



CONSORTIUM

of social organisations for supporting migrants and refugees

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COMMENTS OF THE CONSORTIUM OF SOCIAL ORGANISATIONS REGARDING THE NEW PACT ON MIGRATION AND ASYLUM

September 2021 will see one year pass from the announcement by the European Union of the New Pact on Migration and Asylum¹. According to its authors, that document, announced a long time ago, is an outline of a comprehensive change to the migration and asylum law at the level of the European Union effected by means of implementing new directives and amending existing ones. The future of the Pact depends on whether or not EU member states are able to reach an agreement - this is why a critical examination of solutions proposed by the Commission is so important.

The first question which needs to be asked while discussing the Commission's proposal is: would it be reasonable to accept the New Pact as it is now? Current standards pertaining to the legal protection of people seeking international protection and migrants which arrive in European Union member states for other reasons are not respected. This is evidenced not only by reports from social organisations, predominantly those providing assistance to refugees, but also by opinions voiced by academics² and a number of court decisions in which European courts confirmed that there are systemic infringements related to this area of the law. It would seem that the European Commission, meant to ensure that the provisions of its treaties are adhered to, should focus first and foremost on taking steps aimed at ensuring that the law in force is observed by all EU member states. The proposed changes to the migration and asylum law do not solve that problem. There is a chance that the New Pact will become merely a framework of reference which is removed from reality and which nobody complies with in full just like other similar regulations currently in force.

The Consortium believes that, as part of negotiations related to introducing the New Pact, it is essential to discuss whether or not a further change of the migration and asylum law in the direction proposed by the Commission is justified. We believe that a considerable portion of the solutions it proposes needs to be re-examined. The purpose of this document is to draw attention to crucial aspects which need to be considered and to point out certain possible directions of development without going into a detailed critical review of those solutions.

Even though the New Pact is intended to cover the migration policy of the EU in its entirety, it focuses almost exclusively on two aspects of it: management of forced migration and combating illegal migration, placing a

¹ <https://eur-lex.europa.eu/legal-content/pl/TXT/?uri=CELEX%3A52020DC0609>

² A group of academics studying legal matters and migration policies expressed their critical opinion in an open letter



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to the European Commission: http://admigov.eu/upload/Call_EU_funded_researchers.pdf.



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particularly strong emphasis on protecting borders and improving the efficiency of returns. The Pact only briefly addresses the issue of legal migration (though its authors claim otherwise) and does not refer to such important matters as: protection of migrants against exploitation at work, protection of migrants against discrimination, and combating the xenophobia, particularly Islamophobia, which has become quite pronounced in EU member states.

Current migration and asylum policy of the EU

Even though the authors of the Pact claim that the new migration and asylum policy will be driven by humanitarian ideals and the concept of humane treatment of others, this seems a purely rhetorical device as such ideas find little reflection in the practical solutions proposed in the document. The emphasis is put on making it more difficult for migrants to access the territory of the EU, strengthening EU borders, and effectively implementing EU's return policy. Not much room is dedicated to ensuring efficient protection of the rights of people reaching the EU to apply for international protection.

At a time when discrepancies between the Global South and Global North keep growing and when climate changes affect our world to an ever increasing extent, the European Union should do more than just pay lip service to noble ideals; instead, it should introduce real legal solutions to show its human-oriented attitude and solidarity with the rest of the world. Receiving people fleeing from extreme poverty or persecution must not be considered as a task to be performed only by less developed countries which already host 86% of the world's refugee population³. A policy assuming the creation of a wall between one's own country and the rest of the world is not only inhumane to the extreme - it also proves completely ineffective in the long run. When seen in such a context, the proposed New Pact seems like a missed opportunity for actually remodelling the migration and asylum-related systems of the European Union which have been subject to criticism for many years now.

What the Pact also lacks is a broader perspective on the activities of the EU and its member states which have a direct or indirect impact on people living in the Global South, forcing them to migrate. What we mean here is mostly the following:

- matters related to responsible economy and use of natural resources, the problem of employee exploitation in their countries of origin, including by companies residing in the EU; in other words, it seems necessary to promote corporate social responsibility to a greater extent;
- politically (and sometimes also financially) supporting governments and regimes which commit infringements of human rights and avoiding responsibility for the consequences of armed conflicts caused by EU member states (e.g. in Iraq or Afghanistan);
- no resources and ideas for reacting to crimes against humanity, war crimes, and genocide.

Those are only the most important and severe issues which are not addressed in the Pact and which nevertheless have a direct impact on EU migration policy.

The Pact stipulates development-related assistance and activities aimed at facilitating the creation of stable and cohesive societies while at the same time countering poverty and inequality. However, those matters are only addressed in very general terms and no specific solutions aimed at achieving such goals are mentioned. At the same time, the Pact does predict the outflow of educated and skilled people from countries of the Global South due to the EU being more attractive to talented people, highly skilled employees, and students (a phenomenon referred to as brain drain). Such an attitude is far removed from the proposed principles of global solidarity and widespread support in improving the stability of partner countries and the well-being of people living there.

³ The relevant statistical data are available at the following UNHCR website: <https://www.unhcr.org/refugee-statistics/>.



Legal migration

The New Pact fails to put enough emphasis on the need to provide migrants with legal and safe ways to migrate to the EU. This is in spite of the fact that such ways could become good solutions to many problems which have been affecting the EU migration system for years, including overcrowded centres for receiving migrants and high mortality rate among migrants while they attempt to cross the territorial waters of the EU. The authors of the Pact are correct in pointing out that migration has always been a part of human history. Consequently, it should be taken into account when planning a migration-related policy rather than considering migration an extraordinary phenomenon.

To this end, the process for obtaining a visa should be simplified and we should make it easier for people wishing to look for work in the EU (including people fleeing from areas affected by armed conflicts and natural disasters) to legalise their stay in the EU member state they are in. Furthermore, we should firmly oppose all practices and regulations which facilitate depriving migrants of their right to lawfully stay and work in EU member states. It is also necessary to plan and introduce regularization paths - this includes making it possible for migrants to legalize their stay in a given country even if they are not eligible for any type of international protection provided by the EU. To realise that this issue is indeed important, one needs only to consider the fact that as little as 30% of people whose legal status is unclear / undefined are actually expelled from the EU⁴ and, consequently, there is little chance of considerably improving the efficiency of the return policy. Legalising the stay of such people in the EU seems like a reasonable strategy. Stateless people should also be taken into account as part of such a strategy - they are not mentioned in the New Pact, even though their numbers among people reaching the EU keeps growing. It is much easier to manage migration when the percentage of people whose legal status is unclear is low.

Current legal framework shows that various measures facilitating the legalisation of stay are possible for migrants who are in demand in the context of EU's economy (i.e. people who are highly skilled). This is also the case for migrants performing unskilled labour. Poland could be considered a good example to follow as far as this is concerned. The relative ease with which one can legalise one's work and stay in Poland resulted in many people fleeing Ukraine (after Russia's aggression directed at the Crimea and Donbas) or Belarus (after Alexander Lukashenko's regime brutally quenched peaceful protests in 2020) not having to apply for international protection but just entering the Polish job market without any major obstacles. Without giving up on procedures making it possible for migrants to apply for international protection, we should also enable them to take advantage of alternative migration-related options such as simplified legalisation of their stay due to their occupation.

Screening

The Commission's proposal includes screening procedures for vetting people applying for international protection before they are officially allowed to enter a given country. Those procedures are to be applied to all people apprehended in an attempt to cross the border illegally, rescued at sea, or apprehended in a given country if it is proven that they have crossed the country's border in violation of the relevant regulations. Though it may seem like such procedures take little time - up to 5 days under normal circumstances and up to 10 days under extraordinary circumstances - but it is not so in actuality because during that period the person applying for protection remains in a legal limbo of sorts.

The solution proposed by the Commission stipulates that as part of the procedure people who express their willingness to apply for international protection will be officially recognised as applicants but they will not have access to any guarantees following from the asylum law available to them until the screening has been completed. Consequently, they will have no access to things such as legal or psychological aid during that period. Also, for the duration of the procedure, applicants will not be allowed to enter the country they

⁴ Data available on the website of the European Commission: https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en.



intended to enter; this could be seen as a potentially detrimental legal measure intended to avoid taking responsibility for guaranteeing proper rights to such people.

The Pact should also specify what procedural guarantees will be made available to people with special needs such as children migrating on their own, the sick, and the elderly.

Border procedures

Border procedures, i.e. simplified procedures for people applying for international protection at EU borders, which the New Pact assumes will be widely used are not an adequate response to the current situation at EU's borders. The activity of border guard organisations of several EU states and of Frontex have led to infringements of human rights of people seeking asylum at EU borders on a massive scale⁵. There have been documented cases of violence towards refugees, of ignoring their applications for international protection, and of placing them in centres in inhumane conditions; this is only the tip of the iceberg of problems to which the European Union's border-related policy has led.

In our opinion, introducing border procedures is a profoundly inhumane solution because it will lead to people who fled persecution being deprived of their liberty in spite of the fact that it is forbidden to deprive asylum-seekers of their liberty under international standards regarding human rights protection. This could also lead to infringements of human rights and to such people being pushed back to countries where they might be in danger. Those procedures are another step towards restricting the right to seek asylum. Even now there is a systemic practice consisting in groundlessly and illegally denying refugees the right to apply for international protection. Such illegal practices can also be observed at Polish borders, as confirmed by recent decisions of the European Court of Human Rights in cases *M.K. and Others v Poland* and *D.A. and Others v Poland*. Another step towards further infringements of international laws is the situation at the Belarus-Poland in the August and September of 2021 where Polish border guard officers place refugees from Afghanistan in Osnaż Górný⁶ and resort to illegal pushback of other people attempting to cross the border, forcing them to leave Poland even if they are apprehended after crossing the border and already in Poland.

Border procedures assuming an extension of the power of border guard services (which are under the influence of politicians) while at the same time restricting the rights of people arriving at Polish borders in search of international protection will only deepen current problems. Those procedures assume a further limitation of procedural guarantees: less time for making an appeal against a negative decision, limited access to psychological and legal aid, and detention justified by the system. What is more, such border procedures will likely not meet the hopes placed in them - this line of reasoning seems correct in view of the hot-spot approach introduced at the southern borders of the EU in 2015. It did not lead to faster and more efficient procedures for people who ended up at such facilities and only resulted in them being detained for a long time in inhumane conditions.

Like in the case of screening procedures, the Commission proposed accepting a legal fiction consisting in recognising that people subjected to such border procedures are outside of the EU's territory. This would lead to such people being deprived of legal guarantees following from EU law, which is unacceptable. The proposed Pact also considerably limits the rights of people from "safe third party countries" or "safe countries of origin" and of people from countries with a low percentile rate of approved applications. Such an assumption fails to take into account special circumstances which might apply in a particular case and it could lead to protection being arbitrarily denied to people from countries which the EU considers safe.

The fact that the authors of the Pact refer to the need to prevent abuse of the asylum procedure (which is, according to statistical data at hand, a marginal phenomenon) reveals their true intentions hidden behind

⁵ See, for example, Refugee Rights Europe and End Pushbacks Partnership report available at: <https://endpushbacks.com/wp-content/uploads/2020/11/pushbacks-and-rights-violations-at-europes-borders.pdf>.

⁶ See report of the Polish Ombudsman: <https://bip.brpo.gov.pl/pl/content/wizytacja-ad-hoc-kmpt-w-usnarz-gorny-rpo-pisze-mswia-uchodzcy-granica>.



lofty words of humanitarianism and a humane approach. We should decidedly oppose the introduction of border procedures; instead, we should promote regulations aimed at protecting the right to apply for international protection. If the proposal to introduce border procedures is upheld, the EU should present clear and unambiguous guidelines on how it intends to ensure that the procedures will not result in arbitrarily restricting the liberty of applicants and that they will provide applicants with effective procedural guarantees, including ones related to access to information and free-of-charge legal aid and representation, also via social organisations and other civil society groups independent of state authorities.

Detention or deprivation of liberty

In spite of what is proposed as part of the New Pact, it is necessary to reduce the use of detention towards migrants rather than add further conditions under which detention can be applied. Detention of people who have committed no crime should be discontinued mostly for humanitarian reasons as detention has a negative impact on people thus isolated, particularly those who have experienced forced migration or fled from torture or persecution. It should also be discontinued for practical reasons. Detention is costly and its efficiency is questionable. Research has shown that detention longer than three months is unreasonable because there are almost no effective expulsions after that period⁷. Consequently, detention should be resorted to under exceptional circumstances and its duration should be reduced as much as possible (and it should not go beyond one month). Every time before detention is considered, other measures alternative to it should be taken into account first. There are reports indicating that such measures are less detrimental to the detainees while at the same proving to be just as effective as detention.

Detaining children should be absolutely forbidden and ended immediately, regardless of their age and their family situation; children must also not be separated from their parents or guardians accompanying them as they migrate. It should be pointed out here that major organisations and institutions protecting human rights unanimously agree that guarded detention centres are not places suitable for children⁸. The Pact introduces a distinction between children aged under 12, who would not be subjected to border procedures and the detention associated with those, and children who are 12 or more years of age, who would be subjected to such procedures and possibly also detention; such a distinction is unjustified and inconsistent with international standards regarding the protection of children rights. The Convention on the Rights of the Child considers all people who are not older than 18 years of age children and stipulates that they are to be detained only under extraordinary circumstances and for as short a period of time as possible. The New Pact should also increase the level of legal protection available to this group of people instead of lowering it.

Responsibility of countries for asylum applications (the Dublin procedure)

Research indicates that the Dublin system is, in its current form, ineffective and fails to meet its objectives⁹. Unfortunately, the Pact does not introduce any major changes to that procedure, even though such changes were widely expected. A token extension of the rights of applicants proposed in the document is balanced out by a restriction of other rights, including worse court protection, introduction of evidence preclusion, changes to rules regarding unattended minors, and the negative consequences affecting uncooperative applicants.

The Pact stipulates establishing an even stronger connection between the applicants and the foreign country they first enter, even though this solution has been subject to criticism for years. It results in uneven distribution of responsibility among countries, with EU states located at its borders bearing more responsibility and strain than other EU member states. Being aware of that, the authors of the Pact proposed

⁷ Comp.: <https://crisismag.net/2020/05/09/fund-but-disregard-the-eus-relationship-to-academic-research-on-mobility/>.

⁸ Comp. End Immigration Detention of Children: <https://pace.coe.int/en/pages/campaign-detention-children>

⁹ Comp. for example a report of the European Parliament: https://www.europarl.europa.eu/doceo/document/A-9-2020-0245_EN.html



to introduce a solidarity-based adjustment mechanism, even though attempting to remedy for defects in one set of regulations by introducing further regulations seems odd and erroneous.

Solidarity Mechanism

Solidarity mechanism, the flagship idea of the New Pact, also deserves some criticism. It is to consist in member states engaging in complex negotiations based on rather vague criteria regarding division of responsibility; the system lacks clarity and predictability which are both needed, now more so than ever. Disputes as to whether or not boats with survivors / refugees should be allowed into the EU keep re-emerging at the level of the entire Union, showing that such negotiations are difficult and time-consuming and that results satisfactory for all parties involved are rarely achieved in their course. What is more, the system proposed as part of the New Pact will lead to even more bureaucracy related to the asylum and return procedures and, consequently, to increased costs.

The Pact provides for an option for the member states to fund the return of migrants to their countries of origin and thus to be released from their obligation to relocate people in need of international protection. Such a solution seems unjustified if one recalls that the priorities of asylum policy and return policy differ and should not be considered jointly. What is more, it is unclear how such a solidarity mechanism would help reduce the strain on states located at external borders of the EU in a situation where no state chooses relocation as the solution. The Pact does make it possible for a member state to file a unilateral declaration on discontinuing to operate according to the solidarity principle due to force majeure considerations. That being so, there is a considerable chance of countries unwilling to receive people seeking international protection, Poland included, taking advantage of this possible way out. The solidarity system proposed by the Commission will also result in an increase of uncertainty among people to whom such procedures apply - it would be possible to move the case of a given person from one member state to another several times as their case is being reviewed.

A more reasonable solution would be to introduce a mechanism consisting in obligatory relocation for all member states without the option of buy-out by sponsoring forced returns. Such a mechanism would have to be associated with procedures aimed at quickly establishing what the legal status of applicants is in order to make it possible for them to travel within the EU lawfully so that they could change the country they wish to live in (due to their existing family, cultural, professional, or linguistic ties to a certain state) after they receive international protection.

Solidarity at sea

One of the most important challenges the EU faces is the high mortality rate among men, women, and children at the waters surrounding the Union. A report from the International Organisation for Migration (IOM) indicates that the first half of the year 2021 saw 1,146 people trying to reach the EU perish¹⁰.

It is therefore necessary to resume effective search and rescue operations and to introduce predictable rules for accepting refugees reaching the EU by sea. It should also be borne in mind that migrants and refugees resort to dangerous ways of reaching the EU as a direct result of there being no legal migration options available to them. Solidarity is crucial here but it needs to be applied not only within particular member states but also at the level of the EU at large and at the level of the entire world, particularly in view of the progressing climate changes and global inequalities for which all developed countries should bear equal responsibility.

Cooperation with external countries

The New Pact places a strong emphasis on the external aspects of the migration and asylum policies of the European Union consisting in establishing cooperation with countries from outside of the Union. In exchange

¹⁰ <https://www.iom.int/news/deaths-maritime-migration-routes-europe-soar-first-half-2021-iom-brief>.



for financial and operational support, such countries would receive people who were pushed back from EU borders. Such cooperation is usually established according to principles other than EU mechanisms for concluding contracts of that type and one party to such agreements is often an authoritarian regime which fails to observe and protect fundamental human rights¹¹. It is commonly known that such a policy has led to a considerable deterioration of the situation of refugees returned to Libya, Turkey, or Belarus. Recent years have given us plentiful opportunity to witness just how cynically such cooperation is used by countries on which the EU relies as far as migration is concerned.

This is why such cooperation is to be criticised. It amounts to shifting responsibility for guaranteeing the protection of refugees to other countries, including ones which do not respect fundamental human rights and will not extend proper support to such refugees. Not only is this far removed from humanitarian principles and leading to greater harm being done to people forced to flee from their own country, it also goes against EU values referred to in the relevant treaties. According to Article 3 of the Treaty on the European Union, the EU should, as part of its relations with external entities, contribute the sustainable development of the Earth, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law. It is difficult to imagine a greater violation of those principles than paying the Libyan, Turkish, or Belarusian border guard to assist the EU in illegally pushing refugees back from its borders.

Monitoring of infringements

The Pact proposes that a mechanism for monitoring the observance of fundamental rights at external EU borders should be introduced but this is hardly enough. It is necessary to considerably extend the scope of monitoring so as to ensure full protection of human rights as part of asylum-related procedures. This should include not only access to protection at border crossings but also monitoring of other related matters, e.g. the situation at detention centres and observance of the law in the course of return procedures. To ensure that such a mechanism is effective and independent, social organisations and experts in the relevant fields should be involved in it. To this end, adequate funding is needed. Further, the results of such monitoring should be made available to the general public. Member states should also be obliged to adjust their laws and practices to the recommendations included in documents resulting from such monitoring.

The Pact should also specify in detail the consequences of failure to introduce appropriate monitoring solutions and of infringements of the rights of migrants. If there are no such sanctions, the monitoring mechanism will likely not drive the expected changes related to the way in which refugees are treated at EU borders. It should be pointed out here that there are already well-documented infringements of the right to refuge but this has not led to any improvement of the situation. Consequently, it seems justified to expect that the New Pact should result in actual and not apparent improvement of the situation of this special group of people which includes people seeking international protection.

No punishment for actual solidarity

The Pact lacks a clear statement that humanitarian aid for the benefit of migrants will never be considered a crime. Current practices resorted to by member states and criminal charges being pressed against the employees of social organisations and their volunteer activists show that such an assurance is indeed necessary. This is the only way to ensure that the authorities of particular states cease to hinder the activity of particular people or organisations trying to help refugees and migrants regardless of their legal status.

Conclusion - consequences of the policy for European societies

¹¹ Further information about the external aspects of EU migration policy can be found in, for example, a report from the Transnational Institute: https://reliefweb.int/sites/reliefweb.int/files/resources/expanding_the_fortress_-_1.6_may_11.pdf.



If the migration and asylum policy proposed in the New Pact, which seems to adhere to the principle of a “beleaguered castle” or “Fortress Europe”, is accepted in its current form, it would have major impact on migrants. It would also influence the European society in two significant ways. Firstly, it would lead to exclusion of migrants from the European community, pushing them to the margins of the society, making their stay in Europe illegal; this would lead to migrants having to suffer from alienation and to extremism, nationalism, and violence. Such a policy would lead not to our society becoming safer - on the contrary, it would make it considerably less safe.

Secondly, such a policy would influence EU communities themselves by means of undermining the foundations of our values on which we tend to pride ourselves so much. This would be disastrous indeed: we would have less faith in democracy and its values and we would trust our governments less, both in our own country and at the level of the entire EU; this would, in turn, result in an even further intensification of nationalist and xenophobic attitudes - already visible in our society¹².

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¹² Comp. an appeal of European psychologists: <https://thepsychologist.bps.org.uk/volume-34/march-2021/bring-end-inhuman-disregard>.

