Bijlage bij de brief aan de staatssecretaris van J&V met nadere vragen over het GCM (kenmerk 164221.07u)

EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 1 February 2019
sj.i(2019)691461 LG/sa

Opinion of the Legal Service[1]

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Subject: **The legal effects of the adoption of the Global Compact for Safe, Orderly and Regular Migration by the UN General Assembly**

1. INTRODUCTION

Following the endorsement by the UN General Assembly ('UNGA') of the Global Compact for Safe, Orderly and Regular Migration ('GCM')[2] this note analyses the legal effects of the formal adoption of the GCM.

2. PRELIMINARY OBSERVATIONS

2.1.1. The EU and its MS at the United Nations

1. The EU is not a member of the UN but it enjoys an enhanced observer status and participates in the works of the UNGA on the basis of the UNGA Resolution 65/276 of 10 May 2011 on the participation of the European Union in the work of the United Nations[3].

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2 UN General Assembly resolution 73/195 of 19 December 2018 on the Global Compact for Safe, Orderly and Regular Migration. The text of the GCM is to be found in the annex to this UNGA resolution

3 Resolution A/65/276,sets out the modalities for the participation of the representatives of the European Union, in its capacity as observer, in the sessions and work of the General Assembly and its committees and working groups, in international meetings and conferences convened under the auspices of the Assembly and in United Nations conferences.

2. In accordance with this Resolution, the Union does not have the right to vote but it can, among other things, make statements and present orally proposals and amendments.

3. According to Article 221 TFEU the EU Delegation to the UN is responsible for coordinating EU positions on the spot and for representing the EU at the UN (including through delivery of statements). In EU coordination meetings, and although the voting rules under EU Treaties do apply, consensus is currently the working practice.

4. The coordination of EU positions and the cooperation between EUDEL and MS at the United Nations is subject to the principle of loyal cooperation.

5. The principle of loyal cooperation states that Member States shall facilitate the achievement of the Union's tasks and refrain from any measure, which could jeopardise the attainment of the Union's objectives (art. 4.3 TEU).

6. This principle was subject to analysis of the Court in case C-246/07 Commission vs Sweden[4]. The Court stated that "*Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action*".[5]

7. What is more, Article 210 TFEU clearly states that both the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes in order to promote the complementarity and efficiency of their action. According to this provision, the Commission may take any initiative to promote such coordination.

2.1.2. The procedure of adoption of the GCM

8. In September 2016, the UN General Assembly adopted the New York Declaration for Refugees and Migrants,[6] officially launching the process of elaboration of a GCM.[7] It was welcomed by the European Council in its conclusions on migration of 20 October 2016[8].

9. In the New York Declaration, the UN Member States committed to launching, in 2016, a process of intergovernmental negotiations leading to the adoption of a

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4 Judgment of 20 April 2010 in Case C-246/07, Commission vs Kingdom of Sweden, ECLI:EU:C:2010:203

5 *Ibid.*, point 74 and 103

6 http://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html

7 UN General Assembly resolution 71/1 of 19 September 2016 New York Declaration for Refugees and Migrants

8 http://www.consilium.europa.eu/en/press/press-releases/2016/10/20/european-council-conclusions-migration/pdf

global compact for safe, orderly and regular migration at an intergovernmental conference to be held in 2018.[9]

10. In the Annex II to the New York Declaration UN Member States decided that the global compact would be elaborated through a process of intergovernmental negotiations. Furthermore, it was decided that "*the negotiations [would] culminate in an intergovernmental conference on international migration in 2018 at which the global compact [would] be presented for adoption*".[10]

11. The modalities for the intergovernmental conference were adopted by a separate UNGA resolution.[11]

12. It follows from these texts that the process for adoption of the GCM consisted of two stages:

    1) The negotiating stage which included:

    - the negotiation and drafting of the text of the GCM (ended on the 13 July 2018) and;

    - the adoption of the text (outcome of the negotiations) at the Marrakesh Conference on 10-11 December 2018.

    2) The endorsement of the GCM by UN General Assembly (Resolution 73/195).

13. EU actors negotiated the GCM on behalf of the EU and its MS.

14. On 10 December 2018, the Intergovernmental Conference was convened in Marrakech, Morocco, and attended by 164 participating States and by the European Union. On EUMs side, Austria, Italy, the Czech Republic, Hungary, Latvia, Poland, Slovakia, Bulgaria decided not to attend the Intergovernmental Conference in Marrakech.

15. The participating States adopted the outcome document of the Conference, the Global Compact for Safe, Orderly and Regular Migration, by consensus. The Intergovernmental Conference recommended that the General Assembly endorses, at its seventy-third session, the Global Compact for Safe, Orderly and Regular Migration as adopted by the Conference.[12]

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9 UN General Assembly resolution 71/1, op. cit., point 63

10 Annex II to the UN General Assembly resolution 71/1, op. cit., point 9

11 UN General Assembly resolution 72/244 of 24 December 2017 on the Modalities for the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, the Intergovernmental Conference, as amended by UN General Assembly resolution 72/308 of 6 August 2018

12 Conference resolution A/CONF.231/L.1 of 10 December 2018 on the Outcome document of the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration

16. On 19 December 2018, the UN General Assembly endorsed[13] the Global Compact with 152 votes in favour (including 19 EU Member States) to 5 against (Czech Republic, Hungary, Poland, Israel and United States), with 12 abstentions (including Austria, Bulgaria, Italy, Latvia, Romania); 24 UN Member States were absent from the room and did not cast a vote. Slovakia was one of them.

17. The positions of EUMS in the adoption of this resolution were therefore threefold (on top of those Member States voting in favour of the GCM):

    a. EU Member States voting against the GCM;

    b. EU Member States abstaining in the vote on the GCM; [14]

    c. EU Member State not participating in the vote on the GCM.[15]

    Only the adoption of the UN General Assembly resolution created legal effects of the Global Compact within the EU legal order

3. LEGAL EFFECTS FOR THE EU AND ITS MS OF THE ADOPTION OF THE GCM

3.1. EU law

18. Article 4(3) TEU stipulates that:

    "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

    The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

    The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

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[13] UN General Assembly resolution 73/195 of 19 December 2018 on the Global Compact for Safe, Orderly and Regular Migration

[14] The situations under letter a. and b. are questionable in terms of the compliance of the Member States with the principle of loyal cooperation. The behaviour of the Member States concerned could be seen as the dissociation from a concerted common Union strategy. In particular, during the adoption of the GCM, one Member State referred to the fact that the European Union's migration policy has failed and undermined the EU acquis in the field of migration. Such a situation compromises the principle of unity in the international representation of the Union and its Member States and weakens the EU negotiating power with regard to other countries. What is more, it jeopardises the reputation and credibility of the European Union on the international stage.

[15] One Member State decided not to participate in the voting. This situation should be distinguished from the two others as there is no obligation for a Member State to take part in international meetings. This is dependent on the decision of the Member State and constitutes one of the state functions that is protected under Article 4(2) TEU.

19. Article 21(1) second subparagraph of the Treaty on the European Union (TEU) stipulates that:

"*The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.*"

20. Article 208(2) TFEU states that:

"*The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.*"

21. Article 210 TFEU stipulates that:

"*1. In order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. They may undertake joint action. Member States shall contribute if necessary to the implementation of Union aid programmes.*

2. The Commission may take any useful initiative to promote the coordination referred to in paragraph 1."

22. The New European Consensus on Development[16] further states:

"*40. Addressing migration cuts across many policy areas, including development, good governance, security, human rights, employment, health, education, agriculture, food security, social protection and environment, including climate change. Through the Partnership Framework approach the EU and its Member States will address in a comprehensive manner the multiple aspects of migration and forced displacement, including smuggling and trafficking in human beings, border management, remittances, addressing the root causes, international protection and return, readmission and reintegration, on the basis of mutual accountability and full respect of humanitarian and human rights obligations. The EU and its Member States will take a more coordinated, holistic and structured approach to migration, maximising the synergies and applying the necessary leverage by using all relevant EU policies, instruments and tools, including development and trade. Through these strengthened efforts, the EU and its Member States will actively support the further implementation of the joint 2015 Valletta Action Plan and the elaboration of the UN Global Compacts on Migration and*

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[16] Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission "The New European Consensus on Development: Our World, Our Dignity, Our Future", OJ C 210, 30.6.2017, p. 1–24

Refugees, as called for by the 2016 New York Declaration for Refugees and Migrants."

3.2. Assessment

3.2.1. Migration as part of the Union's development cooperation

23. Article 208(1) TFEU provides for the objectives of the Union's development cooperation. The Treaty states that the primary objective of this policy is the reduction, and in the long term the eradication of poverty.

24. The European Court of Justice clarified the scope of the development policy in its Philippines judgement (case C-377/13, Commission vs. Council).[17] It stated that in accordance with Article 208(1) TFEU "*[t]he primary objective of that [development] policy is the reduction and, in the long term, the eradication of poverty and the European Union must take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.*"[18]

25. Furthermore, the Court clarified that "*European Union policy in the field of development cooperation is not limited to measures directly aimed at the eradication of poverty, but also pursues the objectives referred to in Article 21(2) TEU, such as the objective, set out in Article 21(2)(d), of fostering the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.*"[19]

26. The Court further referred to the 2005 European Consensus on Development[20] in order to establish the broad meaning of the development cooperation. In this regard, the Court highlighted that the European Consensus on Development clearly states that the objective of development cooperation is the eradication of poverty in the context of sustainable development, including pursuit of the Millennium Development Goals. In this context, the Court noted that the concept of sustainable development includes in particular environmental aspects. As the eradication of poverty has many aspects, achievement of those aims requires, according to the European Consensus, the implementation of many development activities as referred to in that paragraph.[21]

27. Moreover, the Court pointed out that the 2005 European Consensus on Development migration, transport and environment are integrated into the development policy. It noted that according to the text of the European Consensus

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17 Judgment of the Court of 11 June 2014 in case C-377/12, Commission vs. Council, ECLI:EU:C:2014:1903

18 Ibid., point 36

19 Ibid., point 37

20 Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled "The European Consensus", OJ C 46, 24.2.2006, p. 1–19

21 Ibid., point 42

migration is viewed as positive factor for development contributing to poverty reduction.[22]

28. The New European Consensus on Development reflects those findings of the Court[23]. In point 71 the New Consensus states that "*[m]igration, sustainable development and stability are strongly interlinked. (...)*". Furthermore, it states that well-managed migration and mobility can make positive contributions to inclusive growth and sustainable development.[24] Moreover, it explains that stronger engagement of the Member States and the Union should facilitate the safe, orderly, regular and responsible migration and mobility of people.[25] In point 40 last sentence, the New Consensus on Development supports the elaboration of a GCM.

29. Finally, in case C-377/12 the Court referred to Regulation 1905/2006 establishing the instrument for development cooperation[26] in order to justify the broad meaning of the Union's development cooperation policy. It noted that migration and environment are certain areas of development cooperation that may receive the EU assistance by means of thematic programmes.[27]

30. Regulation 1905/2006 was replaced by Regulation No 233/2014[28] which states that "*[c]ooperation under this Regulation shall contribute to the achievement of the international commitments and objectives in the field of development that the Union has agreed to, in particular the MDGs, and post-2015 new development targets*".[29]

31. Regulation No 233/2014 also provides that the achievement of the reduction of and, in the long term, the eradication of poverty as well as contribution to fostering sustainable economic, social and environmental development, and to consolidating and supporting democracy, the rule of law, good governance, human rights and the relevant principles of international law is measured by using certain indicators relating to Millennium Development Goals and other indicators agreed at international level by the Union and the Member States.

32. Last but not least, the objectives listed in Article 2 of Regulation No 233/2014 are agreed "*[w]ithin the framework of the principles and objectives of the Union's*

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22 Judgment of the Court of 11 June 2014 in case C-377/12, op. cit., point 49

23 Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission, OJ C 210, 30.6.2017, p. 1–24. The 2005 European Consensus on Development has been replaced by the New European Consensus on Development. In its points 5 and 12 the new document reproduces the findings of the Court. The New Consensus is supposed to provide for a framework for the implementation of the 2030 Agenda for Sustainable Development and Sustainable Development Goals

24 The New European Consensus, op. cit., point 39

25 Ibid.

26 Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ L 378, 27.12.2006, p. 41–71

27 Judgment of the Court of 11 June 2014 in case C-377/12, op. cit., point 50

28 Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020, OJ L 77, 15.3.2014, p. 44–76

29 Ibid., Article 1(2)

external action and of the European Consensus and agreed modifications (...)".[30] It is for this reason that the Regulation provides for the possibility by the Union to grant financial and technical assistance with regards to questions relating to migration and asylum both in geographical and thematic programmes.[31]

3.2.2. The GCM and its effects on the EU development cooperation

33. Firstly, it clearly states that it rests on and is rooted in the 2030 Agenda for Sustainable Development and to Sustainable Development Goals.[32]

34. What is more, the GCM confirms that it rests on certain interdependent guiding principles. One of those principles is sustainable development. In this respect, the GCM states that:

> "*The Global Compact is rooted in the 2030 Agenda for Sustainable Development, and builds upon its recognition that migration is a multidimensional reality of major relevance for the sustainable development of countries of origin, transit and destination, which requires coherent and comprehensive responses. Migration contributes to positive development outcomes and to realizing the goals of the 2030 Agenda for Sustainable Development, especially when it is properly managed. The Global Compact aims to leverage the potential of migration for the achievement of all Sustainable Development Goals, as well as the impact this achievement will have on migration in the future*"[33]

35. Finally, in view of the broad definition of Union's development cooperation given the Court in case C-377/12, it must be noted that each of the 23 objectives for safe, orderly and regular migration has a development dimension. The implementation of those objectives would be based on the use of the financial resources available in the framework of the development cooperation policy.

36. In view of the above, the GCM should be considered as falling within this policy.

37. The adoption of the GCM has legal effects for the EU development policy.

38. First of all, in accordance with Article 21(1) TEU the Union should "*promote multilateral solutions to common problems*".

39. The GCM aims to foster international cooperation by setting out guiding principles and providing for a multilateral political framework. It deals with the complex nature of international migration by addressing a wide range of migration-related aspects, such as border management, smuggling and trafficking in human beings, migrant documentation and return and readmission, as well as diasporas and remittances.

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30 Ibid., Article 2(1) chapeau

31 Ibid., Annex I, in particular point A.III.a) and Annex II, point A.V

32 The GCM, points 2 and 6

33 The GCM, point 15 letter (e)

40. Therefore, the GCM fulfils the criterion of being a "*multilateral solution to a common problem*" with regards to migration as indicated in Article 21(1) TEU.[34]

41. Secondly, Article 208(2) TFEU obliges the Union (and the Member States) to comply with development commitments, and take into account of objectives, approved in the framework of the UN.

42. The GCM has been endorsed by UNGA. Therefore, the UN have approved the commitments and objectives therein.

43. Thirdly, in case C-399/12[35] the Court stated that an act has legal effects when it is "*(...) capable of decisively influencing the content of the legislation adopted by the EU legislature (...)*".[36]

44. As demonstrated above, the New European Consensus on Development together with Regulation No 233/2014 integrate the GCM by contributing to the implementation of 2030 Agenda on Sustainable Development and to the fulfilment of Sustainable Development Goals. What is more, the Union needs to take into account any international indicators agreed at international level. Such indicators will be developed in the framework of the GCM.[37]

45. Therefore, the way the Regulation 233/2014 and the development cooperation policy as defined in the New European Consensus on Development will be implemented is directly and decisively affected by the GCM.

46. It must be, therefore, concluded that the GCM has legal effects as it is able to decisively influence the content of the legislation adopted by the EU legislature.

3.2.1. Modalities of the sincere cooperation within the EU

47. Given that the Union is <u>obliged</u> to comply with the commitments and take account of the objectives of the GCM, this has consequences with regards to the cooperation between the Union and the Member States. In accordance with the principle of loyal cooperation, the Member States should take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

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34 There is a legal obligation to integrate objectives and principles of external action, as defined in Article 21 TEU into the development policy. Article 208(1) EU states that development cooperation shall be conducted "*within the framework of the principles and objectives of the Union's external action*". These objectives and principles are defined in Article 21(1) and (2) TEU. The obligation on the European Union to integrate those objectives and principles into the conduct of its development policy is apparent from Article 208(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU (by analogy to Opinion 2/15 of 16 May 2017 (Singapore FTA), ECLI:EU:C:2017:376)

35 Judgment of the Court of 7 October 2014 in case C-399/12, Germany vs. Council, ECLI:EU:C:2014:2258

36 Ibid., point 63

37 In example, GCM, Objective 1, point 17 letter a)

48. The Court confirmed that the principle of loyal cooperation, as enshrined in Article 4(3) TEU, means that "(…) *Member States are subject to special duties of action and abstention (…)*".[38]

49. These duties of action and abstention are especially important in situation where a matter falls both within Union and Member States parallel competence (as in the case of the GCM) as Member States have the right to participate in international meetings and in decision-making procedures in their own right. This all the more important in case of exclusive competence (migration policy aspects in the GCM), especially in situation where the Union cannot participate in the deliberations on a given matter.

50. For the specific purpose of development cooperation, the principle of sincere cooperation is further elaborated in Article 210 TFEU. It stipulates that the Union and the Member States shall coordinate their policies on development cooperation and that they shall consult each other on their aid programmes. The Union and the Member States are obliged to do so both in international organisations and in international conferences. The Commission may take initiatives to promote such coordination.

51. The cooperation between the Member States themselves as well as between the Member States and the Union is crucial in order to achieve the objectives and execute common concerted strategy. In any case, the reputation and credibility of the European Union on the international stage cannot be endangered.[39]

4. CONCLUSION

52. The Union shall promote multilateral solutions elaborated in the framework of the GCM. Furthermore, the adoption of the GCM has an impact on the financial assistance provided by the Union to third countries. This means that the GCM is an integral part of the Union positions in development cooperation as the GCM participates to the Union's legal framework.

53. In accordance with the principle of loyal cooperation Member States should facilitate the achievement of Union's objectives, including the implementation of the GCM. At the same time, they should refrain from any action that could jeopardise the attainment of those objectives.

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[38] Judgment of 20 April 2010 in Case C-246/07, Commission vs Kingdom of Sweden, ECLI:EU:C:2010:203, points 74 and 103

[39] Opinion of Advocate General M. Szpunar, case C-620/16 Commission v Germany, point 96