

TIGHTENING THE SCREW: USE OF EU EXTERNAL POLICIES AND FUNDING FOR ASYLUM AND MIGRATION

ECRE'S ASSESSMENT OF CHANGES TO EU EXTERNAL RELATIONS BROUGHT ABOUT BY THE PACT, THE VISA CODE AND THE NDICI

I. INTRODUCTION:

A significant part of the not-so-fresh start heralded in the Pact on Migration and Asylum published last year is the EU's focus on relations with third countries. Within a very divisive policy area, this is the one issue on which all Member States (EUMS) seem to agree. Discussing the external dimension even appears to be used as a tactic to create consensus among EUMS. In all four of the exchanges between Justice and Home Affairs (JHA) Ministers that have taken place since the Pact was launched, a significant part of the discussion focused on external affairs. The message is clear: in order to make EU asylum and migration policy work, other governments, rather than EUMS, need to do more.

ECRE has criticised the approach of outsourcing responsibilities for various reasons, including:

- » The attempt to stop irregular movement towards the EU by encouraging policies that limit movement in other parts of the world will impact negatively on people needing asylum as they often have no choice but to move irregularly. The situation is made even more acute by the lack of regular pathways to protection in the EU, all at a time where more people are displaced, when displacement is becoming increasingly protracted, and when COVID-19 and climate change act as multipliers of the vulnerabilities that crisis and conflict-affected countries and populations experience;
- » Externalisation by Europe further exacerbates the imbalance in protection responsibilities: 85% of the world's refugees live in developing countries, many in a small number of major refugee-hosting countries;
- » The dominance of home affairs objectives in external action undermines the EU's external policies and its reputation on the global stage, including its ability to address the root causes of forced displacement through development, security, governance and trade policies which instead become diverted to migration prevention objectives. Migration is a major global issue so should of course be part of EU external affairs however the issue needs to be approached in a way that respects and contributes to external affairs objectives, international commitments and obligations, including respect for human rights, and the needs and interests of the countries and people concerned.

This Policy Note analyses the substantive changes to EU external affairs proposed by the Pact and related EU policy developments. It highlights the implications for the rights of asylum seekers, refugees and displaced person and for the EU's effectiveness as a foreign policy player, and concludes with a set of recommendations.

II. ANALYSIS

SAME OLD BUT DIFFERENT – NEW ELEMENTS OF THE PACT RELATED TO EXTERNAL AFFAIRS

The external part of the Pact is best understood as a continuation of the approach embedded in the Partnership Framework of 2016, which attempted to make EU external affairs subservient to EU home affairs objectives. The European Commission (EC)'s Communication accompanying the Pact is a case in point, however it goes further than the Partnership Framework in that it stresses that migration should be a “core issue” of the EU's relations with partner countries. As before, this goal sits uneasily with the ambition to build “real mutually beneficial partnership” with third countries. There is no acknowledgment that many countries with which the EU seeks such partnerships do not see migration as a priority or at least not in the same way.

The Pact goes beyond stating ambitions in political declarations and attempts to codify some of these ideas in legislation, mostly notably in the Regulation on Asylum and Migration Management (RAMM). ECRE has [commented in detail on the RAMM](#) and summarises here proposals with implications for EU external affairs:

- » The “comprehensive approach” to asylum and migration management is informed and driven by EU home affairs objectives allowing internal affairs to influence external policies and not vice versa (i.e. adapting EU external affairs to meet the EU's internal objectives but excluding EU external affairs actors from discussions) (Article 3 and 4 of RAMM).
- » The review processes introduced assess relations with third countries according to objectives defined by home affairs but with significant implications for EU external affairs (set out in Article 7 of RAMM).
- » EUMS may contribute to responsibility sharing for asylum in Europe by building capacity or providing operational support outside Europe, in third countries (Article 45 RAMM).

WHAT DIFFERENCE DOES IT MAKE?

There are implications of integrating these issues into EU asylum legislation. First, it sends a signal that will be noticed by third countries. Including the relevant provisions in the first substantive part of the RAMM suggests that making asylum work and finding a solution to the lack of responsibility sharing within the EU starts with actions outside the EU. Second, it focuses external affairs on a select set of objectives related to asylum and migration as opposed to a more holistic reference to primary sources such as Article 21 Treaty of the European Union and Article 208 Treaty of the Functioning of the EU. Third, it expands the influence of mechanisms established in secondary legislation to enable home affairs actors to guide EU external action. Article 7 goes beyond what was agreed in the revised Visa Code (see below) and envisages that the EC can suggest “any measures which could be taken to improve the cooperation of that third country as regards readmission”. Fourth, it introduces the option that EUMS discharge their solidarity responsibilities linked to asylum in Europe by carrying out ill-defined capacity-building measures and operational support in third countries.

WORKING ON ASYLUM AND MIGRATION OUTSIDE THE EU – A CROWDED AND UNACCOUNTABLE FIELD

The proposals add to the already crowded field of home affairs actors operating outside the EU. DG Home has immigration liaison officers deployed in nine countries; the latest mandate change expanded the role of Frontex in third countries; and proposed changes to the EU Asylum Agency (EUAA) foresee greater cooperation with third countries. This carries significant risks, most importantly to the principle of *non-refoulement*, as oversight and accountability for activities outside the EU are lacking, and the issue of legal accountability, especially in the case of deployment of Frontex or EUAA personnel to third countries, has not been satisfactorily addressed. It also undermines efforts to create greater coherence in EU external affairs, which should be developed and led by the EEAS, including throughout the networks of EU Delegations in countries.

WHAT LIES BEHIND THE COMPREHENSIVE APPROACH?

Overall, it seems that a genuine comprehensive approach informed by interests from all sides, internal and external action, including foreign, security and development objectives is not sought. Instead, the ongoing trends for internal affairs institutions to both expand influence over external policies and to set up parallel foreign policy structures continues. For instance, the proposed Recommendation on Migration Preparedness and Crisis Blueprint suggests the setting up of a network bringing together all of the EU's existing crisis management mechanism for the purpose of “more efficient migration management, building resilience and preparedness as well as organising a response to a migration crisis”. What it will add to the five already existing early warning and crisis response mechanisms that are listed is not clear, except

that it - again - serves as a tool for allowing control over external affairs with developments in EU external affairs including trends in displacement and migration, classified as potential risks for EU asylum systems. Similarly, the role of the EU Return Coordinator in relation to EU external affairs is not well defined and in negotiations on the Pact proposals, the suggestion has been made that the position will support EUMS in their relations with third countries to which returns should take place, implying that a significant part of the job is outward facing.

VISA CODE AND ANNUAL ASSESSMENT OF READMISSION COOPERATION: AN ADDITIONAL ELEMENT

During the last revision of the Visa Code in 2019, the obligation for the EC to assess cooperation with third countries on readmission annually was introduced. This should take into account the number of return decisions issued for a particular nationality and cooperation by the third country in readmitting people. The assessment can go beyond the admission of a country's own nationals to include readmission of third country nationals who have transited through the territory if this is covered by a Union or bilateral readmission agreement. This provision is particularly problematic from the human rights perspective as it creates the risk of indirect (or chain) *refoulement*.

Where the EC considers that a country is not cooperating sufficiently, it can suggest that EUMS adopt an implementing decision that alters the visa regime between the EU and the respective country. This can affect processing times, cost of visas and the validity of multi-entry visas. If the cooperation is deemed positive, steps may be taken to reduce the length or costs of the visa process or to expand the validity of multi-entry visas.

The EC has completed its first assessment on readmission cooperation based on data on return and irregular arrivals provided by EUMS, Eurostat and Frontex. The third countries covered by the assessment are not listed but based on the selection criteria, it is likely to include over 35 countries. While the report which is submitted to the Council is not public, a related [Communication](#) summarises the main findings and illustrates that the ambition of the EC is to go beyond visas and take measures in other policy areas to improve cooperation on readmission. Article 7 of RAMM is highlighted as an opportunity in this respect, which confirms the concern of the increasing dominance of home affairs objectives in EU external affairs outlined above.

MIGRATION CONTROL CONDITIONALITY: THE NEW REALITY OF EU DEVELOPMENT FUNDING

Attempts to make allocation of development assistance dependent on the extent to which third country governments cooperate with the EU on its objectives related to migration have succeeded. Article 8.10 of the Neighbourhood, Development and International Cooperation Instrument (NDICI), which governs EU external funding for the next seven years, stipulates that the NDICI is part of an approach which “shall combine all appropriate tools and the necessary leverage through a flexible incitative approach with, as appropriate within this context, possible changes in allocation of funding related to migration in accordance with the programming principles of this Regulation. It shall take into account effective cooperation and implementation of EU agreements and dialogues on migration.”

Cooperation on migration is to be reviewed annually and could result in adjustments of funding allocations which, [as argued elsewhere](#), undermines the purpose of development assistance, leads to less effective spending, and is unlikely to reach the desired objective. What aspects are considered in the assessment is yet to be defined. ECRE argues that the indicators used need to reflect development goals. They could include expansion of access to asylum (e.g. number of people granted refugee status) and regularisation programmes (number of people granted legal status); facilitation of regional mobility; recognition of international legal standards (e.g. ratification of the Kampala Convention); and implementation of international commitments (e.g. activities to support the Global Compacts on Refugees and Migration).

Another new element is the dedicated allocation of 10% of NDICI to actions supporting management and governance of migration and forced displacement which amounts to EUR 7.946 million. As forced displacement and migration is not a priority for the majority of countries in which NDICI is spent, this represents significant challenges when it comes to preserving the pretence of local ownership (country-led development), ensuring development effectiveness, and compliance with EU and international obligations on development and human rights. To ensure the latter, a risk management framework covering international human rights and other legal obligations for EU funding on forced displacement and migration should be developed.

III. RECOMMENDATIONS

To EU Member States

- » Adopt a position on the RAMM which removes Article 3(a), Article 7 and the reference to third countries in Article 45(1)(d). If these articles are maintained, safeguards to guarantee EU external actors and related objectives guide external affairs and to ensure compliance with EU and international obligations should be introduced (see ECRE's Comments on the RAMM).
- » Increase fundamental rights monitoring and legal accountability for deployments in third countries in the negotiations on the EUAA proposal and through the Management Committee of Frontex.

To Members of the European Parliament

- » Adopt a position on the RAMM which removes Article 3(a), Article 7 and the reference to third countries in Article 45(1)(d). If the articles are maintained, safeguards to guarantee EU external actors and related objectives guide external affairs and to ensure compliance with EU and international obligations should be introduced.
- » Ensure consistent oversight of spending under NDICI, starting with the call for the introduction of a risk management framework for EU funding on forced displacement and migration for which Article 8.15 provides a basis to ensure the observance of international human rights and other legal obligations.
- » Monitor the deployment of Frontex in third countries and increase fundamental rights monitoring and legal accountability for deployments in third countries in the negotiations on the EUAA proposal.

To external affairs Directorate Generals and the European External Action Service

- » Base the assessment of cooperation on migration under NDICI on indicators focused on the right to asylum, contribution to mobility and development-related aspects of migration, and fulfillment of legal obligations and international commitments.
- » Introduce a risk management framework for EU funding on forced displacement and migration under Article 8.15 NDICI to ensure the observance of international human rights and other legal obligations.