

Working Paper

Research Division EU Integration
Research Division Global Issues
Stiftung Wissenschaft und Politik
German Institute for International
and Security Affairs



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The re-nationalisation of migration policy- making?

EU cooperation after the Immigration
Pact

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**Working Paper FG 1, 2009/ 02 and FG 8, 2009/ 05
January 2009, SWP Berlin**

1. The power-and-autonomy agenda

It was not an easy birth. As conceived by the French government, the *Pact on Immigration and Asylum* was supposed to tidy up and reinvigorate EU migration cooperation. Comprising a non-binding set of guidelines, the Pact covers all major areas of migration cooperation—legal migration, illegal immigration, border control, asylum, and the “external” or foreign-policy dimension of migration regulation. After a period of brief but passionate wrangling between the Member-State governments, the European Council was able to adopt the text at its October 2008 summit. Onlookers immediately denounced the Pact as the ugly offspring of Fortress Europe.

To its critics, the Pact displays the age-old preoccupation of the Member-State governments with the maintenance of their power and autonomy. This preoccupation is deemed out of step with the demands of modern migration management, and has been identified in three interrelated facets of the text:

1. The Pact frequently prefers national solutions over European ones, indicating a bid to shore up national discretion. Throughout the Pact, the Member States, and not the Community, are treated as the

main protagonists and are often permitted to proceed on a “voluntary basis”—i.e., on the basis of a kind of opt-in arrangement not foreseen in the European treaties.

2. The “national bias” is clearest in the area of legal migration. This reflects the Member States’ concern with reasserting their power and sovereignty over *illegal* immigration. Such efforts have long trumped any social, economic and foreign-policy priorities that would necessitate the opening of legal channels to the EU. Whilst the Pact does pay lip-service to these previously neglected priorities, commentators who have followed the text’s development note the pedigree of restrictive priorities in the formulations chosen.

3. The desire to reassert national power is also found in the emphasis that the Pact places upon security and control at the apparent expense of freedom and justice. The opening paragraph parrots the established rationale for introducing control-heavy, security-oriented migration policies: The progressive removal of the European Community’s “internal borders” is deemed to require a complementary effort to control migration into the EU.

Fig.1, The Pact in overview

<i>Policy area</i>	<i>Prescription</i>
Legal migration	<ul style="list-style-type: none"> - increase the attractiveness of the EU for highly-qualified workers - weigh up the introduction of new conditions in policies for family reunification - introduce a vigorous immigrant-integration policy stressing rights <i>and</i> duties of migrants
Illegal immigration	<ul style="list-style-type: none"> - desist from mass regularisations of illegal immigrants - incorporate measures to combat irregular migration into policies on legal migration and free movement - develop incentive systems to foster voluntary return of irregular migrants - penalise those employing illegal immigrants - make expulsion policies a core part of EU external relations - bolster joint efforts amongst member states to expel illegal immigrants - realise mechanisms to prevent the expelled from returning to the EU
Border Control	<ul style="list-style-type: none"> - give Frontex, the EU agency for coordinating the protection of the Union’s peripheral borders, greater resources - consider the problems that some member states have with large influxes of irregular immigrants - from 2012, introduce a system registering exit and entry of travellers
Asylum	<ul style="list-style-type: none"> - in 2009, establish a European Asylum Support Office facilitating practical cooperation - by 2012 at the latest, introduce a uniform EU asylum status and a single procedure for assessing asylum claims - introduce a scheme for resettling those individuals protected by UNHCR to the EU
Migration and Development	<ul style="list-style-type: none"> - forge agreements with third countries on legal migration, illegal immigration and expulsion - use migration to promote development of third countries - open opportunities for citizens of EU’s neighbours to come to the EU and gather professional expertise

2. Impact assessment

Analysts’ reaction to the Pact thus appears to have been informed above all by a

normative conviction about how EU migration policy ought to look. This is all very well. Yet, they may be wasting their

breath. If, for example, we can already predict that aspects of the Pact will have little effect upon EU policy-making, commentators might more usefully have ignored it in favour of less high-profile but more tangible elements of migration cooperation. It is worth, then, basing any judgement of the Pact upon a prior assessment of its place in, and likely effect upon, the EU policy process.

Arbitrator

In line with the European Council’s broader role in migration policy, the Pact seeks to arbitrate on points of contention within the Council of Ministers. And, as noted above, commentators have been dismayed by the way the “power-and-autonomy” agenda has been bolstered. Analysts suggest that the emphasis placed on security and control by the Heads of Government and State (HOGS) is evidence of the way that the European Council can be “captured” by special interests—in this case the French immigration ministry.

If well-founded, this suspicion appears key to the Pact’s influence. The inference is clear: the prevalence of French priorities in the Pact will deprive the final text of the

“neutrality” necessary for successful arbitration efforts. By merely rubberstamping a “French” Pact, the HOGS will have forfeited any “higher” influence they might have aspired to. The “power-and-autonomy” prescriptions, that commentators object to, will actually be prove ineffectual.

This logic is convincing. Yet, it falls down on two counts.

Firstly, the suspicion that the French Immigration Ministry “captured” the Pact is only partially founded. Specific French concerns are certainly to be found in some “power-and-autonomy” aspects of the text—the resistance to the mass regularisation of immigrants, the emphasis on immigrants’ duties in social-integration policies, the desire for ‘selected immigration’. However, these priorities are bound into a complex set of compromises, in which the priorities of other States’ Immigration and Interior Ministries have been carefully included. By bringing together these disparate agendas into one text, the Pact promises a high degree of effectiveness: States defecting from the Pact’s prescriptions in one area of migration cooperation will endanger their own interests in another.

Fig.2, The Pact as a package of compromises

<i>Conflict between Member States</i>	<i>Pivotal compromise</i>	<i>Explanation</i>
Eastern vs. Southern	Emphasis on cooperation with third countries to the East and South of the EU	At the end of 2005, the European Council adopted a “Global Approach” to migration which sought to integrate the Union’s migration and foreign policies. Its initial application focussed on third countries in Africa. Since 2007, however, some Member States have pushed hard for countries to the EU’s East to be a priority. The compromise, cemented in the Pact, foresees a focus on both the east and the south.
Resource-rich vs. Resource-poor	Emphasis on practical cooperation	Practical cooperation between the EU member states is supposed to allow resource-poor states to improve their administrative structures at the material cost of resource-rich states. These resource-rich states also gain: For these states, a prime goal of EU migration cooperation has been the reduction of their “pull factors” for “unwanted immigration”. Member States with higher standards of care for immigrants are deemed to be more attractive to unwanted immigrants. Legislative harmonisation between the EU states failed to solve the problem, because practical and administrative disparities persisted. The Pact’s emphasis on practical cooperation is supposed to create a “win-win” situation for rich and poor states and overcome arguments about “solidarity” between member states.
Big vs. Small	Creation of a European Asylum Support Office with limited powers	As a project, the founding of an Asylum Support Office is part of the broader agenda, outlined above, to facilitate practical cooperation between Member-State authorities. However, whilst small Member States see the idea of a strong supranational Office as conducive to their interests, the larger ones balk at the suggestion. They fear it will curtail their autonomy and influence. The compromise package takes a consensual path, foreseeing the creation of a central Office, albeit one with the initial role of “handmaiden” to the Member States.
North vs. South	Framework for seconding member-state officials in case of asylum influx/prospect of a more centralised Frontex	The Union’s southern states have long demanded “burden-sharing” from their EU partners. Insofar as they have offered support, their northern partners have sought to maintain control of its use. Simple monetary transfers have often been resisted in favour of the secondment of national officials: this way, northern Members can easily check that their resources are being used appropriately. In the past, though, a particular point of contention has been the degree to which Member States can call in Frontex and thus place other states’ officials at their own disposal. Some Member States from the north and west worry that peripheral states abuse this power. They call for Frontex to have a greater say on the use of resources on the basis of its own Intelligence. As a compromise, the Pact opens the scope for binding commitments on sharing resources whilst also offsetting the risk of abuse.

Secondly, when, on past occasions, the HOGS have exercised greater independence in drawing up migration-policy guidelines, the implementation of their prescriptions has been patchy to say the least. The “higher” influence, which the HOGS are accused of forfeiting by approving a “captured” Pact, has actually proved illusory.

The European Council’s 1999 Tampere Programme is a case in point. The Tampere Programme set out the JHA guidelines for the period 1999-2004. The precise process of the Programme’s formulation remains unclear, but analysts today suggest that an effort was made to prevent individual national ministries from influencing the HOGS. Thus isolated from their domestic colleagues, the HOGS were encouraged to make daring prescriptions for the development of EU cooperation. Yet, when the Programme was placed before the Council of Ministers, the national representatives assembled there viewed it as an ideologically-motivated intervention in their sphere of influence. The Programme’s implementation proved slow, and the end-results were often far removed from the HOGS’ original aims. Having been “captured” by the national actors responsible for its implementation, the Pact therefore appears to have a rosier future—pending negotiation with the European Parliament.

Cattle-prod

The second of the European Council’s roles in migration policy involves chivvying the Council of Ministers and Commission to make quick progress in migration cooperation. There is little of this to be found in the Pact. In fact, the Pact’s main contribution is to actually loosen time constraints imposed earlier by the HOGS: Some four years ago, the European Council prescribed the creation of a Common European Asylum System (CEAS) by 2010. The Pact now allows for this deadline to be shifted back to 2012. What, if any, effect will this prescription have?

In the past, the HOGS’ timetabling efforts have been most successful when they have reflected not only the capacity of the Commission to present relevant proposals but also the independent political priorities of the Interior Ministries in the Council of Ministers. The Pact’s 2012-prescription resonates with these realities, and both

Commission and Council will likely exploit the relaxed timetable.

For some observers, the relaxed timetable will in turn be taken as evidence of the Pact’s aim to stem the dilution of state sovereignty. Yet, such critique gives only half the picture: If the Pact resonates with the priorities of the interior ministries in Council, it is not merely because of any shared “power-and-autonomy” agenda.

Until now, the EU’s asylum agenda has pursued two contradictory guiding aims. On the one hand, the goal of completing construction of a Common European Asylum System as set out by the Hague European Council has required a forward-looking approach if it was to stand any chance of success before the headline date of 2010. On the other hand, the EU asylum agenda since 2005 has been largely concerned with consolidating progress achieved in the period 1999-2004. As part of this consolidation, the Hague Council recognised the need to evaluate the EU asylum measures already adopted. The Hague Programme called for the thorough evaluation of the existing (or “first-phase”) EU asylum measures by the end of 2007 as a pre-condition for the further development of the CEAS. This 2007 deadline was always an unrealistic prescription given that some asylum measures adopted under the Tampere Program would scarcely have been implemented by then. By adjusting the original 2010-date, the European Council has reconciled these two headline aims. The Pact’s effect will be to allow for the proper evaluation of the foundations of the CEAS.

Constitutor

The European Council’s third role is that of “constitutor”. The HOGS have the final word about the overall institutional framework in which EU migration law-making occurs. Indeed, the national governments are empowered to alter this institutional framework without resorting to treaty-change. It has, therefore, been a point of particular contention for commentators that the Pact maintains the existing degree of national sovereignty in the decision-making process.

Following the Pact, the European Parliament’s and European Court of Justice’s powers vis-à-vis the national governments will remain ‘incomplete’. Moreover, the Council of Ministers will continue to deal

with questions of legal migration by unanimous, rather than qualified-majority, voting. This maintenance of the institutional status quo seems to have broader significance for the influence of the Pact: Institutional change would likely be required if the few qualitative (recognising the human rights and dignity of migrants) and quantitative (progress in the area of legal migration) goals which go against the “power-and-autonomy” agenda are to be realised.

All the same, analysts have misjudged the reasons for the maintenance of the current institutional setup. The disinclination to ‘complete’ the communitarisation of migration policy may lie just as much in the HOGS’ reluctance to “cherry-pick” from the Lisbon Treaty than in any “power-and-autonomy” agenda. The stalled Treaty foresees the expansion of the European Parliament’s and Court’s powers in migration policy, as well as the introduction of qualified-majority voting in Council for legal migration. To introduce such changes without the Treaty would be to reduce the political pressure behind it, as well as being likely to further aggravate the Irish people.

Dramatics

For EU citizens, the pageantry of the European Council summits is often the most visible, and reassuring sign, of Union activism. The Pact might, then, have played a useful role in reassuring EU citizens about the Union’s efforts in migration regulation. There has, however, been some criticism of the Pact in this vein: it offers “nothing new”.

The inference is that in order to reassure citizens, the European Council should have launched new measures. This critique is wide of the mark. Firstly, citizens’ awareness of existing EU measures is low. The Pact could easily “launch” these existing activities anew. Secondly, the attractiveness of the European Council performing this reassuring role lies precisely in the fact that it offsets the pressure on the EU to introduce concrete new initiatives that themselves perform little more than a symbolic function.

As it turned out, however, the Pact was put firmly in the shade by the incipient global financial crisis. Although it was adopted as planned at the October European Council, the Pact was no longer to be the highlight of the Summit. The Pact succeeded neither in its symbolic role, nor as a “re-launch” platform. The pressure persists for high-

profile legislative and executive measures to be launched, many of which are made tangible to EU citizens because they restrict their own freedoms.

3. Cooperation after the Pact: a re-nationalisation of policy-making

In short, it is not merely the contents of the Pact that are of interest. As a form of decision-taking too it has broad implications: Commentators have long noted a tendency in EU Justice and Home Affairs whereby the Member-State governments, and particularly national interior ministries, seek to re-establish their influence over deliberations. They wish to offset the creeping communitarisation of decision-taking. Amongst the most obvious examples are the use of formal opt-outs and the elaboration of strategic Programmes by the European Council. There have also been more informal and ad-hoc examples of this trend. In the G6 and Prüm formats for example, national governments have begun cooperating in cosy groups on the edges of the EU’s legal framework. Once there, they have short-circuited concurrent negotiations at the Union level in which the European Commission or Parliament were active. With their “mobility partnerships”, meanwhile, coalitions of willing Member States have supplemented Community efforts in controlling migration from certain third countries. This too has entailed a renationalisation of policy-making and move away from truly common EU endeavours.

Of course, this “renationalisation” of decision-taking will not necessarily spawn policy outcomes that reassert national autonomy. Indeed, if the proponents of this kind of decision-making are to be believed, just the opposite will occur. These actors argue that the activism of the European Commission and Parliament in communitarised decision-taking has previously forced them to block policy initiatives which diverge from the “power-and-autonomy” agenda: thanks to the influence of the Commission and Parliament, these divergences simply went too far. Having reasserted themselves in the decision-making process therefore, national governments ought to be readier to break from the power-and-autonomy agenda. They will be happier to engage in cooperation on questions of economic migration, for example, if the Commission and Parliament are all but absent from negotiations. In the

same way, the governments will be happier to deal with migration from a non-security-related perspective if allowed to do so in coalitions of the willing.

A cursory glance at the contents of the Pact suggests that this is logic is questionable to say the least. The national governments have not exploited their discretion in the Pact's decision-taking process in order to dilute the "power-and-autonomy" agenda. Just the reverse, in fact: if the above analysis is anything to go by, the Pact will cement the autonomy-and-power agenda. By tying together previously disparate agendas into an overall package of compromises, the European Council has given all Member States a strong interest in the Pact's realisation. States previously sceptical about the "power-and-autonomy" agenda, are thus more closely bound to it.