stabilire in che misura lo Stato membro dovrebbe collaborare alla gestione del fenomeno migratorio in una situazione di pressione migratoria o in situazioni di crisi dovute a un afflusso di cittadini di paesi terzi o apolidi che arrivano irregolarmente.

Le opzioni flessibili includono la ricollocazione delle persone appena arrivate o la sponsorizzazione del rimpatrio, per cui uno Stato membro si assume la responsabilità di rimpatriare una persona senza diritto di soggiorno per conto di un altro Stato membro. Un'altra opzione comprende la possibilità di prestare sostegno operativo immediato e a lungo termine per contribuire a rafforzare i vari aspetti di questo nuovo sistema, per esempio aiutando a sostenere varie

procedure, come l'accoglienza o il rimpatrio, l'assistenza o la cooperazione con i Paesi Terzi. Tuttavia, come si può osservare, si tratta di un sistema "à la carte", la cui attuazione sembra piuttosto complessa e metterebbe alla prova la capacità dell'UE di obbligare gli Stati a rispettare le disposizioni e, in particolare, a rispettare i diritti fondamentali di queste persone.

Per quanto riguarda il nuovo Patto, la responsabilità primaria dei flussi migratori rimane nelle mani degli Stati membri di primo ingresso. Questo è stato il principale elemento contestato dai Paesi del Sud. In effetti, il sistema di ripartizione esistente nell'UE, stabilito dal Regolamento di Dublino, grava sugli Stati membri del Sud che si trovano alle frontiere marittime del continente. Un altro effetto dannoso del Regolamento di Dublino è il suo fallimento nel riconoscere che le disposizioni sull'asilo dovrebbero essere un bene comune e pubblico. Invece, la responsabilità della gestione dei rifugiati è interamente assegnata nelle mani dello Stato membro ricevente.

Inoltre, i rifugiati non possono spostarsi dal primo paese di ingresso, il che comporta un irrigidimento del fenomeno della non redistribuzione tra i paesi. Anche se metodi e criteri alternativi per aiutare i paesi in questione sono implementati dalla nuova disposizione contenuta nella proposta del Patto. Il principale è l'obbligo per tutti i paesi di sostenere gli Stati sotto pressione migratoria o in quelle considerate come situazioni di crisi. La discrezionalità nel decidere quale modello applicare in quale situazione è lasciata ampiamente alla Commissione e alle Agenzie dell'UE. Questo può avvenire attraverso una serie di opzioni che sono ulteriormente elaborate nel secondo capitolo.

Come diretta conseguenza della proposta della Commissione, molti Stati membri non hanno trovato accettabile il suo contenuto. Come viene spiegato nel terzo capitolo, i primi paesi che si sono opposti sono stati quelli che fanno parte del gruppo di Visegrad. Questi paesi hanno già dimostrato in passato la loro inflessibilità nel non voler accogliere i richiedenti asilo entro i loro confini. Dall'altro lato, gli Stati membri del Sud non sono soddisfatti delle misure solidaristiche previste dal Patto. Secondo loro, metodi alternativi di redistribuzione delle responsabilità non farebbero che complicare il fragile stato in cui si trovano già i loro sistemi di accoglienza dei rifugiati e delle persone che chiedono protezione internazionale. Infine, le organizzazioni non governative chiedono un'urgente revisione della proposta prima della sua approvazione. Temono che queste nuove misure "solidaristiche" non farebbero altro che rafforzare la formazione di "hotspot" nell'area mediterranea, causando ancora di più la violazione dei diritti umani come la libertà di movimento. Un altro aspetto temuto è che le nuove misure potrebbero legittimare e incoraggiare il rimpatrio di individui. I conseguenti processi di rimpatrio o di espulsione potrebbero ostacolare il principio di non respingimento.

Nonostante l'urgenza di trovare un accordo sulla proposta del Patto tra le molte parti coinvolte, molte domande rimangono senza risposta. A causa della diffusione della pandemia COVID-19, l'Unione Europea e le sue istituzioni hanno scelto di dare priorità alla soluzione della crisi economica e sanitaria. I negoziati sulle proposte del nuovo Patto sono stati ritardati più volte. Alla data di settembre 2021, non è stata adottata una sola proposta di misure solidaristiche.

Indubbiamente, la solidarietà tra gli Stati membri è essenziale per mantenere l'Unione Europea un valido e riconosciuto sostenitore e promotore dei diritti umani nel mondo. Anche se il concetto di solidarietà non era completo delle questioni migratorie agli albori della Comunità Europea, si è evoluto fino ad essere uno degli elementi più cruciali dell'organismo e uno dei più controversi. Da questo si può dedurre che il risultato dei negoziati tra le diverse parti coinvolte nella ricerca di una soluzione comune per un sistema migratorio solidale, e quindi nella riuscita o meno di un nuovo Patto sulla Migrazione e l'Asilo, potrebbe definire l'inizio di una nuova era per l'Unione nel tema della gestione dell'immigrazione o l'inizio del collasso del concetto di solidarietà europea in questo ambito nella sua interezza.