

Well before the French Presidency took over the European Council in July 2008, it was well known that immigration was going to constitute one of its central priorities. The French enthusiasm coincided with an increasing interest by Barroso's Commission in this domain.¹ The French government and the European Commission started to fine-tune their respective strategies and 'the way forward' through a series of informal meetings. This materialised in the presentation of two policy outputs: First, a Commission Communication on a Common Immigration Policy for Europe and another on a Policy Plan on Asylum;² and second, various drafts of the French Presidency's European Pact on Immigration and Asylum, the latest of which appeared on September 3rd. This Policy Brief refers to all previous drafts offered up for public comment so far.

The intersection between these initiatives raises a number of questions: First, what are the nature, context and key issues of the Pact? Does it present anything really new to the current state of affairs in EU law and policy? Second, does the EU really need a pact on immigration and asylum, given the ongoing processes of Europeanisation surrounding these policy domains? And third, is the logic driving the Pact fully compatible with the interests of the EU interests and the

¹ Commission Communication, The European Interest: Succeeding in the Age of Globalisation, COM(2007) 581 final, Brussels 3.10.2007. See Bigo, et al., (2008).

² Commission Communication, A Common Immigration Policy for Europe: Principles, Actions and Tools, COM(2008) 359 final, 17.6.2008, Brussels. Commission Communication, Policy Plan on Asylum: An Integrated Approach to Protection across the EU, COM(2008) 360, 17.6.2008, Brussels.

The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights?

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Commission's priorities, or does it rather represent a competing model between 'more Europe' and the principle of subsidiarity over immigration, borders and asylum?

I. The European Pact on Immigration and Asylum: Context and Key Issues

The Pact constitutes a political document, and therefore a non-legally binding act, providing the general lines and principles expected to guide future EU policies on immigration, asylum and border management. Indeed, it needs to be read in conjunction with the current policy processes paving the way for the adoption of the next multi-annual (five-year) programme in the fields related to an Area of Freedom, Security and Justice (AFSJ).³ The successor to the current Hague Programme⁴ is expected to be agreed under the auspices of the Swedish Presidency sometime during the second half of 2009. The French Presidency therefore aims at having an early impact on these

³ Among other ongoing processes, see the Report by the Future Group (2008).

⁴ Brussels European Council, Presidency Conclusions, 4 and 5 November 2004, 14292/1/04, Brussels, 8 December 2004, Annex I, "The Hague Programme: Strengthening Freedom, Security and Justice in the European Union", point 1.5. 2005/C53/01, OJ C53/1, 3.3.2005.

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processes by getting the Council to agree on a set of common principles upon which the future policy agenda on immigration and asylum will be established and developed during the period 2009-2015 in this regard. The Pact states: “The programme that will be the successor of the Hague Programme in 2010 will, in particular, enable the Pact to be transposed further into practical actions.”

The Pact has been through a number of drafts and amendments so far, many of which have not been made publicly available. Most recently, a public version of the text was discussed at the JHA Council meeting in Brussels on 24-25th July 2008.⁵ At this meeting the Council took account of the “broad measure of agreement” reached between member state representatives at the informal JHA Council meeting in Cannes on 7-8th July 2008, and proposed its adoption at the next European Council Summit of October 15-16th. A new non-official version was circulated at the beginning of September.⁶

What are the key issues addressed in the Pact? The text proposes concrete measures in relation to a set of common principles labelled as “basic political commitments”. The five commitments are expressly stipulated as follows:

First, organise legal immigration to take account of the priorities, needs and reception capacities determined by each member state, and encourage integration.

Second, control irregular immigration by ensuring the return of irregular aliens to their country of origin or a country of transit.

Third, make border controls more effective.

Fourth, construct a Europe of asylum.

Fifth, create a comprehensive partnership with the countries of origin and transit to encourage the synergy between migration and development.

It therefore calls upon the European Council to adopt the concrete actions as outlined in the sections below, in order to give shape to these five common tenets.

1.1. Legal Migration

The Pact states that it is for each member state to determine its legal migration needs including “the conditions of admission” and quotas. It suggests that this should be done in conjunction with countries of origin. The Pact uses the term “*immigration choisie*” or selective immigration, which has been quite

contentious in France. It recommends selective immigration policies to be developed by the member states taking into account the perceived needs in their own labour markets and the potential impact that domestic policies will have on other member states. Further harmonious integration of third country nationals (TCNs) and fair treatment are also considered to be key factors in determining selective immigration. It then encourages the member states (rather than the European Commission or the EU) to:

- Make the EU an attractive place for highly qualified TCNs and to take further measures to facilitate the admission and movement of students. The Pact does not mention the Commission’s proposal for a directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, often qualified as the Blue Card Initiative.⁷
- Privilege systems for temporary and circular migration.
- Regulate family migration “more effectively” – each member state assessing its integration capacities for family members, in particular regarding support and accommodation needs and language knowledge. The Pact does not mention the Council Directive 2003/86 on the right to family reunification for TCNs, which sets out EU-wide hard law on the conditions for family reunification and which applies in all member states (except Denmark, Ireland and the UK).⁸
- Improve information on migration and the tools available, and foster the creation and use of databases on migration and TCNs.
- Create integration policies that are based on a “balance between migrants’ rights and duties” with a particular emphasis on measures promoting language acquisition and access to employment, and stressing “respect both for national identities of member states and the European Union and their fundamental values”. It also calls on member states “to take into account, ... the need to combat any forms of discrimination to which migrants might be exposed”.
- Exchange information and best practices on reception and integration of TCNs on the basis of national policies.⁹ The Pact refers to the EU

⁷ See the Commission’s Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637 final, Brussels, 23.10.2007. See E. Guild (2007).

⁸ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003.

⁹ See Carrera (2008) for a critique.

⁵ The July 4th version of the Pact is available at www.libertysecurity.org. See also JHA Council Meeting 2287th, Brussels, 24 and 25 July 2008, 11653/08.

⁶ The September 3rd non-official version of the Pact is available at www.statewatch.org

Framework on Integration and the Common Basic Principles for Immigrant Integration Policy adopted by the Council in November 2004.¹⁰

1.2. Irregular Migration

The Pact continues to use the term ‘illegal’ migration, which is no longer favoured in international circles where immigration is under discussion. The alternative terms, such as ‘irregular’ or ‘undocumented’ migration are much less normatively charged and many international institutions consider that they enhance the possibilities for discussion. Under this heading the Pact calls for three specific actions:

- The reinforcement of cooperation among member states and countries of origin and transit to fight irregular immigration, taking into account the need for a ‘Global Approach to Migration’.
- The expulsion or departure of all TCNs irregularly on the territory of a member state; here the member states are expected to take action against persons irregularly present. It is also said that “each Member State undertakes to ensure that this principle is effectively applied with respect for the law and for the dignity of the persons involved, giving preference to voluntary return”. Further, the Pact calls for the application of Directive 2001/40 on the mutual recognition of expulsion decisions of TCNs¹¹ – the result of a Portuguese proposal before the Commission had a monopoly over legislation. This last Directive has proved very unpopular among the member states and all evidence shows it is little used. In its nature it is an intergovernmental style of Directive as it is based on the mutual recognition of expulsion decisions; for that reason is very difficult for officials to make use of it.
- The proposition that all states are required to admit their nationals (which as a position in international law is not so clear – states cannot refuse entry to their nationals but that is a different obligation from admitting their nationals if they have not expressed an individual desire to re-enter). On the basis of the proposition, the Pact calls for a wide range of measures including agreements with third countries to enforce expulsion measures.

1.3. Border Controls

The Pact calls for six measures with mixed responsibilities between the member states and the EU

institutions. A strong intergovernmental approach is also evident here in the sentence “the European Council recalls that each Member State is responsible for the controls of its section of the external border”. These measures include the requirement to:

- Improve external frontier controls at all external borders;
- Ensure that biometric visas are ready for issue everywhere by 1st January 2012;
- Provide more powers and resources to FRONTEX (the European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union) to carry out temporary or permanent border control operations (specialised offices) and potentially to consider the setting up of a European system of border guards;¹²
- Continue to develop modern technologies and electronic systems of entry and exit (presumably accompanied by databases) and make the existing databases interoperable within the context of the EU’s integration border management strategy;¹³
- Develop cooperation with countries of origin and transit of migrants in order to reinforce border controls, including further training and improving equipment; and
- Improve the modalities and frequency of Schengen border control evaluations.¹⁴

1.4. Asylum

The Pact is complimentary to the progress that has been made in the asylum field in recent years, with no mention of criticism from UNHCR, but an acknowledgement of the challenge presented by the increasing divergence across the member states in recognition rates among asylum-seekers from the same countries of origin (such as Iraq). In order to improve the situation, the Pact recognises that the reinforcement of external border controls must not prove an obstacle to the protection of refugees but gives no suggestion as to how to achieve this. Four actions are foreseen:

- The creation in 2009 of a bureau or European Support Office that would facilitate information exchange and practical administrative cooperation on asylum, but would have no power to give definitive instructions or decisions. The Office would “use the shared knowledge of countries of

¹⁰ Council of the European Union, Justice and Home Affairs Council Meeting 2618th, Brussels, “Common Basic Principles on Immigrants Integration”, 14615/04, 19 November 2004.

¹¹ Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals of 28 May 2001, OJ L 149, 2.6.2001.

¹² Jeandesboz (2008); Carrera (2007).

¹³ Carrera et al., (2007). Commission Communication, Preparing the next steps in border management in the European Union, COM(2008) 69 final, 13.2.2008.

¹⁴ Faure (2008).

origin to harmonise national practices, procedures and consequently decisions”. And notably:

- Establish a single asylum system by 2012 with common standards on refugee protection and subsidiary protection; sadly, the disparities in recognition rates among the member states are not the result of different substantive interpretations of the existing directives in the field but rather a different appreciation of the facts, particularly in countries of origin;
- Put into place procedures to deal with a ‘massive influx’ of asylum seekers that would allow the ‘lending’ of officials among the member states and effective solidarity (unspecified);
- Reinforced cooperation with UNHCR with a possible resettlement programme within the EU and a system of cooperation with third countries to reinforce their protection capacities; and
- The provision of training on fundamental rights of “persons in need of protection” to the personnel responsible for external border controls.

1.5. *Migration and Development*

Under this heading the Pact again notes the EU’s Global Approach to Migration.¹⁵ It foresees a relationship between irregular migration, legal migration and development, particularly in the east and the south of the EU. Under this heading the Pact has eight proposals:

- Agreements either at the EU level or bilaterally with countries of origin and transit which include provisions on legal migration, irregular migration, readmission and development;
- Member states should consider offering legal migration possibilities to countries, particularly for temporary purposes (circular migration);
- Develop policies within third countries to inhibit and combat irregular migration;
- Integrate immigration policies with their development counterparts;
- Support development projects that allow TCNs to invest at home;
- Prepare a second ministerial conference in the Euro-Africa programme;
- Accelerate the implementation of tools developed in the Global Approach that provide for ‘migration

balances’, ‘cooperation platforms’ and ‘partnerships for mobility’ and ‘circular migration programmes’ to be established and a balance between migratory routes in the south and the east within the framework of readmission agreements. In this regard, it is necessary to underline that the Council has already concluded two mobility partnerships with Cape Verde and Moldova covering these issues, and is negotiating similar agreements with Senegal and Georgia;¹⁶ and

- Develop the migration perspectives of the Neighbourhood Policy.

II. **Innovative Elements of the Pact: Nationalism and Intergovernmentalism**

In light of the above, can we identify anything truly innovative in the principles and policy initiatives provided by the Pact? There seems to be very little that is new in a majority of the measures. Most of them are, or have been, already part of previous initiatives and/or discussions coming from some member states, the Council, the European Commission and other EU institutional actors. In addition to its purported political significance, perhaps one of the most innovative elements characterising the Pact on Immigration and Asylum is the very nature of some of the policies being proposed, which are in our view, driven by two distinct guiding principles: nationalism and intergovernmentalism.

2.1. *Nationalism*

The Pact includes certain initiatives greatly inspired by current French legislation and public policies dealing with immigration and integration. The strategy of the French Government has been to bring supranational legitimacy to some of its current priorities, visions and laws affecting human mobility and social inclusion and to transform them to some extent into European trends. This is most especially evidenced when looking at some of the actions put forward by the Pact in relation to family reunification, integration and labour immigration. By means of illustration, the Pact calls for regulating “more efficiently” family reunification by taking into account its own reception capacities and families’ capacity to integrate, as evaluated by their resources and accommodation in the country of destination and, for example, their knowledge of that country’s language.

This is complemented with an allusion to “specific measures...that will stress respect for the identities of

¹⁵ Commission Communication, The Global Approach to Migration one year on: Towards a Comprehensive European Migration Policy, COM(2006) 735 final, Brussels, 30.11.2006.

¹⁶ Council of the EU, Joint Declaration on a Mobility Partnership between the European Union and Cape Verde, 9460/08, Brussels, 21 May 2008. See also Council of the EU, Joint Declaration on a Mobility Partnership between the European Union and Moldova, 9460/08, Brussels, 21 May 2008.

the Member States and the EU and for their fundamental values”.

The original draft version of the Pact contained a direct reference to an integration contract. This was inspired by the current *Contrat d'accueil et d'intégration* (CAI) and the *Contrat d'accueil et d'intégration pour la famille* (CAIF) currently provided in French immigration law.¹⁷ We remind the reader about the significance of these two contractual immigration-control measures at times of restricting access by TCNs to security of residence and family reunification in France. The allusion to the integration contract was finally taken out of the Pact's wording partly as a consequence of the strong opposition by some member states, particularly the current Spanish government.¹⁸ While the disappearance of the contract alleviated the 'Frenchness' inherent in the proposals related to the dimension of integration policy, it is worth underlining that the current wording of the Pact still refers to specific measures to promote language-learning and stressing the need to respect the identity of the member states, something which in our view allows for, and therefore promotes, this kind of state practices. It is however to be welcomed that the September version of the Pact includes, in contrast with the July one, a new sentence stating:

The European Council also calls upon the Member States to take into account, by means of appropriate measures, the need to combat *any forms of discrimination* to which migrants may be exposed. (Emphasis added.)

Indeed, one of the central innovative ingredients of the Pact is for a particular member state to successfully transplant some its own normative and political priorities to the EU level. In light of this, the Pact needs to be understood as a countervailing strategy in relation to the Community method and destined to universalise and convert to the European level some ideological lines substantiating policies and laws presenting a predominantly national character. The French understanding of the nature and scope of Europeanisation processes over issues related to human mobility and diversity weakens the EU political project of progressively building a common immigration policy. The 'European' is in this way instrumentalised to legitimise contested national politics in these sensitive areas, and even universalises them to the

entire EU by becoming part of the European immigration and asylum policy.

2.2. Intergovernmentalism

The Pact is endowed with an inherently intergovernmental nature. While it has been presented as 'European', we argue, however, that its adoption will weaken the possibilities for the EU to fully accomplish a 'common' and harmonised immigration and asylum policy that is coherent, global and integrated. The Pact is very much oriented towards the member states and it is driven by a predominantly intergovernmental logic prioritising the competences of the member states over those of an EU at 27. By doing so it fosters the predominance of the national level over the policy domains of immigration, asylum and borders, which at the current stage of European integration, one would not really expect! It will boost the ongoing tension between the establishment of a European immigration and asylum policy and the perpetuation of member states' competences and power of discretion over these fields. The significance of the principle of subsidiarity will be reinvigorated. The respective interests of some member states, and their current governments, will constitute one of the key factors guiding the rationale of European policies. This will prevent the achievement and materialisation of any 'common' policy in the years to come.

In the same vein, the Pact reinvigorates the traditional struggles between the member states and the EU over the competence on immigration, borders and asylum. Even though the last draft non-official version of September has included new allusions aiming to alleviate the original intergovernmentalist logic, and which now includes for instance more references to the European Commission,¹⁹ the member states' interests and competences over these policy domains are undoubtedly the ones being prioritised and promoted.

For instance, sentences such as the one alluding to the member states' 'exclusive competence' over the conditions of entry of legal TCNs in the EU are very striking.²⁰ This is particularly so when taking into

¹⁷ Loi relatif à la maîtrise de l'immigration, à l'intégration et à l'asile n° 2007-1631, version consolidée 21 novembre 2007, (retrievable from <http://www.legifrance.gouv.fr>).

¹⁸ In fact, the latter had been very critical about a similar proposal on an integration contract put forward by the leader of the opposition party (Mariano Rajoy, Partido Popular) during the pre-election campaign in the beginning of 2008.

¹⁹ When comparing the July and September versions of the Pact two new references to the European Commission have been included in the text: First, in the section dealing with legal migration, the new paragraph a) now says “to invite Member States *and the Commission* to implement policies for labour migration,...”. Second, the section on migration and development, paragraph a) stipulates that “the European Council invites the Member States and the Commission to inform and consult each other on the objectives and limits of such bilateral agreements, and on readmission agreements”.

²⁰ The precise wording in the Pact reads: “The European Council...recalls that it is for each Member State to decide on the conditions of admission of legal migrants to its territory, and where necessary, to set their number”.

account Article 63 of the EC Treaty's recognition of EU competence in these domains. This provision leaves no doubt about the fact that the conditions of entry are not an exclusive competence of the member states, but rather one that is shared between the national and the supranational realms in the EU setting. This would have been more than confirmed with the entry into force of the Lisbon Treaty and the new Articles 4.2.²¹ and 79.2.a and 79.5 of the TEU.²² Also, the experience in these fields over the past 25 years has shown that without a strong central impetus, there is no real progress towards common objectives in immigration and asylum. By advocating the need to strengthen national competences, the EU's project of establishing a common immigration and asylum policy substantiating the AFSJ will be weakened.

That notwithstanding, the Pact does not allude to the shared nature of the competence over immigration, asylum and borders in the EU setting. It does not mention that some of these policies have been in fact Europeanised since 1999, when the Amsterdam Treaty entered into force and the EC Treaty was given a new Title IV on "Visas, Asylum, Immigration and other Policies related to Free Movement of Persons". In this manner the Pact fails to acknowledge the role that the EU is already having in areas beyond the establishment of the free movement of persons, the lifting of the EU internal borders controls and the common external borders control, such as that labelled "legal migration". Also, as pointed out in Section I of this Policy Brief, all too often the Pact fails to refer to the adopted EU laws (Directive on the right to family reunification) and existing initiatives (e.g. the EU Blue Card).

The Pact should acknowledge that during the last nine years the EU has already developed various supranational responses limiting the power of discretion and sovereignty of the member states in legislating on immigration, asylum and borders. For instance, while the Pact mentions the need to further restrict family reunification, what remains arguable is the extent to which the member states' are completely

²¹ Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C306/01, Volume 50, 17 December 2007. Article 4.2 says that "Shared competence between the Union and the Member States applies in the following principal areas: j. Area of freedom, security and justice". See Carrera & Geyer (2008).

²² Article 79.2.a stipulates that "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: a) the conditions of entry and residence". Article 79.5 provides: "This article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work".

free to do so and assess their own 'integration capacities' for family members in particular regarding support and accommodation needs and language knowledge. The adoption of the Council Directive on the right to family reunification has meant a transfer to the EU level of the sovereignty over the set of conditions, standards and rights conferred to family members of TCNs in the EU. This was recognised by the judgement of the ECJ on *European Parliament v. Council*, Case C-540/03 of 27 June 2006.²³

In addition to the above, the following question might be posed: Does the EU need the Pact? The official goal purported by its current wording is that while in the last twenty years progress has been reached toward a common immigration and asylum policy, the latter is still considered to be insufficient. The Pact identifies five concrete successes of EU migration and asylum policy: the abolition of intra-member state border controls on the movement of persons; the adoption of a common visa; the common external border control policy and asylum rules; cooperation in the fight against irregular migration; and the creation of FRONTEX and the establishment of funds for solidarity among the member states. However, it calls upon the European Council to promote a "new impetus"

in a spirit of mutual responsibility and solidarity between Member States and of partnership with third countries, ...to the definition of a common immigration and asylum policy that will take account of both the collective interest of the European Union and the specific needs to the Member States.

In light of this, where does the Pact fit within the evolving common EU immigration policy and the existing evaluation mechanisms and political processes embedded in the EU multi-annual programmes on an AFSJ? As the Pact also clearly acknowledges,²⁴ the EU already reckons with the proper policy framework for reviewing the achievements in the implementation of AFSJ-related policies in the context of the second multi-annual Programme on policies related to Freedom, Security and Justice – the Hague

²³ In this ruling the Court of Luxembourg held for instance that "the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation".

²⁴ In stating: "The European Council particularly welcomes the major advances achieved under the Tampere (1999-2003) and Hague (2004-2009) programmes, which it undertakes to fully implement."

Programme.²⁵ The European Commission evaluates on an annual basis the progress achieved in the level of policy convergence over these domains, as exemplified by the Communication on the Report on Implementation of the Hague Programme for 2007.²⁶

For all these reasons, it is in our view difficult to argue the added value of the European Pact on Immigration and Asylum, taking into account the existing normative and institutional setting of migration, borders and asylum in the EU legal system.

III. The Pact and the European Commission

The French political drive might have been conceived by the European Commission as a unique opportunity to boost the ‘added value’ of a common EU immigration and asylum policy. The Pact might have been regarded as a perfect occasion to move the politics around Europeanisation forward over domains where some member states are still hesitant about the need to have ‘more Europe’. While qualified majority voting and co-decision already apply to most of the areas falling within the scope of Title IV of the EC Treaty, the field of legal immigration is still subject to the unanimity rule and consultation with the EP. It is also true that these institutional and decision-making configurations, some of which would have been solved with the entry into force of the Treaty of Lisbon, make the role of the EU, and more particularly that of the European Commission, weak in respect of areas as important as labour immigration. The current decision-making and institutional landscape, however, should not have justified the Commission’s confidence about the compatibility and potential positive effects of the paradigms and proposals provided by the Pact over its own strategies.

The tensions between the Pact and the EU become evident, for instance, when comparing the former with the Commission Communications, and more particularly with the one dealing with immigration: A Common Immigration Policy in Europe: Principles, Actions and Tools of 17th June 2008.²⁷ This Communication stipulates its new political vision for

the development of a common EU immigration policy in the years to come. It specifically identified ten common principles around which the common immigration policy is expected to be articulated and grouped them under three main headings: prosperity, security and solidarity.

What might be some of the main points of friction between the Pact and the Commission Communication? The Communication calls for EU and member states’ actions at a time of defining “clear and transparent rules for the entry and residence” of TCNs, “including for exercising a paid or self-employed activity”. Moreover, and unlike the Pact, the European Commission attributes more importance to the equal and fair treatment paradigm that should have inspired EU common policy responses on human mobility after the Tampere Programme agreed by the Council in May 1999.²⁸ In contrast to the July version of the Pact, the September version has now introduced the following sentence: “The European Council stresses the importance of adopting a policy that enables fair treatment of migrants.” This new sentence is welcome, yet it does not go far enough. The European Commission presented a proposal in October 2007 for a Council Directive on a single procedure for a single permit for third-country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state,²⁹ which the Pact does not mention at all.

In addition, the Commission Communication calls upon the European Council to adopt the set of common principles which would constitute the basis upon which the common immigration policy will be taken forward. The Commission proposed that this process will occur through “coordinated and coherent action” by the EU and its member states and by setting up a “common methodology” consisting of the translation of the common principles into common objectives and indicators that would ensure their implementation. The Commission would elaborate an annual report on the basis of the implementation of the common objectives and member states’ “national immigration profiles”. The implementation of the “concrete actions” would be

²⁵ Brussels European Council, Presidency Conclusions, 4 and 5 November 2004, 14292/1/04, Brussels, 8 December 2004, Annex I, ‘The Hague Programme: Strengthening Freedom, Security and Justice in the European Union’, point 1.5. European Council, the Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C53/01, OJ C53/1, 3.3.2005.

²⁶ Commission Communication, Report on the Implementation of the Hague Programme for 2007, COM(2008)373 final, 2 July 2008, Brussels.

²⁷ Commission Communication, A Common Immigration Policy for Europe: Principles, Actions and Tools, COM(2008) 359 final, 17.6.2008, Brussels.

²⁸ This is exemplified by the following statement: “Fair treatment of third-country nationals who reside legally on the territory of the Member States should be ensured, with the aim of approximating their legal status to that of EU nationals.”

²⁹ Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638 final, Brussels, 23.10.2007. See EESC, Opinion on the Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, SOC(307), 9th July 2008, Brussels.

monitored, on the basis of a Commission report, on an annual basis by the Spring European Council, which would be carrying out a “political assessment of the situation at European and national levels” and put forward recommendations.

In comparison, the final paragraph of the July version of the draft Pact called the European Council to:

hold an annual debate on immigration and asylum policies. To that end, it requests the Council, *together with the Commission*, to present *a report each year on the implementation of the commitments* contained in the present Pact. Furthermore, it invites Member States to devise *quantitative indicators* to assess the impact and effectiveness of their policies and to keep each other informed of any new measure or legislative reform they intend to enact. (Emphasis added.)

By contrast, the last non-official version made public at the beginning of September has amended this very paragraph as follows:

hold an annual debate on immigration and asylum policies. To that end, it invites *the Commission* to present a report to the Council each year, based on Member States’ contributions and accompanied, as necessary, by proposals for recommendations, on the implementation, *by both the Union and its Member States*, of this Pact *and of the programme that will follow on from the Hague programme*. This annual debate will also enable the European Council to be kept informed of the most significant developments planned by each Member State in conducting *its* immigration and asylum policy. To prepare for this debate, the European Council invites the Commission to propose a *tracking method* to the Council. (Emphasis added.)

Even though the September version is more in line with some of the elements comprising the Communication COM(2008) 359, the Pact does not go as far as the ‘common methodology’ backing up the Commission’s aspirations. What is also uncertain is the extent to which the member states would accept the indirect harmonisation of a coordination regime or ‘tracking method’ proposed by the Communication, taking into account the failure of a similar Communication on an Open Method of Coordination for the Community Immigration Policy.³⁰ This former Communication, which also intended to apply an open method of

coordination to immigration policies, was not even discussed inside the Council rooms.

IV. The Pact: Security vs. Rights?

The Pact draws inspiration from a metaphor of balance, which has in recent years constituted one of the foundations of EU policies dealing with the fields of Freedom, Security and Justice. CHALLENGE (*Changing Landscape of European Liberty and Security*), a five-year project funded by DG Research of the European Commission, has provided an interdisciplinary academic critique of this metaphor in relation to the AFSJ,³¹ which arguably has been damaging for the legitimacy of the EU’s AFSJ. It entered EU discourse after the attack of 11th September and became incorporated into the second five-year work programme that commenced in 2004 – The Hague Programme.³² At the heart of the problem of this metaphor is the illusion that liberty and security are similar types of concepts and therefore can be compared and weighed one against the other.³³ What is common to all the conceptions of liberty is that it is one of the core values of democracy, rule of law and fundamental rights that are designed to protect the liberty of the individual within society. Security, on the other hand, is not a value as such, something that is not evident from the way in which security is framed and understood by the Pact, where the notion of state security prevails.

The Pact is inspired by, and promotes, the narrative of a balance in respect to policies related to human mobility and diversity. For instance, the introductory paragraphs of the Pact make reference to the ways in which international migration contributes to economic growth. It then makes the equation with the justification of a global approach to migration policy, calling for better management and control (control of irregular immigration and border-related/security policies). This is complemented with the following sentence: “The EU does not have the resources to decently receive all migrants hoping to *find a better life here*”. Another example is the way in which it presents the relationship

³¹ See: www.libertysecurity.org

³² In particular, the Hague Programme stated that “The European Council requests the Council to examine how to maximise the effectiveness and interoperability of EU information systems in tackling illegal immigration and improving border controls as well as the management of these systems on the basis of a communication by the Commission on the interoperability between the Schengen Information System (SIS II), the Visa Information System (VIS) and EURODAC to be released in 2005, taking into account the need to strike *the right balance* between law enforcement purposes and safeguarding the fundamental rights of individuals” in the section entitled “Strengthening Freedom”.

³³ Bigo et al., (2007).

³⁰ Commission Communication on an Open Method of Coordination for the Community Immigration Policy, COM(2001)387, Brussels, 11.7.2001.

between the freedom to move and the need to ensure compensatory security measures.

The understanding of balance in the Pact comes into sharp focus when looking at the relatively few references made to the rights and liberties of TCNs. It is not only that the Pact does not mention the Commission Proposal on a Common Framework of Rights highlighted above, but its wording refuses to identify the respect of human rights and the respect of the rule of law as one of the key principles, and ‘basic commitments’, of any future common policy on migration, borders and asylum. The difficult relationship between the securitarian rationale of the Pact with liberty, human rights and the rule of law, has been equally a subject of concern by many civil society organisations and NGOs across the EU.³⁴ As the European Network Against Racism (ENAR) (2008), has proposed, the Pact should at least include a sixth principle that could read:

European Law, Policy and Practice in Immigration and Asylum shall respect, protect and fulfil the rights of all and will not undermine the vision of a Europe without Racism.³⁵

V. Conclusions and Policy Recommendations

The European Pact on Immigration and Asylum is far from being an initiative endowed with a truly European nature. It is in fact guided by the principles of nationalism and intergovernmentalism. These principles are difficult to reconcile with the building of a common European policy on migration, borders and asylum. The rationale and driving logic of the Pact bring legitimacy to certain policy responses and national practices of particular member states at the EU level, and aim at universalising them in an enlarged Europe. The added value of the Pact is also rather questionable, taking into account the existing normative, policy and institutional settings surrounding the domains of migration, borders and asylum in the EU legal system.

Furthermore, the European Commission might have overestimated the negative implications of the French Presidency’s strategy. The logic of the Commission and that of the Pact appear to be moving in two different directions. The Pact will give strength to a competing model of cooperation to that promulgated by the Community method of cooperation. This model prioritises national competence over that of the EU in relation to immigration and asylum-related fields, something which at the current stage in the European

integration process is not only surprising, but also regrettable. The adoption of the Pact by the European Council will reinvigorate the relevance of the principle of subsidiarity over these policy domains in the years to come. This will weaken the construction of a common AFSJ where the European interests are duly safeguarded, promoted and developed.

On the basis of the above, we put forward the following policy recommendations:

1. The balance metaphor between freedom and security guiding the Pact creates a critical tension in respect of liberty, human rights and the security of the individual. The Pact should include a sixth principle referring to the need that any future policy and legal instrument to be adopted in the future common immigration and asylum policy should comply as a premise with fundamental rights, the fair and equal treatment paradigm, the rule of law and non-discrimination and racism.

2. The Pact should acknowledge the degree of Europeanisation that has already taken place in all the areas related to immigration, borders and asylum, including that of legal immigration. An express reference should be made to those legislative measures adopted, or being proposed, as well as the proactive interpretation provided by the jurisprudence of the European Court of Justice.

3. The wording of the Pact should also emphasise the shared competence between the EU and its member states over these domains. The current format overemphasises the exclusivity of the competence of the member states over that of the EU. It should also highlight the added value of a truly ‘common’ European policy on immigration and asylum, where the needs of the entire EU, and not those of a few member states as perceived by current governments, would be the guiding principle.

4. The European Commission should play a more critical role in respect of these kinds of nationalistic and intergovernmental initiatives. It should continue to take a proactive and forward-looking position in fostering common European responses. The latter might not necessarily follow current priorities and political strategies of particularly powerful member states’ authorities. A policy ‘making sense’ in, and being in the interests of, the entire EU at 27 should be preferred.

5. The democratic deficit affecting some of the policies dealing with immigration, and especially those related to legal immigration and integration, should be overcome. It is also fundamental that the European Parliament, which is gradually becoming one of the central actors in policies related to an AFSJ, would be directly involved in the political processes that will lead

³⁴ By way of illustration, see AEDH (2008) and Cimade (2008).

³⁵ ENAR (2008).

to the successor of The Hague Programme and the future European policy on immigration.³⁶

6. The role of civil society, NGOs and the social partners is of utmost importance in order to ensure that the common EU immigration and asylum policy take on board social realities and needs, and is not only driven by governmental interests and opportunistic political visions. Civil society and the social partners need to be given a real voice in the policy processes leading to the next multi-annual programme related to an AFSJ, and particularly in the setting up of the guiding principles that will shape its development in the years to come.

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³⁶ The new reference made to the European Parliament in the concluding remarks of the September draft version is certainly not enough. Unlike the July version, the current one now says: "The European Council invites the European Parliament, the Council, the Commission and the Member States, each for their own part, to take the decisions necessary for the implementation of this Pact."