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From the Migration Crisis to the New Pact on Migration and Asylum

The Status Quo Problem

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Abstract

This paper discusses the European Commission's proposal for a New Pact on Migration and Asylum, and emphasizes that the current gridlock of the European Union (EU) in the field of asylum is rooted in a status quo problem: the EU's approach to asylum is characterized by a static policy core and a lack of institutional capacity building. This status quo problem limits sustainable internal solutions by the EU and its member states and shifts the weight onto the external dimension of migration and asylum.

Key words: Asylum, Cross-Loading, European Union, Migration, New Pact on Migration and Asylum

Summary

There are already numerous critiques of the European Commission's proposed New Pact on Migration and Asylum, but these often tend to be detached from the current political realities in the European Union (EU) and its member states. This contribution firstly reflects on these political realities that are manifest in the pact, and traces their underlying drivers. It maintains that there has been a restructuring of socio-political conflicts in Europe since the 1990s that has altered political behavior and has led to a rise of anti-migrant political parties, which has consequently triggered more restrictive asylum and migration policy trends. These political developments have consolidated the idea that migration is in need of more control, partly irrespective of the numbers or effects of (asylum seeking) migration. As a result, today there are two distinct (although ultimately not too dissimilar) visions about migration that co-exist among member states and are reflected in debates around the New Pact on Migration and Asylum. The first one is led by the idea that migration can be halted entirely through external border controls and the external dimension, and that it is desirable to do so. The other vision instead puts an emphasis on keeping migration at bay, acknowledging that migration cannot be turned off like a tap.

The paper, secondly, underlines that the challenge for EU governance in the field of asylum lies in overcoming the current status quo that has been locked in for decades now. The status quo problem is composed of the static policy core, including the Dublin regulation as the sticking point of the current gridlock. The status quo problem is moreover also about the mode of governance. The dominant mode of governance has been through policy regulations, which has provoked severe compliance challenges – as the 2015 migration crisis vividly demonstrated – and which ought to be substituted with an institutional capacity building approach. Setting up these capacities at the EU level, however, isn't easy to achieve, as this process is prone to a conflict of interests between member states.

Given that more sustainable internal solutions appear to be out of reach for now, the paper argues that the external dimension, i.e. the co-optation of non-EU states into European migration and asylum policies through foreign policy tools, will certainly remain high on the EU agenda.

Whilst expecting big leaps in the near future would be unrealistic, the current Portuguese Council Presidency nevertheless presents an opportunity. It might bring back a more multilateral perspective, and could strengthen the Commission's pact with reference to global frameworks, such as the Global Compact on Safe, Legal and Orderly Migration. The paper concludes that an international perspective, that is attentive of interests and needs of sending and transit states will be

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certainly welcome, considering the ongoing relevance of the external dimension for EU migration and asylum governance.

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A crisis of governance

In a recent European Parliament debate[1] on the humanitarian situation of refugees and migrants at the EU´s external borders Ylva Johansson, the EU Commissioner for Home Affairs spoke of a crisis of governance when referring to the current situation in Bosnia,[2] with thousands of migrants being stranded in freezing weather conditions without proper shelter.

This diagnosis of a crisis of governance is not only appropriate when thinking of events in camps such as Lipa the Commissioner referred to, or the Greek camp Moria,[3] but more broadly to the institutional state of the European Union in the field of asylum and its resulting consequences.

The European Union has been facing gridlock on the issue of asylum for years now. In order to address this gridlock, the Commission under President Van der Leyen has called for a turning of the page and a fresh start, presenting a New Pact on Migration and Asylum[4] in the autumn of 2020.

This pact has been widely criticized by academics[5] and human rights organizations[6] alike for proposing too little if anything that truly turns the page at all. Whilst much of the criticism is comprehensible and justified from a human-rights protection perspective, to be frank the pact reflects the existing political realities. Given these realities, any other, more bold response to the current gridlock would likely be futile. Calls for radical policy changes are understandable from a normative point of view but seem utterly detached from political dynamics.

The pact highlights the static nature of the policy core in the field of migration and asylum established in the 1990s and early 2000s. The Van der Leyen Commission did not come up with this policy core but inherited it, a legacy given the political realities that seems to be very difficult to leave behind. The challenge for EU migration and asylum governance is the stability of this

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[1] Ylva Johansson, Speech at the European Parliament, 19 January 2021. Available at: <https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commissioner-johanssons-speech-european-parliament-plenary-humanitarian-situation-refugees-and_en>.

[2] "Migrants in Bosnia: EU, UN officials condemn situation in Lipa camp," *InfoMigrants*, 6 January 2021.

[3] "'A mental health emergency': no end to trauma for refugees on Lesbos," *The Guardian*, 22 December 2020.

[4] European Commission, "New Pact on Migration and Asylum: Questions and Answers" 23 September 2020. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1707#contains>.

[5] Filippo Scuto, "Solidarity in the Common Asylum System and the Control of Illegal Immigration: A Critique of the New EU Migration Pact," *BRIDGE Network blog*, 14 January 2021. Available at: <https://bridgenetwork.eu/2021/01/14/solidarity-in-the-common-asylum-system-and-the-control-of-illegal-immigration-a-critique-of-the-new-eu-migration-pact/>.

[6] European Council for Refugees and Exiles, "Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded," 6 October 2020. Available at: <https://www.ecre.org/the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded/>.

policy core, as well as – related to it – the continuation of the regulatory path of integration in the field of asylum as opposed to institutional capacity building.

In this short contribution I will try to reflect on these political realities that are manifest in the pact, trace its underlying drivers, and the status quo problem it perpetuates.

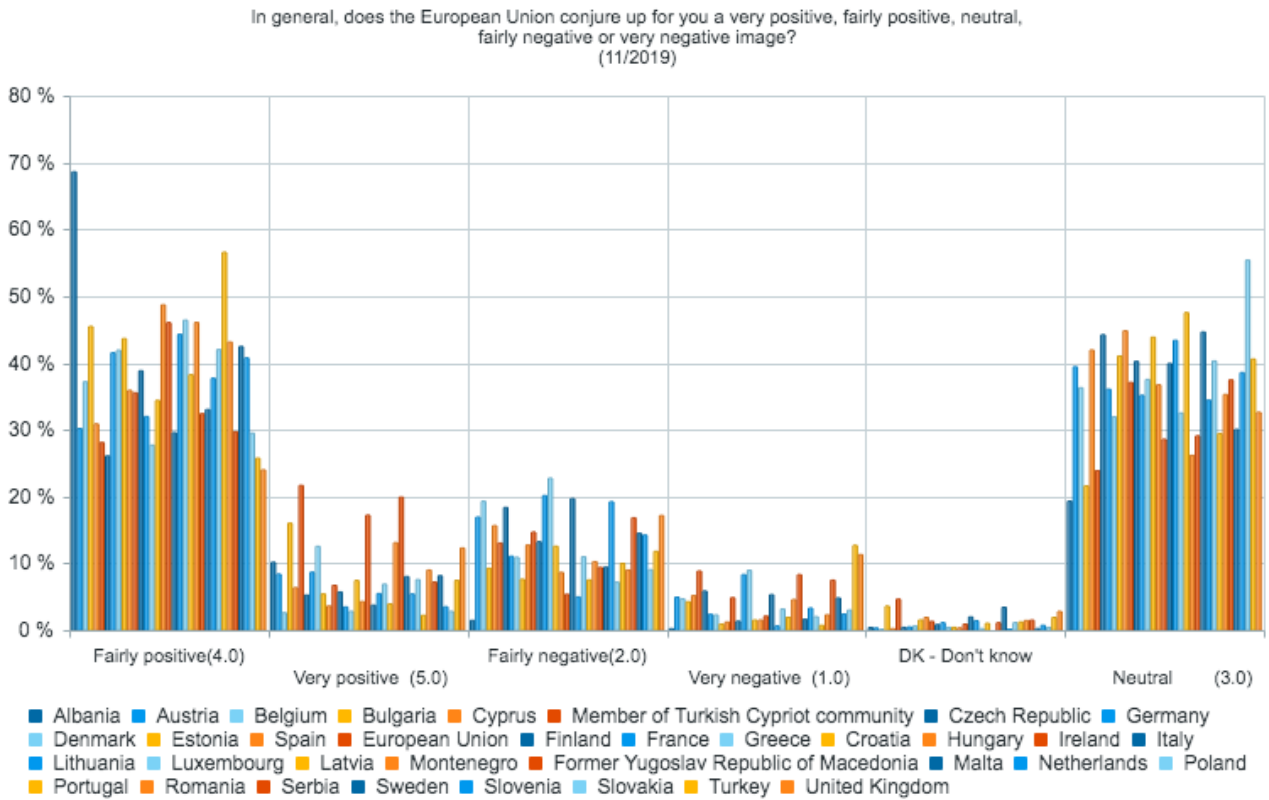
Changing politics, changing political realities

The European Union, and the European integration has been facing a changing political context in the past two decades, which have crucially shaped dynamics in the migration policy field at the EU and national levels. We have seen a restructuring of socio-political conflicts in Europe from the 1980s onwards. This development has been widely referred to as a conflict between losers and winners of globalization[7]: those who are in favor of and (are perceived to) benefit from post-national developments, and those who oppose it based on the real or perceived diminishment of their socio-economic status. This restructuring or to be more accurate the overlapping of new and old conflict lines has altered political behavior, which resulted in a political backlash, and rise of the radical right. Both opposition to European integration and immigration are rooted in the same grievance about the erosion of the nation state, and attitudes towards immigration and European integration tend to reinforce each other. Eurosceptic and anti-immigrant political parties that have targeted the political establishment have seen rising support[8] across Europe.

It is important to stress, however, that Europeans today are overall not anti-European,

nor are they anti-migration (see Figure 1 and Figure 2).

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[7] Kriesi, H., Grande, E., Dolezal, M., Helbling, M., Höglinger, D., Hutter, S., & Wüest, B. (2012). *Political Conflict in Western Europe*. Cambridge: Cambridge University Press.
[8] Rooduijn, M. 2015. "The Rise of the Populist Radical Right in Western Europe," *European View* 14:1, 3-11.
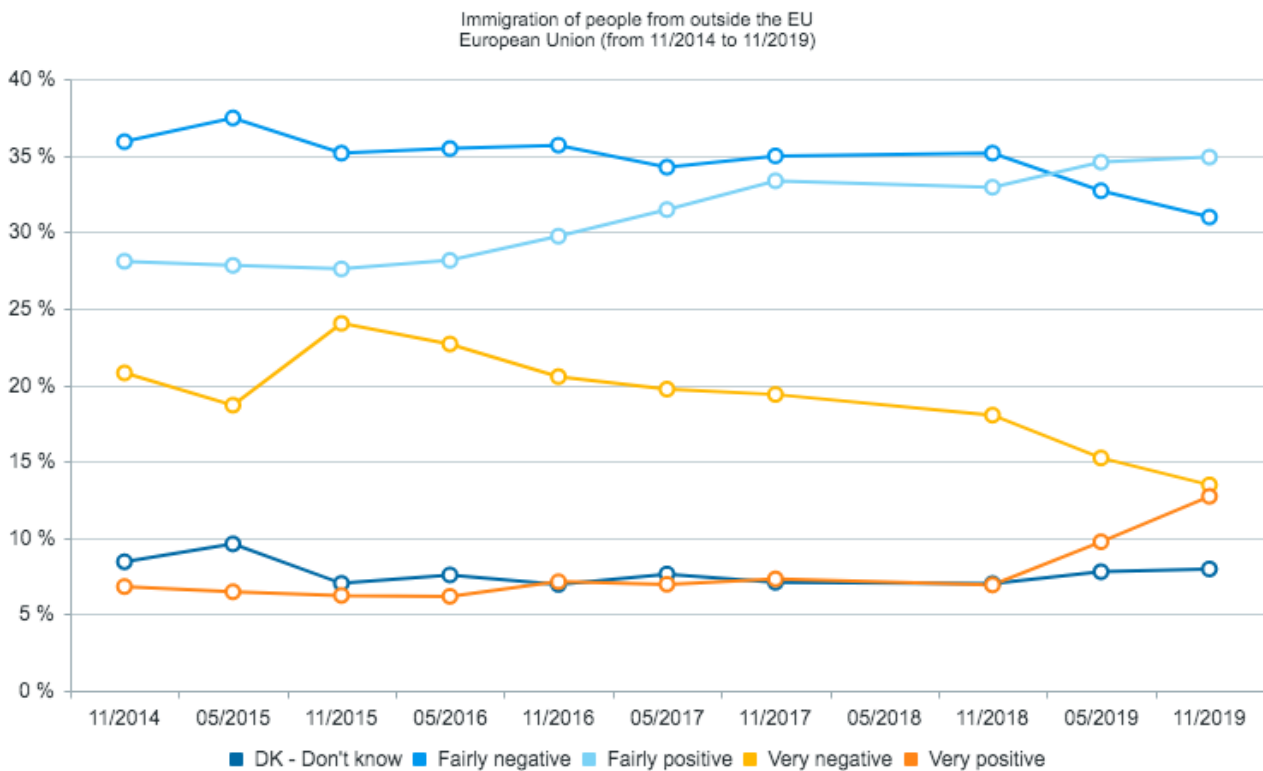
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Figure 1: European image across EU Member States

In general, does the European Union conjure up for you a very positive, fairly positive, neutral,
fairly negative or very negative image?
(11/2019)

Source: Eurobarometer interactive.[9]

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[9] Available at: <https://ec.europa.eu/commfrontoffice/publicopinionmobile/index.cfm/Chart/index>.

Figure 2: Attitudes to migration in the EU

Immigration of people from outside the EU
European Union (from 11/2014 to 11/2019)

Legend: ■ DK - Don't know ■ Fairly negative ■ Fairly positive ■ Very negative ■ Very positive

Source: Eurobarometer interactive.[10]

Instead, it was latent or dormant concerns about Europe and migration among sections of the electorate that became activated through the increasing visibility of these issues in public debate and through mobilization by certain political entrepreneurs.[11]

Restrictive migration and asylum policy reforms across EU member states, and consequently on the EU level, have initially aimed at containing the anti-establishment mood, and the rise of Eurosceptic, anti-immigrant parties. But by doing so they have further increased the prominence and visibility of the migration issue and as a consequence contributed further to its contestation. Those political entrepreneurs that were meant to be kept at bay have gained further power. As a consequence of their electoral strength, quite a few of them have been entering government across Europe, and the pressure to continue a restrictive path has risen further. Put differently, these political developments have firmly consolidated ideas of migration as in need of more control, partly irrespective of the numbers or effects of migration.

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[10] Available at: <https://ec.europa.eu/commfrontoffice/publicopinionmobile/index.cfm/Chart/index>.

[11] Dennison, J. and Geddes, A. (2019), A Rising Tide? The Salience of Immigration and the Rise of Anti–Immigration Political Parties in Western Europe. *The Political Quarterly*, 90: 107-116.

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Throwing money at curbing and controlling migration has led to an immensely costly[12] migration control apparatus as well as a rise of a private migration industry,[13] which re-emphasizes that the contestation of migration is not primarily or exclusively about economics.

The static policy core

Whilst we can see some shifts towards restriction as opposed to a previous more ambivalent policy approach – that was characterized by the partly contradictory co-existence of liberal and restrictive components reflecting the different interests within the EU – the policy core in the domain of asylum has remained remarkably stable. The first generation of the Common European Asylum System (CEAS) policy instruments and the infamous Dublin regulation, which determines which state is in charge of processing an asylum claim, has largely remained intact up to today. These policies were put in place prior to the adoption of the Lisbon Treaty, i.e. before the application of the Community Method in the migration and asylum policy field. As EU cooperation on asylum and migration developed largely through intergovernmental modes, member states, i.e. the Council, managed to remain in the driver's seat vis á vis other EU institutions even after the formal power of the other institutions (EP, ECJ, and EC) increased.[14]

The development of the CEAS, and its incorporation of the Dublin regulation, which prescribes that an asylum claim must be made in the first EU member state through which an applicant passes, was driven by powerful member states, such as Germany, with a strong regulatory expertise in the field of asylum.[15] These states viewed communitarization of asylum as a way to diminish their 'burden' of high numbers of asylum applications. The Mediterranean countries, which were hardly exposed to asylum flows (in the early days of EU communitarization of asylum) and hence had little experience in regulating asylum, played only a marginal role. The lack of institutional capacities in the Mediterranean states coupled with their growing responsibility in the wake of adopting a common legal framework resulted in the incomplete implementation of this framework. Compliance with the CEAS was thus doomed to fail if pressures on the national system increased, as happened during the 2015 'migration crisis'.

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[12] See Gammeltoft-Hansen, T., and Sorensen, N., eds. *The Migration Industry and the Commercialization of International Migration*, Routledge: 2013.

[13] Davitti, D. (2019). The Rise of Private Military and Security Companies in European Union Migration Policies: Implications under the UNGPs. *Business and Human Rights Journal*, 4(1), 33-53.

[14] Trauner, F., and Ripoll Servent, A. (2016) The *Communitarization* of the Area of Freedom, Security and Justice: Why Institutional Change does not Translate into Policy Change. *JCMS: Journal of Common Market Studies*, 54: 1417–1432.

[15] Zaun, N. 2017. *EU Asylum Policies: The Power of Strong Regulating States* (Palgrave McMillan).

The regulatory approach to asylum and migration

Not only did the policy core remain intact over time, we also saw a continued regulatory approach to asylum and migration matters as opposed to institutional capacity building. The issue with such a regulatory approach is that it simply does not work, as the conflicts and compliance issues in the wake of the 2015 migration crisis demonstrated. Compliance costs fall directly on the state[16], and these compliance costs are high. Without either having comprehensive institutional capacities already in place, or being able or willing to invest in such costly institutional capacities to be able to comply with EU rules, compliance by member states will not happen. In order to avoid this problem compliance costs for the individual states have to be diminished, which implies that institutional capacities at the EU level are required. Setting up these capacities at the EU level isn't easy to achieve either, as this process is prone to a conflict of interests between member states. Who pays for it, and who benefits from it? 'The cat is biting his own tail', as German speakers tend to say in such cases: the problem of EU integration in the field of asylum seems to be caught in a loop.

Dublin and the divisions among EU member states

The Dublin regulation has become the sticking point of the gridlock in the asylum domain since the migration crisis. This mirrors the severe in-built limitations of the original design of the CEAS and the regulatory approach more broadly. On the one hand, the Northern and Western immigration states that drove the regulations of the CEAS in the first place perceived the Mediterranean states at the external borders as rule breakers who did not enforce the Dublin system, which caused 'secondary movement' of asylum seekers.

On the other hand, the states at the external Mediterranean border, demanded relocations to compensate for the uneven responsibilities caused by the Dublin regulation. But at the same time these states also had severe concerns about the expansion of common institutions at EU level. Such common institutions (with more executive powers), were not necessarily perceived as alleviating pressure but instead as instruments of oversight and control by other MS, given that regulations (like Dublin) that disadvantaged them in the first place would stay in place.

And last but not least, you had member states, most notably the Visegrád countries, that vehemently opposed the implementation of common rules, given that they were least affected by (asylum seeking) migration, and/or have been seeing supranational governance on migration matters as an

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[16] Genschel, P., and Jachtenfuchs, M. (2018) From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory. *JCMS: Journal of Common Market Studies*, 56: 178– 196.

illegitimate imposition by the EU: an exhibition of 'moral imperialism'[17] as Hungary's prime minister Viktor Orbán framed it.

The New Pact on Migration and Asylum: The end of Dublin?

The New Pact on Migration and Asylum proposal by the European Commission declared the end of the infamous Dublin regulation. The underlying principle, however, stays basically intact. Responsibility for processing asylum procedures largely remains within the country of entry. The pact, though, proposes a set of various support measures.

The novelty in terms of policy development is that with this proposal, the Commission has given up its previous demand for mandatory relocation of asylum seekers. The obligation to relocate has been turned into an obligation to contribute[18] in a flexible manner, through a variety of support measures including relocation, capacity building measures and other forms of operational support measures, as well as the possibility of taking over the responsibility to return migrants, so called 'return sponsorships'.[19] In cases of significantly increasing migration flows the choice of support measures is conceptualized to be narrowed down either to relocation or return sponsorships.

The pact certainly represents a concession to the Visegrád countries, who have opposed mandatory relocation. In other words, it is a successful attempt at cross-loading[20] of policy preferences by a group of like-minded illiberal member states.

Whereas the Visegrád states however, called for voluntary solidarity schemes, the pact proposes to make support measures obligatory. The point of major discord at this point is about mandatory return sponsorships as the only alternative to relocation in case of heightened migratory pressures. CEE states see this as opposing their efforts of halting migration entirely, given that if returns have not been completed after a certain time (8 months/ respectively 4 months in times of crisis), migrants would be transferred to the territory of states that sponsored these respective returns:

> 'We feel obliged to voice our concerns also on the concept of return sponsorship as the only equivalent to relocation. It might be misleading – and will likely result in the redistribution of illegal migrants who do not have the right to remain in the EU. There is a risk that the concept could prove counterproductive and create incentive for noncooperative migrants who should be returned.' (Non paper by Poland, Hungary, Slovakia, Czech Republic, Estonia and Slovenia, 2020)

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[17] Morgan, G. (2020) Is the European Union imperialist?, *Journal of European Public Policy*, 27:9, 1424-1440.
[18] Manservisi, S. 2020. "The EU's Pact on Migration and Asylum: A Tsunami of Papers but Little Waves of Change," *IAI Commentaries* 20|88. Available at: <https://www.iai.it/it/pubblicazioni/eus-pact-migration-and-asylum-tsunami-papers-little-waves-change>.
[19] Florian Trauner , Olivia Sundberg Diez, "EU return sponsorships: High stakes, low gains?" European Policy Centre Discussion Paper, 19/01/2021.
[20] Aggestam, L., and Bicchi, F. (2019) New Directions in EU Foreign Policy Governance: Cross-loading, Leadership and Informal Groupings. *Journal of Common Market Studies*, 57: 515– 532.

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The Mediterranean states instead have reiterated their position that there is no viable alternative to mandatory relocation to share the 'burden' of asylum-seeking migration (Non paper by Greece, Malta and Spain, 2020).

And not unsurprisingly they also voice their concern about the pact proposal's mandatory asylum border procedures, as this reinforces the responsibility on them as states of first entry, and they fear that it would replicate today's situation with people being stranded indefinitely at the external borders.

The external dimension

Whereas measures on asylum are among the more controversial parts, there is greater agreement among member states when it comes to the external dimension of migration management within the pact, i.e. the co-optation of non-EU states into European migration and asylum policies through foreign policy tools. This dimension is not novel but its importance has steadily increased on the EU agenda.

Since EU states are incapable of finding internal solutions, given the outlined shortcomings of the existing approach, they have been increasingly striving to shift the solution outside of the EU. The question is whether and to what extent non-EU countries are willing to play along, and at what costs for migrants and the EU, remains to be seen.

Visions of migration in EU member states

Current debates and controversies in the wake of the publication of the New Pact on Migration and Asylum highlight that today two visions about migration among member states co-exist: The first one is led by the idea that migration can be halted entirely through external border controls and the external dimension, and that it is desirable to do so. The other vision instead puts an emphasis on keeping migration at bay. The idea that migration is stoppable, enshrined in the first vison, largely ignores the complexities and realities of migration. The second vision instead is much more cautious regarding the idea that migration can be turned off like a tap. Whilst the latter vision in contrast to the first vision acknowledges that some kind of internal responsibility sharing will be needed to tackle asylum challenges, these two visions are in the end not too far apart when it comes to their understanding of the need of curbing (unwanted) migration. Both visions are an expression of the restructuration of socio-political conflicts and consequent political developments described in the beginning of this contribution, which led to the establishment of the idea of migration as a major problem.

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*Which way forward for the New Pact on Migration and Asylum under the Portuguese Council presidency?*

Before it can be realized the pact must pass through its current a negotiation phase, that will last up to two years, and then gain unanimous support in the Council. As regards the responses by EU member states we have seen disagreement but no overall refusal so far which, given the political climate, is widely seen already as a small success. The current Portuguese EU Council presidency, moreover, is deemed weak, and indeed lacks strong alliances (see Figure 3). Stronger EU Member States have failed during their presidency to take the asylum agenda forward. So, doubts have been raised whether we will see much progress under the Portuguese leadership.

Figure 3: Portugal's alliances in the field of migration in the EU
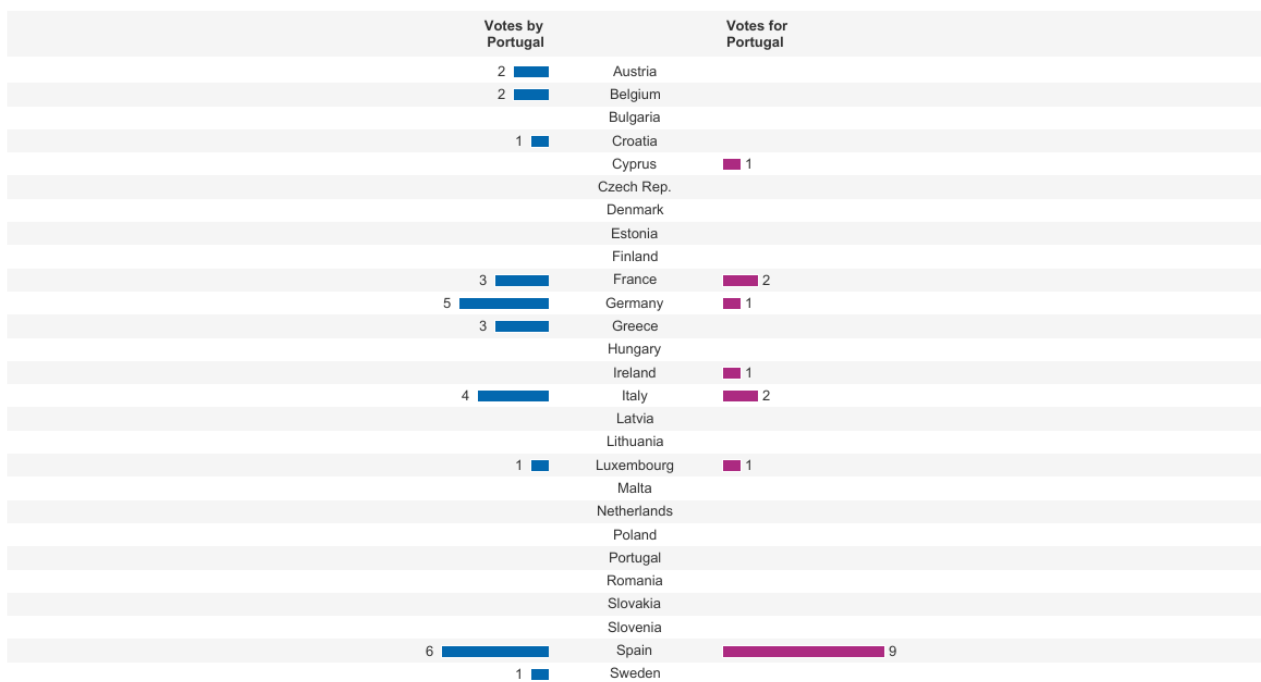
Source: European Council on Foreign Relations 2020[21]

However, the Portuguese presidency might at least point the EU in a more fruitful direction, on how to address politicization. Portugal is not only widely viewed as a role model in terms of accommodating migrants,[22] but is a country in which there is in comparison to other EU member states hardly any political mobilization on the issue of migration. Portugal, thus, is one of the EU member states, which do not fall in either of the two camps (halting migration vs keeping it at bay), but to some extent has a more inclusive and, even more important, relatively depoliticized vision of migration.

The country is moreover known for its multilateral approach. The pact as it stands lacks any major references to global frameworks, such as the Global Compact on Safe, Legal and Orderly Migration.[23] The Portuguese presidency might at least bring some focus again on multilateral, international perspectives. It might also take off some weight from the external dimension in terms of its primary focus on EU migration needs, as regards partnerships with non-EU countries. This will be a relevant point, since it is almost certain, given that sustainable internal solutions that tackle the creation of institutional capacities for now seem to be out of reach, that the EU's efforts will concentrate to a large extent on external solutions.

It is simply unrealistic to expect big leaps in the EU asylum and migration domain. But what is certainly needed is the discontinuation of the status-quo, and some (however partial and incomplete they might be) solutions that truly address the in-built limitations of the original design. Finding such (partial) solutions will be surely crucial to manage the 'crisis of governance' that has unravelled in the past years in the field of migration.

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[22] See Sustainable Governance Indicators (Social Policies), available at: <https://www.sgi-network.org/2020/>.
[23] Available at: <https://www.iom.int/global-compact-migration>.

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