Opening speech Hohenheim

As an old friend and big fan of the Hohenheimer Tage, I feel very privileged to do the opening of the conference in my new position and reflect on the current developments. I am a member of the LIBE committee, which covers security, civil law, rule of law, asylum and migration, fundamental rights, citizenship etc. The Greens have 14 members in LIBE, of which I am co-coordinator.
Member of Schengen scrutiny committee, rapporteur for the Recast proposal of the Returns Directive.
AFET (foreign affairs) and Droit (human rights). Combination LIBE and AFET on purpose to be more effective on the external dimension.

Since the elections, we have a new political reality: EPP and S&D not almighty, so different coalitions are possible. S&D, Renew, the Greens and GUE altogether have a just majority in the committee, but after Brexit? At least more dynamics.

Maybe due to my academic background, one of my aims is to further evidence-based policies. Not only through sound arguments instead of framing but also in ensuring that informed decisions can be made. I would like to contribute to making and holding the EU responsible for complying with fundamental rights, where ever it acts.

I will first discuss the developments on asylum, elaborate on how to enforce the current rules, discuss the external dimension of EU asylum and migration policy, elaborate on legal migration and, of course I will end with Return.

Asylum

In the previous term, the idea was to focus on implementation of the recast instruments on asylum (reception, procedures, qualification) that were adopted before 2014. However, the so-called Balkan route in 2015 changed everything. Since then, all attention focussed, maybe in an attempt to show we are in control, on new legislation. Negotiations started on new asylum instruments in an attempt to approach a uniform asylum system that would take away any incentive for secondary movements. A plan for revising the Dublin Regulation was also launched, however still keeping the principle that the first state of entry is responsible. All negotiations ended in a deadlock in the Council, but the European Parliament managed to adopt a common position on each of the files.

Against that background, you may understand the feeling of frustration in Parliament when Von der Leyen, already in her first speech, announced to withdraw all the proposals and come up with a so-called New Pact on Migration and Asylum. It is interesting that the wording has changed: the term Common has been deleted. And this is for the purpose of getting support from all Member States by offering some flexibility, in relocation as well as on the rules. We will hopefully hear more about the plans of the Commission tomorrow, but I would like to briefly comment the current plans that circulate.

Many Member States seem to agree that the distribution system of asylum seekers should change, and that the best way to do this, is after a procedure at the external border. Where Member States are divided, is the content and

scope of that procedure. The Netherlands want a full fledge asylum procedure and after that relocate the asylum seekers that received a status, Germany wants a first assessment in order to filter out the prospectless cases, and only distribute the successful ones.
Greece and Italy however only envisage a procedure to identify and register the asylum seeker and prepare the relocation. This division is not surprising. The Southern Member States don t want to keep the burden of the more complex cases and the returns, that often turn out to be difficult. They don t feel relieved with these proposals.

If you look at it from the perspective of the asylum seeker, it is hard to imagine that the Southern Member States will be able to apply a swift, efficient and careful border procedure. Just like now, it may take very long, including the appeals, and according to the plans asylum seekers have to await these procedures in detention, which is at odds with the standards on detention. EASO suffers from severe shortages as Member States fail to send officials, so on the short and middle-long term the procedures will rely heavily on the national capacities of immigration authorities, legal aid, judges, but also of reception. Replacing the authorities with a reinforced EASO, requires a fundamental institutional change, with also solutions for judicial scrutiny at a EU level for instance.

The Greens want a real solidarity mechanism, but we think this will not be achieved if all asylum claims are assessed in the first state of entry, even if it concerns only a first screening. To what extent solidarity can be differentiated is a challenging question, as there is a high risk that if Member States can sell their responsibility or otherwise ensure that they need to take less cases, the

support for solidarity may swiftly decrease even more. And of course we need effective incentives to ensure compliance with relocation obligations.

What I miss in the discussions on the New Pact, is attempts to reduce the risk of unsafe and irregular routes. The Malta declaration was one attempt to enable disembarkation at a European safe haven. But the problem is more complex and requires a structural solution. We demand that the EU takes responsibility for an EU coordinated Search and Rescue capacity, and that the trend of criminalisation of NGOs who assist migrants is reversed. And we want the EU to take more responsibility for resettlement and financial support of refugees in fragile regions. This is still left to the discretion of the Member States.

I consider the idea that new legislation will overcome the deadlock between the deeply divided Member States and at the same time lead to the necessary harmonisation, as wishful thinking. We look forward to the plans of the Commission and all eyes are on the German presidency. Chance is big however that we remain negotiating for years, neglecting the tools we already have for promoting harmonisation.

Implementation current standards: promote compliance

Because if the current rules were properly implemented, we would have reached a much higher level of harmonisation. But unfortunately these rules are not always complied with, sometimes resulting in serious human rights violations.

I mention the reporting of pushbacks at a large scale, by many European countries located at the external borders of Schengen or the EU. Migrants are refused access to an asylum procedure, and this is in some countries accompanied by brutal violence. The Commission does not seem to act very vigorously, despite case-law of the European Court on Human Rights on Hungary, Poland, Spain and Greece. The persistent allegations on pushbacks by the Croatian authorities at the border with Bosnia and Herzegovina, did not prevent the Commission from concluding that Croatia is ready to access the Schengen area. It will be for the German Presidency to decide if it will push for accession or first ensure that the push backs are brought to an end. We have asked the Fundamental Right Agency to undertake a study on push backs in Europe, to have more acknowledgement at the EU level.

The situation of asylum seekers in Greece is far beyond depressing. They live in inhumane, unsafe and unhealthy circumstances and many unaccompanied minors are left on their own. The LIBE Committee has urged for an improvement and for swift relocation many times. There are many underlying factors such as the EU Turkey deal and the lack of relocation, but apart from that, it clearly shows that the current standards on asylum don t protect asylum seekers in the whole EU territory. In Italy, Salvini has dismantled the reception system by warehousing asylum seekers, offering them only very basic needs.

Start implementing and complying with the rules in place begins with transparent and independent monitoring. The Commission is obliged to evaluate the implementation periodically. On asylum, the Commission failed to this during the last term. This deprives the Commission but also national actors from tools for enforcement. In the Netherlands, lawyers and judges very much

rely on evaluation reports of the Commission, in order to assess the correct implementation and the need for a preliminary ruling. The Commission does not equip itself with sufficient staff for evaluating and enforcement. You can say that this is also a political choice. The double mandate of the Commission, being both a supervisor and having the right to initiative for new legislation, may also trigger turning a blind eye to lack of compliance. Because why irritate a Member State that you try to persuade to agree on new legislation? It may be more effective to disentangle the two functions, and task another institution with independent and transparent monitoring of the application of the EU rules on asylum and migration.

Implementation reports are also important to assess **new proposals**: will they solve gaps in the implementation or national divergences? Are they necessary? In that sense they would reduce the risk of political wishful thinking. In the absence of Commission reports, the LIBE Committee has decided to evaluate the implementation of the Dublin Regulation and of the provisions on border procedures, in order to better judge the upcoming new Commission proposals. For the same reason it is important that the Commission releases impact assessments prior to a new legislative proposal, if that proposal would have significant consequences. This follows from the Commissions own rules on Better Regulation. With the Asylum package of 2016 the argument was: no time, we are in a crisis. With the New Pact, this argument would not be credible.

Controlling the Agencies

Many tasks are delegated to Agencies, and especially Frontex and EASO have been granted more tasks and competences. This should go hand in hand with

more responsibility and accountability. Frontex lacked for a long time a complaint mechanism. After a lot of criticism it has been established one, but the executive director plays a big role in assessing those complaints, which raises the question on independency. With the new Regulation on Frontex, were it was decided that the Agency will grow up to 10.000 border guards, the Greens managed to have an amendment adopted for the establishment of 40 Fundamental Rights monitors, to support the Fundamental Rights Officer. But also there, it is important that this Officer can act independently and transparantly. There is no structural external complaint or monitor mechanism. National Ombudsmen are keen to fill that gap, but we may also need more control at the EU level.

The Parliament, especially the Schengen Scrutiny Group, can exert some political control on the acts of Frontex. But it must be said that access to the documents is really problematic. Many reports about border control are confidential. And even the members of Parliament can only access these classified documents under very strict conditions. First fill in a document of 15 pages on my travels abroad, also from my family, etc. Then the intelligence service of your own country can give a clearance. If granted, you are allowed to enter a room, where the document lies, you re stripped of pencils, pens, mobile phone, everything you could use for reproduction, and then you can read. And after that, this information cannot be shared with other MEPs.

Now this may not be the most effective way to exercise democratic control on the performances of the Agency.

Frontex has working arrangement with many third countries, and there are formal status agreements to be adopted with western Balkan countries. That would enable them to operate on that territory. The advantage can be it might

not only lead to a more effective border control but also to more compliance with fundamental rights, if they perform their task well. But as long as the asylum systems are have serious deficiencies, the cooperation can also lead to less access to an asylum procedure.

External dimension

That brings me to the external dimension of EU migration policies. As said, Member States are deeply divided on internal asylum policies, but seem to unite easily on the external dimension of it. This cooperation started in the nineties with readmission agreements, mostly with neighbouring countries and accession countries. It has been extended not only to many parts of the world, but also to readmission agreements with transit countries, who return those migrants furhter away. The Council is keen to have these agreements, as transit countries restrict their border control for incoming migration to avoid becoming responsible. Although it may lock up migrants and refugees in or outside transit countries, the level of protection is not a criterion for these agreements.

With the EU Turkey deal, the Member States went a step further by returning refugees who already entered the EU and transferring their protection to transit countries. Where now the risk of deportation back to Syria is serious and where many refugees live below the poverty standards. Member States want to apply it also to North African countries, they look at Tunisia for instance. They try to water down the criteria for a safe third country in the recast Procedures Regulation. Not only regarding the level of protection in that country, but also by lifting the requirement that the migrant must have been in that country before. In that way for instance migrants who departed from Libya

could be returned to Tunisia, where they have never been, in the case that Tunisia would be prepared to cooperate.

The EU Turkey deal is exemplary for the shift towards informalisation of the external cooperation. Rather than formal agreements, the EU concludes all kinds of soft arrangements, partnerships, compacts, MOUs, The Way Forward etc. Member States want to use EU tools to gain cooperation from third countries. Von der Leyen urged Commissioner Urpilainen, tasked with concluding international partnerships, to use all incentives, not only as a reward but also as a sanction.
As there are no conditions on human rights or asylum systems, this cooperation can be harmful to refugees who are on their way in search for protection. An evident case is the funding of the Libyan coastguard pulling back migrants from the Mediterranean Sea, although we know that they end up in awful detention centres. We urged the Commission to start working on safeguards, like a risk assessment before entering into a cooperation with a third country, to monitor the effects of the cooperation and suspend if the human rights are violated. Johansson has promised to look how the monitoring can take place.

But the Parliament has a very weak position on external cooperation. Regarding formal agreements we have the right to consent, but it is only the Council who decides on the negotiation mandate and who is involved in the progress. Regarding informal cooperation, we don t have a role at all. In the hearings, Johansson promised to involve Parliament in the external cooperation. This is a good gesture, but it shows that the Parliament depends on gestures. This operating outside the framework of the Treaty not only has consequences for the democratic legitimacy, but also for the judicial control.

This became clear when the Court of Justice declared the appeal of refugees on the Greek islands inadmissible, as the EU Turkey deal would not fall under the competence of the EU. To be honest, I find it astonishing that the Council and the Commission continue to outside the treaty, apparently without concerns about the constitutional consequences and the loss of checks and balances. On asylum, the Commission s position has clearly shifted in the last years from a guardian of the institutional and communautarian interests towards a more political actor, as an ally of the Member States. It not only leaves Parliament in a more isolated position, but it also reflects that Council has gained more power. I think that if institutions neglect their specific institutional role, they may lose relevance.

I see two ways to strengthen our position. One is the budgetary role, as much of the cooperation is based on EU. Since 2015, the Commission and the Member States aim for more flexibility, by using the label ´crisis´ or ´emergency´, in which cases less procedural safeguards are applicable. The EU Trust Fund was such a fund, where development aid was used for border control activities. A new instrument is now being negotiated, NDICI, and Council and Parliament have a fight on flexibility and the involvement of Parliament in the spending. Whatever the outcome will be, we established a financial working group in the committee on foreign affairs, and I will try to track and trace the money spent for migration projects.
Another strategy is to find out the legal limitations of informal arrangement where the Parliament has competence, for instance regarding readmission and visa. In the past, the Court of Justice prohibited the adoption of guidelines by the Council on external sea borders, as an appendix to the Schengen border code. The Court mentioned three arguments. First, interception at sea relates

to fundamental rights, which requires involvement of the EU legislature. Second, the content of the guidelines concern political choices, which is the prerogative for the legislature as well. And third, the rules include essential elements of external seaborders control, which cannot be laid down outside the legislation. And on that point Parliament has a competence. The Court also recalled that the argument of the Council that the guidelines are not binding is not valid as they aim to have a binding effect. I find this reasoning a source of inspiration for the current informalisation of the external dimension of EU migration policy.

Legal migration

So when reflecting on asylum law, I still think we could best start working with the current rules, promoting and enforcing compliance, and only focus on a fair and workable Dublin reform. What about the rules on legal migration? Are they sufficient, effective and well implemented?

It is interesting to see that the oldest instrument, the Family Reunification directive, is practically the only one that has not been amended. It was not necessary as the Court of Justice solved many of the weak spots and vague clauses. This is ofcourse only effective if judgments dealing with one Member State are also respected in other Member States. Here the Commission contributed significantly with two evaluation reports and with guidelines on the interpretation and implementation. However, there are limits to what the Court of Justice can do, for instance legal loopholes cannot be overcome. As beneficiaries of subsidiary protection don t fall under the scope of the directive (at the time of adoption there was no common definition), Member States such as Germany and Sweden could postpone their right to family reunification. There are cases before the ECHR as this different treatment with Convention

refugees affects article 14 ECHR. It would be wonderful it this loophole could be repaired with a reference in the Qualification Regulation, but I would prefer no reopening of the directive as that could also bring less instead of more family life. Interestingly, the directive is never mentioned in the political debate. Only family reunification under the Dublin regime, where Member States again fail to comply with the obligation to swiftly reunite family members. Even if they stay in awful circumstances in Greece.

Regarding labour migration we see reluctance by the Member States and hesitation by the Commission. The only ambition expressed by Commissioner Schinas is to make the Blue Card Directive more effective, but the recast of the Blue Card Directive is stalled in the Council as Member States want to keep their national systems. They say they want to make the EU more attractive for highly skilled migrants, but in fact they act more as competitors instead of colleagues in competition with non EU states like Canada, US and Australia. The application of the Blue Card Directive shows also huge differences between the Member States in the extent to which the Blue Card is issued, and the same has happened with the Long Term Residents Directive. Both directives give Member States the option to issue national permanent permits. Therefore the benefits of the EU status are not always used.
Long term residents also face labour market tests in the second Member States, if they want to settle there. As a result, a very small number exercises the right to mobility. I asked the Commissioner Schinas to consider a targeted amendment of the Directive with the deletion of this optional clause. He promised to look into it, but also here I am afraid that Member States want to keep their discretion. So the intra EU mobility is still very much restricted for third country nationals. This is a missed opportunity, as the idea of the

Tampere conclusions was that more comparable rights with EU citizens should serve their integration as well as the European labour market. We now still see a mismatch of a shortage of workers in the Northern and also Eastern Member States and too many job seekers in the South.
More intra EU mobility could also promote a fair distribution of asylum seekers. If they have a chance to apply for a job in another Member State after they have been granted asylum, they will more easily accept to have their asylum claim assessed in a Member State which is not their first choice. Such positive incentives are more effective than sanctions.

The sum of all legal migration directives is fragment, complex and not always consisten. A binding EU immigration code could solve this, but is not politically feasible. It means that also in this area, we need to further consistency, coordination and compliance in practice. On legal migration, the Commission is much more active with evaluation reports, pilots and infringement procedures. But what could be improved is enhancing the knowledge among civil society, employers and local authorities, in order to overcome hesitation or reluctance to use and acknowledge rights migrants have.

Having said this, I think we need to fill a gap in the legislation regarding labour migrants with other competences than highly skilled and other types of workers like self-employed. Countries like Germany and Sweden have expanded their labour migration policy, but other governments don t address mismatches on the labour market and the demographic change. Actually this implies a decision to accept irregular migration. We could use a European legal framework, where the policies on the numbers and sectors maintain a national competence. If a better regulation would go hand in hand with combatting

abuse and exploitation, the current public unease but also the inhuman situations would be better addressed. Even if legislation is a bridge too far, we could invest in more cooperation to tackle the misfit on the European labour market, from the policy up to the operational level, together with relevant organisations like OECD, the Union and employers. And we can learn from the current pilots on labour migration.

We could work more closely on labour migration with candidate countries and those with association agreements, but this topic also relates to the migration cooperation with other third countries. Member States push the Commission to conclude far reaching arrangements, but if it comes to offer leverage which belong to the national competences, as is the case with visa and permits for labour migration, they usually shy away. However, legal migration in exchange for combatting irregular migration would be a fair way to avoid that the benefits of the third countries, namely the high sum of remittances sent by labour migrants, are affected.

Returns

During the discussions on the New Pact on migration and asylum, Member States and Commission emphasise the importance of swift returns. And only on this file, the Member States reached a political agreement.

In general, the recast proposal is characterised by an emphasis on restrictive measures. The grounds for detention are expanded with public policy and national security and Member States have to establish a maximum period of detention in their legislation, with a minimum term of three months. There is a long list of criteria to for the risk of absconding, and meeting these criteria has

a lot of consequences: detention but also for skipping the voluntary return term of 4 weeks, which means that a re-entry ban has to be imposed. As many criteria are very general, like lacking sufficient resources, lacking an address or official document, these restrictions may even become the rule. This means a shift from voluntary return to forced return. Overall, the procedural safeguards are diminished in the proposal and Member States have more obligations to impose coercive measures, and less possibilities to grant a residence permit. The balance in the current directive, which is guided by the proportionality principle, obliging Member States to use the least coercive measure, is at risk with the proposal.

A novelty in the recast proposal is the return border procedure, as a follow up to the asylum border procedure. It would enable Member States to keep rejected asylum seekers in detention up to 4 months with a view to immediately return them from the border. The Council excluded this part from its political agreement, as it is closely connected to the asylum procedures border. So I would propose we don t touch upon it either yet.

The common opinion is that the directive should lead to effective return policies, but what policy is the most effective? Researchers tend to conclude that longer detention doesn't lead to more returns, that voluntary returns are more sustainable and that individual support has a positive effect. The recast however goes into the opposite direction. The Commission did not make an impact assessment, and as the Parliament insisted on more evidence, it asked its research department to make an own substitute impact assessment. As the Commission did not update its latest evaluation report of 2013, the LIBE Committee decided to do an implementation research itself.

I will table my amendments on mid February, the other political groups in April and formally it is possible to have a vote before Summer. It is awkward to negotiate on the last part of a procedure, that no-one knows how it will look like. It may even happen that the Commission and Member States want to change the partial agreement. We might have negotiations with the Council during the German presidency. I hope we will be able to have an overview by then of how the Pact on migration and asylum will look like, in order to ensure coherence but also sufficient safeguards in the whole system.

Conclusion

So it is clear that on some points, we need new legislation but in many more areas we need correct implementation and coordination. And I would hope that all three institutions will invest in policies that are loyal to the institutional principles of democratic and judicial control, and to the Treaty obligations on solidarity and the fundamental rights. But above all, we need the ambition of European leaders to go beyond the national interests and debates. The EU should be able to act as a Union that takes responsibility for global problems and develops a real European space where all residents have similar rights and opportunities. And have the courage to explain why such policies are the only way forward.