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Too Little, Too Slow – An Analysis of 2022’s Developments in the EU’s Migration and Asylum Policy

Abstract

Migration and asylum are two of the most challenging issues in Europe. With every crisis, new shortcomings are exposed. However, actions taken by the European Union and its Member States have proven that common migration and asylum policy remains a distant goal. In the presented paper, the author analyses developments in the European Union migration and asylum policy of 2022, stating that, despite the momentum caused by the support given to Ukrainians with temporary protection, hopes for comprehensive asylum and migration policy reform should be toned down, despite the end of the legislative period looming on the horizon.

Keywords: European Union, Migration Policy, Asylum, Crisis, Temporary Protection

Introduction

The European Union and its Member States entered 2022 with fresh memories of a crisis on the border between Poland and Belarus. In February of that year, Russia’s unprovoked invasion on Ukraine forced 8 million people to flee their homes and triggered – for the first time in the history of the European Union – the Temporary Protection Directive (Council Directive, 2001). In June 2022, at least 27 migrants and asylum seekers lost their lives attempting to enter Melilla, Spain. Spain pushed

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for irregular migration to be considered a hybrid threat on NATO's roadmap.

The issue of migration also affects the enlargement process (e.g. no progress on Kosovo visa liberalisation was made) which is considered a “geostrategic investment in peace stability, security, and economic growth” (European Commission, 2021) and creates internal divisions. After fifteen years of membership in the EU, Bulgaria and Romania were not admitted into the Schengen Area, being vetoed on the basis of security risks caused by illegal migration. Internally, France and Italy found themselves in a diplomatic spat over the disembarkation of a migrant rescue ship named *Ocean Viking*, and OLAF reported that Frontex routinely covered up pushbacks by the Greek coastguard.

Migration and asylum policies are shared competences between the EU and its Member States. Pursuant to Article 79 of the Treaty on the Functioning of the European Union (TFEU), the Union “shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows”, ensure the fair treatment of third country nationals residing in Member States, and enhance measures to prevent illegal immigration and trafficking. In this area, the Treaty of Lisbon not only introduced the ordinary legislative procedure, but also underlined the principle of solidarity between EU countries. Regarding protection for people fleeing persecution or serious harm in a country of origin, since 1999 the EU has been developing the Common European Asylum System (CEAS), a policy framework aimed at guaranteeing harmonised, uniform standards for third-country nationals seeking international protection in the EU. As a compensatory measure developed to balance open borders and freedom of movement, CEAS emphasises a fair and harmonised asylum procedure in examining cases, irrespective of the Member State where the application is lodged (European Commission, 2016).

In recent years, the EU responded to multiple migratory pressures, but available instruments have not sufficiently addressed challenges that force the EU to respond with emergency measures. Despite an almost tangible need for a comprehensive reform as exposed by the mentioned permacrisis, progress is slow. The European Council was expected to adopt strategic guidelines for an area of freedom, security, and justice in spring 2020. Three years later, those guidelines, crucial to legislative and operational planning, remain absent. Progress on the New Pact on Migration and Asylum – which according to the European Commission (2020b) should be a “fresh start” for migration and asylum – remains sluggish. Member States working on their own or in small groups, e.g. the “big four” (Italy, Spain, France and Germany), MED5 (Italy, Spain,

Greece, Malta and Cyprus), or the Austro-Serbo-Hungarian trio alliance against “asylum tourism” will not be able to deal with future conflict-induced crises, pressures caused by climate change, or factors such as the instrumentalisation of migration.

In the presented paper, and in their analysing of developments in the European Union migration and asylum policy in 2022, the author argues that despite momentum triggered by the maiden launch of temporary protection granted to Ukrainians and the political agreement on a Joint Roadmap on the CEAS and the New Pact on Migration and Asylum signed in September 2022, the EU is nowhere near a comprehensive reform of its asylum and migration policy, therefore hopes for such reform – not only expressed by the NGO’s representatives, but also by EU Commissioner Vera Jourova (Zachová, 2022) – should be toned down. With approaching European Parliament elections, chances to introduce legislative and non-legislative instruments proposed by the European Commission under the abovementioned New Pact on Migration and Asylum umbrella are dwindling. However, migration and asylum policy in the EU has been far from static, as has been confirmed by 2022’s developments. In this paper, following the introduction, developments in four areas of the EU migration and asylum policy will be analysed. This analysis relies on legal acts (and the proposals of such), related literature in law and politics, and policy documents and reports.

Too Quiet on the Solidarity Front...

Despite its relative success in securing external borders, along with developing cooperation with third countries and curbing irregular arrivals, the European Union cannot recover from a solidarity crisis that accompanied migratory pressure in 2015/16. One would assume that with principle of solidarity enshrined in Article 80 of the TFEU, failure of the emergency relocation mechanism (Council Decision, 2015), including Hungary and Slovakia turning to the Court of Justice of the EU to annul the Decision establishing the second relocation scheme; and the European Commission’s emphasis on solidarity and responsibility as pillars of the previously mentioned 2020 Pact on Migration and Asylum, more would have been achieved in 2022. However, the Dublin system based on the “first country of entry criterion” is standing still with slow progress on the Proposal for a Regulation on Asylum and Migration Management (2020). To rub salt into the wound, proposed rules on responsibility allocation remain akin to the current Dublin system (European Parliament, 2021; ECRE 2021).

After the 2015/16 crisis, different solidarity schemes were presented (e.g. Malta Declaration from 2019 or voluntary relocation scheme for unaccompanied minors and vulnerable asylum seekers), but it was under the French Presidency (with the support of Germany) when the Declaration of Solidarity (2022) was signed by 21 states (eighteen Member States and three Schengen associated states). The Voluntary Solidarity Mechanism introduced by the declaration allowed for the voluntary relocation of over 8,289 asylum seekers from five frontal states and offered financial contributions to those states. Although the VSM was presented as a gradual step toward permanent relocation mechanisms enshrined in the proposed Pact on Migration and Asylum from the beginning, the fact that the solidarity scheme was again temporary and non-legislative raised doubts over the willingness of Member States to share responsibility for providing protection to those in need. Also, the Czech Republic, which took over the Presidency of the European Union Council from France, presented its version of a solidarity scheme with “flexible responsibility” at its core. Despite its flaws (ECRE, 2023, p. 7), it has to be recognised that this time, the proposal incorporated a mandatory solidarity contribution.

However, the proposal for the Asylum and Migration Management Regulation (2020) which is a part of the New Pact on Migration and Asylum includes only “half-compulsory” solidarity instead of a binding mechanism allowing for the fair distribution of asylum seekers among all Member States, protracting unsuccessful attempts to introduce an equitable burden-sharing mechanism within the EU (Noll, 2000, p. 285–311), and which will undoubtedly be one point of contention between Member States if work on the draft is resumed. Commitment to conclude the reform of the asylum system by March 2024 might fall short, since Italy’s position that “mandatory relocations must be the heart of any solidarity mechanism” (Non paper, 2023, p. 3) is unacceptable for other Member States, thereby broadening the gap between frontline states and those unaffected directly by migratory pressures.

Finally, a solidarity crisis is also reflected in the fact that solidarity within the EU concerns inter-Member-State relations, completely ignoring solidarity with those who are in need of international protection. With, however, one exception...

Temporary Protection Directive – An Overdue Premiere

Temporary protection is a well-established notion in international refugee law (UNHCR, 2012), some even considered it a customary

international law (Perluss and Hartman, 1986). The lack of a common temporary scheme at the European level was a serious regulatory challenge, becoming especially noticeable during the war in the Former Yugoslavia (Kerber, 1999, p. 35). After protracted policy debates throughout the 1990s, the Temporary Protection Directive was introduced at the beginning of the century. This so-called “off-the-shelf” measure allows asylum seekers to avoid the cumbersome asylum process and/or prevents them from falling into irregular status. Simultaneously, it alleviates migratory pressure on asylum systems of Member States by waving the need of processing individual applications. Finally, it is perceived as an instrument of the solidarity between Member States (Thym, 2022). Despite all of this, it remained unused during previous migratory pressures in 2011 and 2015.

The Russian aggression on Ukraine forced 8 million people to flee Ukraine and internally displaced over 5 million people (UNHCR, 2023). On 4th March 2022, the European Council unanimously adopted a decision establishing the existence of a mass influx of displaced persons fleeing Ukraine (Council of the EU, 2022) and acted by, for the first time in history, activating the TPD. Under the Directive and Decision, temporary protection was granted to multiple categories of persons. With the Operational Guidelines (2022), the European Commission underlined that the directive allows for an extension of temporary protection to additional categories of displaced persons, specifically those who are displaced for the same reasons and from the same country or region of origin. Both the Council and the Commission have to be notified immediately in such cases.

The scheme on offer to protect those leaving Ukraine is quite generous. Firstly, Ukrainian citizens with biometric passports (and other third-country nationals exempted from the short-stay visa requirement) have been able to move freely within the EU once admitted to EU territory, a move called “an unexpected renaissance of ‘free choice’” (Thym, 2022). It allows those citizens to not only to choose preferred Member State where they enjoy rights attached to temporary protection, but also to join family and friends already present in the EU. Secondly, no threshold regarding indiscriminate violence in Ukraine was set. Thirdly, people enjoying temporary protection can apply for international protection at any time. If refused, they should be able to continue to enjoy temporary protection. Finally, the European Commission called for Member States to allow Ukrainians with expired documents to consider them as evidence of the identity or residence status of the person concerned (Operational Guidelines, 2022, p. 5).

Despite strong approval for this admission, dubbed “the most appropriate instrument under the current exceptional circumstances” (EPRS, 2022, p. 1), a “smart and pragmatic response” (Thym, 2022) and a “politically apt” move (Rasche, 2022, p. 1); and assurance by Vice-President of the European Commission Margaritis Schinas that “skin colour is not a criterion for EU policy” (EPRS, 2022, p. 9), the EU Commissioner for Home Affairs, Ylva Johansson, stated that it is unlikely to activate TPD again for those who arrive via the Mediterranean Sea route (Vasques, 2022), with a high probability of wholehearted solidarity with Ukrainians as a single-use measure.

Continuous Externalisation With All Eyes on Africa

Externalisation is an umbrella concept “encompassing any migration control measure affecting refugees undertaken either unilaterally or multilaterally, either extraterritorially or with extraterritorial effects” (Tan, 2021, p. 8). The external dimension of EU policy is a notion which has been developing since the 1990s. The list of so-called “outsourced” practices with various states is quite long and includes financial and operational assistance, training, and support in capacity building on migration management and border protection, among others. All of them require cooperation with countries of origin and transit, amplifying relations with African states. As diplomatically put by Rwandan President Paul Kagame and Greek Prime Minister Kyriakos Mitsotakis, both continents “share challenges related to their most valuable asset: human capital” (2022).

During the long-awaited EU-Africa Summit, which took place at the beginning of the year, European and African leaders promised a “new spirit” for the EU-African partnership. Paradoxically, in terms of migration, the post-summit declaration focused on “preventing irregular migration, enhancing cooperation against smuggling and trafficking in human beings, supporting strengthened border management, and achieving effective improvements on return, readmission and reintegration” (Joint Vision, 2022, p. 5). Durable solutions for asylum seekers and legal pathways were, unsurprisingly, vague. The EU’s pivot to Africa seems to be full of low points, but that did not prevent individual frontline Member States from working on or sustaining bilateral agreements with African states. In November 2022, Austrian Chancellor Karl Nehammer hosted a lunch with the ambassadors of fourteen African states to discuss the fight against illegal migration, including readmission agreements. Italy, disappointed by the relocation outcome, called for the creation of redistribution hubs

in third countries which would allow entry to Europe to only those who have the right to do so. Those who do not qualify would be sent back to their home countries (Pascale, 2022).

Italy’s proposal was not the only one resembling the idea of disembarkation centres which would be responsible for the first screening of asylum applications (European Commission, 2018). In September 2022, Denmark, with Rwanda, announced a “joint ambition” to collaborate on asylum by creating an asylum system centre in an African state. This process is built on an amendment introduced in June 2021 to Denmark’s Alien Act. According to Amnesty International, Rwanda should not be considered a safe country for transferred asylum seekers.

To sum up, the externalisation is criticised as: a constraint on the movement of people needing international protection who often do not have any options but to move irregularly; a factor accelerating the imbalance in protection responsibilities; and an element undermining the EU’s soft power (ECRE, 2021b, p. 1). Additionally, the “outsourcing” of migration activities raises questions on the derivative responsibility of the Member States under international law when third-country counterparts are violating human rights through their push backs or the abolition of the non-refoulement principle. In addition, seemingly neutral training sessions and capacity building programs could potentially fall under the scope of Article 16 of ARSIWA (2001). Despite that, the European Commission announced, while introducing the New Pact on Migration and Asylum, that “the EU will seek to promote tailor-made and mutually beneficial partnerships with third countries”, ignoring the fact that states with which the EU would like to partner, do not see migration as a priority (ECRE, 2021b, p. 2).

The European Union Agency for Asylum In, the European Asylum Support Office Out; FRONTEX Still Standing

One of the most visible changes to the EU migration and asylum policy after the 2015/16 crisis is undoubtedly the evolution of European migration agencies, with some even calling the phenomena *agencification* (Fernández-Rojo, 2021, p. 1). The European Asylum Support Office (EASO), established in 2010, provides the necessary tools to help Member States prepare for migratory pressure and an influx of asylum applications connected with it, and implement EU legislation on the ground. At the beginning of 2022, it was replaced by the European Union Agency for Asylum (EUAA). This new agency is responsible for

improving the functioning of the Common European Asylum System by providing enhanced operational and technical assistance to Member States and bringing more consistency to the assessment of applications for international protection. The ultimate goal of the Agency is to achieve a harmonisation of asylum practices in Member States. This Malta-based agency is less controversial than Frontex or the European Border and Coast Guard Agency.

In 2020, the European Anti-Fraud Office released a report on serious misbehaviour of Frontex employees during operational activities in Greece. The report sets out eight cases of illegal acts and cover ups by staff, including witnessing pushbacks of boats seeking to make protection claims in Greece and failing to file incident reports of various violations of fundamental rights (OLAF, 2021). Frontex has claimed that “these were practices of the past” (Frontex, 2022). Moreover, originally the level of controversy was increased by the lack of public disclosure of the report which had only be presented to selected members of the Civil Liberties, Justice, and Home Affairs’ Parliamentary Committee.

Despite patterns of fundamental rights violations and the “sheer breadth, volume, and seriousness of these findings” (Strik, 2023), Frontex is set to grow by 2027 to 10,000 staff monitoring the EU’s external borders. Frontex will also enhance its border management cooperation with four Western Balkan States, and be given a mandate to “assist those countries to manage migration flows, counter illegal migration, and tackle border crossing crime” by exercising executive powers such as border checks and registrations (Council of the EU, 2022b). It is a clear sign that, from 2019, when the first joint operation on the territory of a non-EU country was concluded, the EU is working on blocking migration beyond its borders.

Conclusions

In the area of immigration and asylum policy, the European Union and its Member States opt for a set of voluntary, *ad hoc* solutions, full of contradictions and a diminishing rights-based approach instead of a sturdy and efficient framework. Despite triggering the TPD, which was a “very positive step to ensuring solidarity and compassion towards those who are suffering and in need of protection” (CEPS, 2022, p. 32), the past year has not brought forth any answers regarding the solidarity mechanism (permanent vs. temporary; rigid vs. flexible; expressed solely in mandatory relocation and/or in financial aid). The TPD itself is not the metaphorical silver bullet for a multifaceted challenge (Savino and Gatta, 2022). With a recorded 330,000 irregular border crossings in 2022

(the highest since 2016) and the low return rate of 22%, migration will be increasingly integrated into security frameworks, amplifying Frontex’s role and focus on relations with countries of origin and transit, which, for now, seems to be the only issue that Member States tend to agree on.

Steps taken by Brussels and European capitals proved that, due to the lack of viable solutions, the situation in the European Union amounts to what in organisational theory is described as “organised hypocrisy” (Brunsson, 1986). The EU continues to decouple its principles and values (albeit rooted in law) from its actions, unleashing the “organised hypocrisy” (Lavenex, 2018). Despite the fact that the central Mediterranean route remains the world’s deadliest, with around 26,000 deaths and disappearances (IOM, 2022) to its name, and an increased number of deaths recorded on the sea migration routes leading to Spain where deaths in 2021 were 103% higher than in 2020 (Caminando Fronteras, 2022), the EU is, surprisingly, lacking even basic legislation on search and rescue activities by private entities, which number has increased significantly in recent years (Rantos, 2022, para. 3).

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