

EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?



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The New Pact on Migration and Asylum presented by the European Commission on 23rd September 2020 assigns a prominent place to cooperation with third countries of origin and transit of migrations flows. As an essential element of any coherent and efficient immigration policy, this external dimension receives, in the New Pact, considerable attention, occupying a whole section of the Pact – section 6, devoted to “working with our international partners” – while numerous references to international cooperation can also be found throughout its other parts.

From the very start of this political orientation document, the Commission recalls how the internal and external dimensions of migration are inextricably linked ([here](#), p. 2), reaffirming the conceptualization of this external dimension as it has traditionally been understood in the EU, as a means to facilitate the achievement of the objectives of the immigration and asylum policies inside the Union. The priorities that EU partnerships with third countries should pursue range, according to the New Pact, from addressing the root causes of migration and developing legal pathways both for protection and legal migration purposes to fostering readmission and strengthening migration management capacities in third countries; all these aims to be achieved under comprehensive, balanced and mutually beneficial alliances. The Commission is offering what it qualifies as a “fresh start” to assume this endeavour and even a “change of paradigm” in migration cooperation with third countries.

Still those familiar with the international agenda of the EU on migration will have the impression that they have ‘heard this song before’. This post aims at assessing whether the way in which cooperation with partner countries on migration has been addressed in the New Pact preserves the existing approach or comes with any innovations, especially on the tools to be used. Therefore, after evaluating the allegedly new Commission’s orientations, the focus will be put on the instruments foreseen for the design and implementation of this international cooperation, by analysing what is new, what is missing and what is in excess within the ‘toolbox’ of this external dimension.

A new paradigm for cooperation with partner countries?

According to the Commission’s press release, the Pact presents “a change of paradigm in cooperation with non-EU countries”, cooperation that will be centred on comprehensive, balanced and tailor-made migration partnerships, mutually beneficial for the parties involved. The revolutionary character of this approach is extremely doubtful. The approach adopted towards cooperation with third countries on migration has been ‘comprehensive’, ‘global’, ‘balanced’ – and some other

synonyms – since the European Council in Tampere in 1999. The idea was particularly ‘officialised’ at the Global Approach to Migration (GAM) adopted in 2005, which has been considered, since then, the main political inspiring framework of the external dimension of EU migration policy (according to the GAM, cooperation with partner countries had to combine the diverse dimensions of migration in the search of a balance between fighting against irregular migration, promoting mobility and legal migration, as well as maximising migration – development synergies). Moreover, the idea of “mutually beneficial partnerships” ([here](#), p. 17), in which not only EU interests but also those of partner countries are taken into account, already appeared at the adoption of the revised Global Approach to Migration and Mobility (GAMM) in 2011, which also added the external dimension of asylum.

Thus, we have indeed ‘heard this song before’. Neither the goals of mainstreaming migration into the whole external action of the EU and of mobilising different external and internal policies, nor the conditionality between mobility/legal migration opportunities and control-oriented commitments, are innovative aspects in the EU approach ([see Guild’s contribution to this collection](#)). The same can be said about the political emphasis on cooperation on return, readmission and fighting against migrant smuggling, as these objectives continue to appear as the most relevant pillar of the EU stance on international cooperation on migration (see contribution by Moraru). It was the (already) “New Partnership Framework on Migration”, adopted in the summer of 2016 under the European Agenda on Migration, that brought back the emphasis on securitisation and conditionality between the mutual engagements of EU and Member States, on the one hand, and third countries, on the other, turning thus the ‘global’ and ‘comprehensive’ approach into a formality, which is being now simply consolidated. And it was the 2019 reform of the Visa Code (art. 25a) which introduced a concrete mechanism to implement negative conditionality between a third country’s cooperation on readmission and the issuance conditions for Schengen visas to its nationals. That mechanism was considered unfair to EU partners’ citizens and prejudicial to good international relations (see Guild’s analysis [here](#)), while it could also lead to a violation of the visa facilitation agreement the EU might have concluded with that country. In this regard, the New Pact and its legislative package consolidates this controversial conditionality principle by extending it to the identification of “any measure” that could improve the readmission cooperation of that country’s authorities ([art. 7 Proposal for an Asylum and Migration Management Regulation](#)).

The New Pact also explicitly insists on the traditional “root causes of migration” approach, by which development cooperation is used to reduce migration from countries of origin (see Chetail’s chapter [here](#)). Unfortunately, controversial statements are once again put on the table, such as affirming that “assistance will be targeted as needed to those countries with a significant migration dimension” ([here](#), p. 20). Prioritising development assistance to countries posing migration challenges means deviating EU development cooperation policy from its primary objective in the Treaties, which is eradication of poverty (see [here](#), p. 178 ff). That deviation appears even more problematic in practice given that funds are limited and therefore devoting part of EU development assistance to migration purposes would mean that the needs of developing countries “without a migration dimension” would be overlooked. The Pact is therefore not only preserving the existing approach on migration cooperation with third countries, but it seems to be also incurring in the same flaws.

EU funding – hopefully from the Asylum and Migration Fund and Internal Security Fund and thus unrelated to development cooperation – will also be essential to achieve the goal of strengthening migration governance and management in partner countries through capacity building actions ([here](#), p. 20-21). The latter includes border management, search and rescue capacities, or well-managed asylum and reception systems, for which the operational support of EU home affairs agencies is explicitly emphasized in the Pact (see [Tsourdi’s contribution](#) to this collection). The novelty here might lie in the provisions on external action foreseen at the already existing proposal for a European Agency for Asylum Regulation, in which cooperation with third countries appears to be more structured and strengthened – including coordination of information exchange, operational activities, coordination of resettlement actions and implementation of international agreements on asylum -, mirroring thus the quite developed external action of the European Border and Coast Guard Agency. For the rest, the Pact is not very specific on the actions through which the Union will improve refugee protection worldwide and support host countries, apart from providing funding and mobilising national efforts on resettlement.

Assessing the Instruments in the ‘toolbox’: what’s new, what’s missing, what’s in excess?

Whilst EU cooperation with partner countries occupies a prominent place in the New Pact, detailed attention has not however been paid to clarify the set of instruments the EU and its Member States have at their disposal to implement this external dimension. In the following lines, an assessment will be made on the (limited) innovations and omissions the New Pact contains regarding the toolbox for cooperation with third countries, including also what, in my view, should have been left outside the Pact.

What is new?

In addition to refer to already existing instruments such as readmission agreements, status agreements, or visa facilitation commitments, the Pact introduces the idea of launching *Talent Partnerships* under the objective of developing legal pathways to Europe and, more particularly, advancing cooperation with partner countries on mobility and legal migration ([here](#), p. 23). The proposed new instrument appears as a EU policy framework to cooperate with third countries through coordination and funding in better matching labour and skills needs in EU Member States, as well as supporting mobility schemes for work or training and capacity building in fields such as labour market, skills intelligence, vocational education, integration of returning migrants and diaspora mobilisation. The Commission’s proposal is inspired from the so-called *Global Skills Partnerships*. These instruments, foreseen in the [UN Global Compact for Safe, Orderly and Regular Migration](#), are bilateral agreements used to foster skills development, by which the country of destination provides capacity building and financing to train potential migrants in countries of origin with the skills needed in the country of destination. As they create skills before migration takes place so that brain drain is avoided and they also include training for non-migrants, they constitute both a migration management and a development tool. Talent partnerships, whose contours are explored in detail by Sarolea and Farcy in this blog, are also presented as “part of the EU’s toolbox for engaging partner countries strategically on migration” ([here](#), p. 23), and thus an incentive for control-oriented cooperation. According to the Commission, a strong engagement of Member States will be needed, most probably because of the exclusive power they preserve on determining the volumes of admission of migrant workers to the EU under [art. 79.5 TFEU](#), although it is unclear in the text whether these instruments will provide for real schemes for the admission of labour migrants. Unfortunately, only a timid intervention of the Union is offered here and in the rest of ‘legal pathways’ that the Commission is suggesting (such as the [recommendation](#) on resettlement commitments). This evidences, once again, a certain lack of will in honouring the Treaty objectives to make the most of EU competences to develop ‘a common immigration policy’ and ‘a common European asylum system’.

The New Pact also refers to tailor-made *Counter Migrant Smuggling Partnerships* with third countries, by which the EU will provide support in capacity building on law enforcement and operational capacities, information exchange and actions on the ground through common operations and joint investigative teams, as well as information campaigns on the risks of irregular migration and on legal alternatives ([here](#), p. 16). As these elements are already being part of the EU external action on migration, together with the operational support of EU Agencies also highlighted in the Pact, we may wonder whether we are in front of a formal cooperation instrument of a truly innovative character or just a new label for addressing anti-smuggling cooperation.

What is missing?

Firstly, certainty on the toolbox and the instruments it contains is clearly missing in the Pact. More particularly, it remains uncertain whether previous instruments used by the EU to cooperate with third countries on migration would continue to be explored, such as Mobility Partnerships ([MPs](#)) and Common Agendas on Migration and Mobility ([CAMM](#)), the emblematic instruments of the GAMM. Apart from implementing existing ones, will these general and comprehensive policy frameworks for migration cooperation continue to be offered to new countries? Are, for instance, Talent Partnerships conceived as an instrument serving to finally honour the legal migration engagements included in MPs? Will the latter be replaced with new general umbrella-like instruments or will the EU simply

address the different dimensions of migration through diverse and specific agreements with partner countries? Without having accurate replies to these questions, I would rather bet on the abandonment of MPs and CAMMs as general policy frameworks of cooperation given that the Union has been departing from the GAMM in the past years.

Secondly, a reference to association agreements is also missing in the New Pact as an important tool, in my view, of the EU external action on migration. The potential of this explicit external competence, enshrined in Art. 217 TFEU, in order to address legal migration issues avoiding the complications inherent to the exercise of Union external competences in this field is to be highlighted ([here](#), p. 185 ff), in addition to their traditional importance for integration purposes by providing a reinforced status of rights for migrants coming from associated countries. More recently, Association Councils have also been used as tools for formalising migration dialogues with partner countries (see [here](#), p. 28-30) or developing cooperation on specific migration-related fields, such as [social security coordination](#). In spite of the importance they may have for migration purposes, the Pact does not mention these ‘global’ international agreements.

What is in excess?

Unfortunately, some other instruments are still there, receiving attention in the Pact as tools of international cooperation on migration. I refer, on the one hand, to military missions and operations launched under the Common Security and Defence Policy (CSDP), which, according to the New Pact, “will continue making important contribution” to the fight against migrant smuggling ([here](#), p. 16). In spite of the advantages for migration cooperation that the mobilisation of all the arsenal of EU external action may have, it is at least debatable, in my view ([here](#), p. 182 ff, and [here](#)), whether CSDP instruments may be used for migration purposes in light of the horizontal delimitation of competences. The application of the ECJ doctrine of the adequate legal basis and the mutual non-affectation clause of Art. 40 TEU may lead rather to the need of resorting to a TFEU instrument such as Frontex and its powers to launch joint operations with and in third countries, including capacity-building and training activities.

Soft law is still present too. Non-legally binding instruments are preserved – implicitly as usually – as a tool for migration management cooperation in the Pact. It is true that the political relevance and added value of soft law instruments of cooperation must be acknowledged, either as a locomotive of subsequent hard law instruments (eg. MPs) or as a way to achieve – a quite otherwise difficult – consensus at the international level (eg. UN Global Compacts). It is however worrisome to find an explicit reference to soft law precisely on readmission cooperation, (the New Pact refers both to “EU agreements and arrangements”, [here](#), p. 21, the latter exemplified in the [Joint Way Forward on migration issues with Afghanistan](#) and some other informal EU [readmission arrangements](#)), in which legal safeguards, democratic accountability and monitoring seem all the more necessary (see [Ott](#)). In addition, the proposed Talent Partnerships are very likely to present the form of non-binding agreements, although we will have to wait for the high-level conference the Commission will organise with Member States and key EU stakeholders for their launching. To this effect, it should be recalled that the Pact endorses a system “fully grounded on European values and international law”, which means that cooperation instruments and their implementation must abide by the safeguards inherent to the rule of law.

Concluding remarks

The New Pact on Migration and Asylum presented by the Commission attributes great political importance to its external dimension by qualifying cooperation with partner countries as one of the most salient pillars of the EU migration policy. Even the definition of the EU “comprehensive approach” of the whole policy, inserted in the [Proposal for an Asylum and Migration Management Regulation](#), includes cooperation with relevant third countries as its first component. However, contrary to the Commission’s position, the orientation and objectives presented in the Pact do not follow neither a “change of paradigm” nor a “fresh start”, but ‘more of the same’, just the existing approach with slight nuances.

The fact that nearly most of the objectives, features and instruments of the cooperation to be established with third countries on migration are not new probably explains why the emphasis put by the New Pact on effective implementation of the existing rules seems particularly apposite for the external dimension. Indeed, further new instruments for cooperation might not be necessary, the accent is thus to be put in exploiting the toolbox the Union has at its disposal and in honouring the commitments in which it has already engaged.

Precisely, an essential duty to respect when implementing this external dimension and putting into practice the toolbox of cooperation instruments is the need to ensure coordination between the supranational and national levels of action, especially in a field in which the intertwinement of EU and MS competences is so evident. To this effect, the Commission's New Pact highlights that the EU and its Member States shall act united and calls for an effective and systematic coordination between both levels of action (here, p. 18). The Pact does not specify however – just as the Stockholm Programme ten years ago, which also insisted on this duty and even asked the Commission for a report – the ways and means by which this coordination should take place. It will be of little use to reformulate approaches, priorities or instruments if one of the most pressing institutional challenges for the effectiveness of this external dimension is not adequately addressed.

Further Reading

Odysseus blog

Majd Achour and Thomas Spijkerboer, “The Libyan litigation about the 2017 Memorandum of Understanding between Italy and Libya”, EU Immigration and Asylum Law Blog of 2 June 2020.

Elsbeth Guild, “Amending the Visa Code: Collective Punishment of Visa Nationals?”, EU Immigration and Asylum Law Blog of 10 May 2019.

Mauro Gatti, “EU States’ Exit from the Global Compact on Migration: A Breach of Loyalty”, EU Immigration and Asylum Law Blog of 14 December 2018.

Mauro Gatti, “Too Much Unity in the European Union’s External Migration Policy?”, EU Immigration and Asylum Law Blog of 20 July 2018.

Paula García Andrade, “External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum”, EU Immigration and Asylum Law Blog of 17 January 2018.

From Tampere 20 to Tampere 2.0.

Elsbeth Guild, ‘The Global Approach and Partnership Framework’, in Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer (eds), *From Tampere 20 to Tampere 2.0. Towards a new European consensus on migration (EPC, 2019)*, p. 49-60.

Vicent Chetail, ‘Migration and Development’, in Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer (eds), *From Tampere 20 to Tampere 2.0. Towards a new European consensus on migration (EPC, 2019)*, p. 39-48.

Relevant works by the author

Paula García Andrade, “The EU Accession to the Geneva Convention Relating to the Status of Refugees: Legal Feasibility and Added Value”, *Spanish Yearbook of International Law* 23, 2019, pp. 193-211, available here.

Paula García Andrade, “EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally?”, *Common Market Law Review* 55, 2018, pp. 157-200.

Paula García Andrade, “The Duty of Cooperation in the External Dimension of the EU Migration Policy”, in S. Carrera (Ed.), L. den Hertog (Ed.), M. Panizzon (Ed.), D. Kostakopoulou (Ed.), *EU*

External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes, Brill/Nijhoff, 2018, pp. 299-325.

Paula García Andrade, “The role of the European Parliament in the adoption of non- legally binding agreements with third countries, in J. Santos Vara (Ed.), S. Sánchez Rodríguez-Tabernero (Ed.), The Democratisation of EU International Relations through EU Law, Routledge, 2018, pp. 115-131.

Paula García Andrade and Iván Martín, EU cooperation with third countries in the field of migration, Study for the LIBE Committee, European Parliament. Nº. PE 536.469, Brussels, October 2015, available [here](#).

Relevant Legal and Policy Documents:

Commission Communication on a New Pact on Migration and Asylum, [COM\(2020\)_609](#) of 23 September 2020.

Proposal for a Regulation of the European Parliament and the Council on asylum and migration management and amending Council Directive concerning the status of third-country nationals who are long-term residents, [COM\(2020\)_610](#) of 23 September 2020.

Commission Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, [C\(2020\)_6467](#) of 23 September 2020.