



INSIGHT

THE NEW PACT ON MIGRATION AND ASYLUM: SUPPORTING OR CONSTRAINING RIGHTS OF VULNERABLE GROUPS?

THEODORA GAZI*

ABSTRACT: The new Pact on Migration and Asylum presented in September 2020 by the Commission proposes the reform of the Common European Asylum System. At the centre of the legislative changes is the effective protection of vulnerable applicants, indicatively minors, persons with disabilities or health issues and survivors of human trafficking and other serious forms of violence. This *Insight* provides readers with an overview of the provisions of the new Pact affecting vulnerable applicants of international protection. It focuses on the measures introduced by three proposed Regulations of the Pact, namely the Asylum and Migration Management Regulation, the Screening Regulation and the Asylum Procedure Regulation. Importantly, it defines which applicants are considered vulnerable and reviews current and envisioned provisions on the EU state responsible to examine asylum claims, relocations, vulnerability assessments during pre-entry screening and the application of fast-track asylum procedures.

KEYWORDS: EU Pact on Migration and Asylum – international protection – Common European Asylum System – vulnerable groups – vulnerability – solidarity.

I. INTRODUCTION

On 23 September 2020, the European Commission presented the new Pact on Migration and Asylum, together with legislative proposals for the reform of the Common European Asylum System (CEAS). The new Pact envisions to overcome the conflicts that prevented the 2016 asylum reform. Based on the Commission's communication,¹ the new Pact adopts a "humane approach", promotes solidarity between EU States and adopts "a pool of projected solidarity measures". Emphasis is placed on the protection of vulnerable groups through a combination of measures, from their relocation to other member States to vulnerability assessments during the pre-entry screening process and

* PhD candidate, School of Law of the University of Athens, thgazi@law.uoa.gr.

¹ Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum.



exemptions of some groups from border procedures. Indeed, this positive framing of migration can support the development of a coherent asylum policy, if translated into binding legal provisions.

This *Insight* provides an overview of the key legal provisions of the new Pact which affect vulnerable asylum seekers. Under this scope, I first present the definition and the role of vulnerability in the asylum context. Then, I review the proposed revisions included in three Proposed Regulations of the new Pact, i.e., the Asylum and Migration Management Regulation², the Screening Regulation³ and the Asylum Procedure Regulation⁴, in comparison with the currently applicable provisions. Given that the Pact is still under negotiation, this *Insight* does not serve as an in-depth analysis of the envisioned regime for asylum and migration. Its aim is to contribute to improved awareness on the impact of the revised legislations to vulnerable groups' access to international protection.

II. DEFINING VULNERABLE ASYLUM SEEKERS

The approach of vulnerability is not harmonised across CEAS legislative instruments. For this reason, it is important to review the different definitions provided, since addressing the needs of vulnerable applicants for international protection presupposes an understanding of their identity and needs.

To begin with, the Dublin III Regulation⁵ only refers to unaccompanied minors as vulnerable (Recital 13). Despite that, it includes special provisions to regulate the situation of minors, dependent individuals and applicants in need of healthcare (see arts 16, 17 and 19 (1)). Moreover, prior to executing transfer decisions, migrants' vulnerability is a factor examined by the state, in light of respecting the EU Charter of Fundamental Rights [2012].⁶

² Proposal COM(2020) 610 final of the European Commission of 23 September 2020 for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund].

³ Proposal COM(2020) 612 final of the European Commission of 23 September 2020 for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) n. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817.

⁴ Amended proposal COM(2020) 611 final of the European Commission of 23 September 2020 for a Regulation of the European Parliament and the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

⁵ Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 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 (recast).

⁶ The Charter includes multiple rights, including the prohibition of torture and inhuman or degrading treatment or punishment (art. 4) and the *non-refoulement* principle (art. 19).

As for the Reception Directive,⁷ it has incorporated an indicative list of vulnerable groups of asylum seekers (also referred to as “applicants with special reception needs”). This list includes minors (accompanied or not), elderly, pregnant women, single parents with minor children, persons with disabilities, serious illnesses or mental disorders, in addition to survivors of torture, rape or other serious forms of violence, including human trafficking (art. 21). After each asylum application, authorities perform a vulnerability assessment within a “reasonable” time. Moreover, special reception needs are addressed, even if they become apparent at a later stage in the asylum procedure (art. 22 (1)). It is important to note that, due to the margin of discretion of EU States to transpose the Directives, there are slight disparities in the categories of applicants deemed vulnerable across the EU.⁸

Furthermore, the Procedures Directive⁹ does not refer to vulnerable groups, but to applicants “in need of special procedural guarantees”. The factors examined to determine this condition include, *inter alia*: age, gender/gender identity, sexual orientation, disability, serious illness, mental disorders and consequences of torture, rape or other forms of violence (Recital 29). Again, national authorities must assess whether the applicant requires special procedural guarantees within a reasonable time after the application for international protection is submitted (art. 24(1)). This assessment is integrated into either existing asylum procedures or the vulnerability assessment of the Reception Directive. Based on the above, “applicants in need of special procedural guarantees” are a broader category which could include both vulnerable and non-vulnerable asylum seekers (e.g., LGBT and applicants with PTSD).

To sum up, the need to both assess and address the vulnerability of asylum seekers is a widely accepted concept across the EU.¹⁰ For this reason and depending on the legislative text, vulnerable groups enjoy a spectrum of rights, including special reception conditions and procedural guarantees. Under this scope, this Insight examines how certain provisions of the new Pact could impact vulnerable applicants.

⁷ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down or the reception of applicants for international protection (recast).

⁸ European Council on Refugees and Exiles, The concept of vulnerability in European asylum procedures (2017) asylumineurope.org.

⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

¹⁰ EASO, Vulnerability in the context of applications for international protection (2021) www.easo.europa.eu.

III. THE PROPOSAL FOR AN ASYLUM AND MIGRATION MANAGEMENT REGULATION

The influx of mixed migration flows to Europe from 2015 onwards strained the asylum systems of EU States of first arrival. Indeed, multiple reports by scholars,¹¹ NGOs,¹² international courts,¹³ in addition to national judgements¹⁴ have underlined the dysfunctionality of certain provisions of the Dublin system, especially in light of respecting fundamental rights. With a view to provide a solid framework for migration and asylum policies,¹⁵ the proposed Regulation on Asylum and Migration Management replaces Dublin III.

To begin with, two key contributions of the proposed Regulation are the expanded definition of family and the recalibration of evidential standards. While these changes apply to all asylum seekers, it is important to examine their implications for vulnerable groups, especially regarding the criteria to determine the EU state responsible for the asylum claim.

Before reviewing the suggested revisions, it should be clarified that Dublin III allows for the reunification of asylum seekers with family members separated across EU States (arts 8-11 and 16). However, it adopts a narrow definition of “family”. First, the family member definition solely includes the spouse, unmarried partner or minor unmarried child, i.e. excluding relatives, siblings and married minors (art. 1 case g). Dublin III introduces two exceptions to this definition. On the one hand, unaccompanied children can be reunited with their sibling or relative, provided that this is in their best interest (art. 8). On the other hand, dependent applicants can also be reunited with a parent or sibling legally residing in another member state, if the relationship was formed in the country of origin (art. 16). Second, Dublin’s definition of family solely recognises families formed in the country of origin (art. 1 case g). Again, an exception is introduced for the reunification of applicants with family members who are recognised beneficiaries of international protection in another EU state (art. 9 Dublin III).

As evident, this complicated set of rules to define family was rightfully replaced in the proposed Regulation. Specifically, the definition of family (art. 2 case g) is extended both to those formed during the migration journey (i.e., not only from the country of origin) and to siblings, in all cases. In other words, family reunification no longer excludes families formed during transit, i.e., before reaching the country of asylum. Widening the defini-

¹¹ Indicatively, see F Keller, ‘Report on the implementation of the Dublin III Regulation (2019/2206(INI))’, (2020) European Parliament, Committee on Civil Liberties, Justice and Home Affairs.

¹² European Council on Refugees and Exiles, *To Dublin or not to Dublin?*, Policy note #16 (2018) www.ecre.org.

¹³ See an overview of related cases at ECtHR, *Dublin cases Factsheet* (2016) www.echr.coe.int.

¹⁴ Indicatively, see European Database of Asylum Law, *Italy: Withdrawal of Dublin transfer to Latvia on the grounds of systemic deficiencies violating human rights* www.asylumlawdatabase.eu.

¹⁵ V Novotny, ‘The New Pact on Migration: A Set of Innovative Proposals with an Uncertain Outcome’ (5 November 2020) Martens Centre for European Studies www.martenscentre.eu.

tion of family means that more applicants can be reunited with family members. Thus, this change can have a significant impact on dependent persons' quality of life.¹⁶

Moreover, the proposed Regulation introduces an important safeguard regarding the rules of evidence for family reunification (Recital 49). Specifically, formal proof, such as original documentary evidence and DNA testing should not be necessary to establish States' responsibility for examining an asylum application "in cases where the circumstantial evidence is coherent, verifiable and sufficiently detailed". This provision also facilitates family reunification and simplifies the procedure to be followed by the interested parties.

Focusing on unaccompanied minors (UAMs), the proposal introduces two changes. Firstly, in the absence of a competent family member in another EU state, the responsible state to examine a UAM's asylum claim is where he/she first lodged the asylum application, unless this is against the child's best interest (see art. 15(5)). However, it appears that the proposed Regulation ignored the M.A. judgment¹⁷ issued by the Court of Justice of the EU. This decision stated that, in case of multiple asylum claims, the responsible EU state should be the one where the UAM is present. Secondly, the proposed Regulation aims at enhancing guarantees for UAM by making best interest assessments (BIAs) "more operational", according to the Explanatory Memorandum. Already, Dublin III recognised that "the best interests of the child should be a primary consideration of Member States when applying this Regulation". (Recital 13 and art. 6 (1)). Subsequently, the proposed Regulation goes one step further, spelling out the content of the BIA prior to transfer decisions of UAMs, i.e., whether the receiving state will adopt the necessary and appropriate measures to "ensure the adequate protection of the child, and in particular the prompt appointment of a representative [...] tasked with safeguarding respect for all the rights to which they are entitled" (recital 48 and art. 13).

Finally, the proposed Regulation introduces an annual Migration Management Report which assesses migratory pressures. Specifically, the Explanatory Memorandum underlines that solidarity should be "available on a constant basis". Under this scope, a report is adopted by the Commission to both describe the anticipated evolution of the migratory situation and indicate whether particular States face capacity challenges, due to hosting vulnerable third-country nationals (art. 6(4)). Said States can utilise the "solidarity pool", a measure which promotes the relocation of vulnerable persons across EU countries (art. 49(3) and (4)). Specifically, the solidarity pool is established by the Commission through the adoption of an implementing act which could also determine the number migrants to be relocated, in case the initial indications fall short of the needs identified (recital 22).

¹⁶ European Council on Refugees and Exiles, Comments on the Commission Proposal COM(2020) 610 2020/0279 for a Regulation on Asylum and Migration Management, (2021) www.ecre.org.

¹⁷ Case C-648/11 *M.A. and Others*, ECLI:EU:C:2013:367 para. 66.

To sum up, it is important to acknowledge the positive narrative on migration in the Explanatory Memorandum, as well as the Commission's intention to strengthen both family unity and children's rights. Moreover, the development of a relocation mechanism is a positive aspect of the Proposal,¹⁸ since the allocation of responsibility portrays the principle of solidarity and fair sharing of responsibility, guaranteed in art. 80 of the Treaty on the Functioning of the European Union [2007].

However, the above analysis demonstrates that the responsibility criteria included in the Proposal will not substantially shift the burden of asylum examinations away from front-line States, given that the "first country of irregular entry" criterion remains applicable (art. 21). Moreover, the implementation of the solidary mechanisms appears complicated, whereas the failure of the 2015 relocation programme¹⁹ serves as cautionary tale about the implementation of relocation and solidarity measures. Under this scope, the proposed changes should be oriented to addressing bottlenecks of the current regime and further explore how to enhance the protection of vulnerable groups, e.g., by introducing vulnerability assessments prior to transfer decisions.

IV. THE PROPOSAL FOR A SCREENING REGULATION AT THE EXTERNAL BORDERS

The Proposal for a Screening Regulation²⁰ aims at the immediate identification of migrants arriving irregularly in the EU, by introducing a screening process of third-country nationals at the external borders. According to art. 6(3), the pre-entry screening is completed in 5 days²¹ from either their apprehension in the external border area or disembarkation in the territory of the Member state or their presentation at a border crossing point. During this process and where relevant, national authorities shall conduct a preliminary health and vulnerability assessment to evaluate whether a migrant is "in a vulnerable situation" (art. 9(2)). After their identification, persons who are either vulnerable or in need of special procedural needs shall receive "adequate support" regarding their physical and mental health. Specifically, Recital 27 calls for States to pay particular attention to individuals with vulnerabilities, providing an indicative list which includes "pregnant women, elderly persons, single parent families, persons with an immediately identifiable physical or mental disability, persons visibly having suffered psychological or physical trauma and unaccompanied minors".

¹⁸ European Council on Refugees and Exiles, Comments on the Commission Proposal for a Regulation on Asylum and Migration Management cit.

¹⁹ S Wolff, 'The Emergency Relocation Scheme: A Burden Sharing Failure' (March 2021) NEXTEUK Policy Paper Series www.qmul.ac.uk.

²⁰ Proposal COM(2020) 612 final cit.

²¹ The duration of the pre-entry screening may be extended in exceptional circumstances, for maximum 5 additional days.

To begin with, it must be highlighted that authorities only conduct said assessment “where relevant”, i.e., not in all cases. This point is further explained in Recital 26, based on which an assessment should not take place “if it is clear from the circumstances that such examination is not needed, in particular because the overall condition of the person appears to be very good”. However, this means that authorities are to examine vulnerability based on mere observation. Inevitably, this provision disregards the diverse nature of vulnerability and discriminates against groups whose vulnerability is not visible or obvious, e.g., victims of psychological trauma or human trafficking. As for persons with disabilities, the Regulation reintroduces a medical understanding of disability and mental health, contrary to the UN Convention on the Rights of Persons with Disabilities [2007].²²

Moreover, the proposed Screening Regulation replicates the “hotspot” approach, currently adopted in Italian and Greek boarders²³. First introduced in 2015 by the Commission, hotspots are a response mechanism to exceptional mixed migration flows. More specifically, hotspots serve as physical sites where national authorities identify new arrivals after disembarkation, register asylum claims and conduct return operations.²⁴

Under this scope, it is important to consider the deficiencies of the hotspot approach during the past five years of implementation. Reports by aid actors²⁵ and agencies²⁶ have repeatedly depicted hotspots as overcrowded facilities, where residents have limited access to services and medical care. The high number of arrivals, in addition to understaffing of national authorities results in the belated (or lack of) detection of vulnerabilities, widespread detention and delays in appointing representatives for UAMs.

Based on the above, a “one-size-fits-all” vulnerability assessment system is highly problematic and cannot adequately consider the rights and needs of vulnerable persons. In other words, by focusing on addressing obvious vulnerabilities, the Regulation overlooks and marginalises a portion of vulnerable new arrivals. Finally, the above analysis shows that the hotspot approach should not serve as a blueprint for EU’s future approach to migration.

²² M Uldry and J Bull, ‘A missed opportunity: How Europe can better protect migrants with disabilities and mental health problems’ (18 December 2020) European Disability Forum www.edf-feph.org.

²³ Caritas Europe, ‘Caritas Europa’s analysis and recommendations on the EU Pact on Migration and Asylum’ (December 2020) www.caritas.eu.

²⁴ Commission staff working document SWD(2017) 372 final of the European Commission of 15 November 2017, Best practices on the implementation of the hotspot approach.

²⁵ Danish Refugee Council, ‘Fundamental rights and the EU Hotspot approach’ (2017) drc.ngoh.org and IRC, ‘The Cruelty of Containment: The Mental Health Toll of the EU’s ‘Hotspot’ Approach on the Greek Islands’ (2020) reliefweb.int.

²⁶ Fundamental Rights Agency, ‘Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy’ (2016) and Fundamental Rights Agency, ‘Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy’ (2019).

V. THE PROPOSAL FOR AN ASYLUM PROCEDURE REGULATION

An essential element of international protection is the establishment of fair and efficient procedures²⁷. The Asylum Procedure Regulation²⁸ repealing the Procedures Directive (2013/32/EU) is an amendment of the Regulation proposed in 2016.²⁹ Its aim is to establish simpler and shorter procedures for asylum claims, while guaranteeing the efficiency of decision-making and improving applicants' rights. One of the changes of the new Pact which affects vulnerable groups is the establishment of a fast-track border procedure for the examination of asylum claims which also prepares returns, following a negative decision (art. 41).³⁰

To begin with, it must be stressed that fast-track procedures pose the risk of procedural errors and mishandling asylum claims. Due to the strict time constraints, applicants' protection needs could be overlooked, while their access to legal aid and their ability to properly exercise their right to appeal negative decisions are limited.³¹

Recognising these risks, the Procedures Directive excluded applicants in need of special procedural guarantees from accelerated or border procedures, when adequate support cannot be provided (art. 24(3)). Adopting a similar approach, the proposed Regulation also exempts asylum seekers in need of special procedural guarantees, in case said guarantees may not be provided or for medical reasons. In addition, unaccompanied minors and families with children below the age of 12 are exempted, except if they are considered as a danger to national security or public order (arts 41(5) and 9)).

A first read of the Regulation indicates that the new Pact broadens the list of groups excluded from border procedures. However, the implementation of the Procedures Directive (as transposed into Greek law³²) in hotspots serves as proof that these safeguards are not adequate to protect vulnerable groups. As noted by Refugee Support Aegean, an NGO working in Greek islands, asylum authorities deem as a rule that adequate support is provided to applicants in need of special procedural needs during fast-track border procedures in Aegean islands, even in cases of particularly vulnerable applicants.³³

²⁷ United Nations High Commissioner for Refugees, Fair and efficient asylum procedures: a non-exhaustive overview of applicable international standards of 2 September 2005, www.unhcr.org.

²⁸ Amended proposal COM(2020) 611 final cit..

²⁹ Proposal COM(2016) 467 final of the European Commission of 13 July 2016 for a Regulation of the European Parliament and the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

³⁰ This Border procedure must be concluded maximum within 12 weeks from the registration of the application.

³¹ European Council on Refugees and Exiles, Border Procedures: Not a Panacea (July 2019) www.ecre.org.

³² Greek Law 4636/01.11.2019, as in force.

³³ Refugee Support Aegean, Comments on the amended Commission proposal for an Asylum Procedures Regulation, (October 2020) rsaegean.org.

For these reasons and to ensure the right to asylum, guaranteed by art. 18 of the Charter, vulnerable groups and applicants in need of special procedural guarantees should be exempted from accelerated procedures, in general.

VI. CONCLUSION

The new Pact on Migration and Asylum is not yet “a pact”; it constitutes a set of proposed measures to be negotiated between the Council and the Parliament. These negotiations present an ample opportunity to promote a human rights-based Common European Asylum System.

However, if the Proposals were to be adopted in their current form, they could negatively impact vulnerable groups’ access to asylum. As mentioned, while the reform of the Dublin system is indeed necessary, the criteria set by the Asylum and Migration Management Regulation do not go much further. In other words, the positive amendments are limited, whereas the responsibility criteria are similar to the existing dysfunctional system. As for the Screening Regulation, the independent mechanism to monitor the respect of fundamental rights in border procedures (art. 7) is neither sufficient to prevent violations, nor would it guarantee the right to due process.³⁴ As regards to the Asylum Procedures Regulation, both vulnerable groups and applicants in need of procedural guarantees must be excluded from accelerated procedures, since by definition, these processes hinder vulnerable groups’ access to a fair asylum process.

Indeed, the Pact is an opportunity to improve asylum systems in Europe. Therefore, in the interest of good migration management, it would be advisable that the problematic provisions underscored here be reconsidered to ensure vulnerable migrants’ real access to asylum.

³⁴ Solidar, ‘Asylum & the Action Plan on Integration and Inclusion 2021-2027’ (December 2020) Briefing Paper 97 reliefweb.int.

