ASGI

Proposal for EU Management of Asylum and Migration: One Step Forward, Two Steps Back

Analysis of critical issues in the European Commission's proposed Regulation on the management of asylum and migration. The main concerns include the externalization of borders, the strengthened State of first entry principle and the overly complicated solidarity mechanisms.

Policy Paper – October, 2021

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Introduction

With the proposal for a Regulation on asylum and migration management (COM(2020)610), the Commission introduces a series of mechanisms and rules into Union law aimed at defining a common framework for asylum and migration management, as well as establishing solidarity mechanisms. The main objective is to determine the responsible Member State for examining asylum applications made by foreign nationals upon arrival on Union territory. These proposals are supposed to overcome the "Dublin System".

ASGI has numerous concerns with the Commission's proposal. These include the partnership with third countries and their cooperation in border management, the failure to overcome the State of first entry criterion (which is, instead, reinforced), the complexity of the proposed solidarity mechanisms and the lack of full guarantees for the rights of the persons concerned.

> The aim of the present document is to examine these concerns in detail, as well as the relocation procedures and solidarity system. After this analysis a number of recommendations are made.

ANALYSIS AND CONCERNS

Common framework for migrant and asylum management

The second part of the proposed regulation (arts. 3-7), which follows the laying out of the definitions, is dedicated to the general management of migration policies by the European Union. The regulation assigns numerous and complex functions to the European Commission and Union agencies relating to general migration policy, including relations with third countries. The Commission would also be entrusted with the task of adopting the European strategy for asylum and migration management, as well as defining "the solidarity response that would be required to contribute to the needs of the Member States of disembarkation through relocation and through measures in the field of capacity building, operational support and measures in the field of the external dimension." The role of European agencies, and in particular that of the European Border and Coast Guard Agency, would not only be strengthened in operational matters, but also in terms of their participation in migration policy making processes.

Concern: Excessive tendency toward externalization

ASGI considers this addition to be incompatible with the overall aims of the proposal. It also risks assigning extremely broad powers to the European Commission in the management of migration policies that concern the whole Union, its Member States, third countries and EU agencies. The partnership with third countries is aimed at an increasing externalization of asylum policies and a further reinforcement of border control systems. These objectives are often pursued through policies which are highly detrimental to the rights of foreign citizens. The Italian experience, among others, shows that agreements with third countries, which are often adopted informally and beyond parliamentary control, have contributed to increasing violations of fundamental human rights. Moreover, in numerous occasions the agreements aimed at containing migratory flows have been implemented with the use of funds intended for development cooperation. This entails a "misuse" of cooperation funds which, beyond dangerously distorting the concept and practices of cooperation from a security point of view, are of dubious legality.

Criteria and mechanisms for determining the responsible Member State

The third part of the proposal, divided into multiple sections and containing various new provisions, is dedicated to the criteria and mechanisms for determining the responsible Member State. Contrary to what was hoped, however, there is no effective overcoming of the criteria already envisaged in the current Regulation and their related concerns.

1. The State of first entry criterion and discretionary clauses

The State of first entry criterion is in general reinforced by the proposal under consideration.

In particular:

- **The State of first entry criterion is also applied when the applicant disembarked on the territory after rescue at sea;**
- There is no cessation of responsibility in the case the applicant leaves EU territory, except where removal or repatriation orders are enforced;
- In the case of irregular external border crossings, the time limit for cessation of responsibility increases from 12 months to 3 years. Furthermore, the criterion according to which the responsibility is transferred after the 5 months provided for in art. 13 par. 2 Reg. 604/2013/EU is deleted;
- Cessation of responsibility is not envisaged for holders of international protection;
- **The application of this criterion is also envisaged for unaccompanied foreign minors;**
- The State of first entry criterion is also applied to the so-called "visa exempt", providing that the State of first entry is responsible for the examination of the application.[1]

Furthermore, there are a number of provisions which **extend the application of the State of first entry criterion, establish serious consequences for asylum seekers and holders who fail to comply with obligations, and reduce the scope of mitigation measures for the application of the criterion**. In particular, exclusion from reception measures is envisaged if, upon being notified of the transfer decision to the responsible Member State, the asylum seeker is in a Member State other than the one where he or she is required to be in accordance with the proposed regulation. On the contrary, the new proposal does not

[1] Deleted, therefore, is the current Regulation's provision which stipulates that when the foreign citizen enters the territory of a Member State where he or she is visa exempt, but submits the application for international protection in another Member State where he or she is equally visa exempt, the responsibility lies with the Member State where the application was submitted.

envisage procedural consequences for the breach of the obligation to provide information to the asylum seeker involved in the procedure, nor that of personal interview.

As envisaged by article 8, the only impediment to the asylum seeker's transfer to a Member State is the presence of systemic flaws. In recent years, however, the jurisprudence of both the national courts of the Member States and the supranational courts (ECHR and CJEU) have shown that the violation of fundamental rights may occur even in the absence of systemic flaws.[2] Moreover, the provision refers solely to the transfer of persons seeking international protection, not that of protection holders or those who arrived in European Union territory through resettlement procedures. In fact, art. 26 of the proposal includes protection holders and resettled persons in take charge procedures.

Some provisions of the text are related to the new Proposal on a screening procedure for persons from third countries. In particular, comma 4 of art. 8 allows Member States to "examine whether there are reasonable grounds to consider the applicant a danger to national security or public order" and to postpone the application of the criteria for determining the responsible Member State to a later date. The States can carry out such controls when the screening measures envisaged by art. 11 of the proposed regulation have not been carried out, and when, even if such measures have been carried out, the State "has justified reasons to examine whether there are reasonable grounds to consider the applicant a danger to national security or public order".

Finally, as regards the criteria for determining the responsible State, it is important to note that the proposal includes an additional criterion for determining responsibility based on the possession of educational diplomas acquired in a Member State. Furthermore, the family criterion is expanded with the inclusion of siblings and the partial reduction of requirements for demonstrating family ties. The State of first entry criterion is not applied in cases where the applicant is subject to relocation procedures.

[2] In particular see ECHR, judgment of January 21, 2011, M.S.S. v Belgium and Greece [GC], Application No. 30696/09; judgment of October 21, 2014, Sharifi and Others v. Italy and Greece, Application No. 16643/09; judgment of December 22, 2014, Tarakhel v. Switzerland [GC], Application No. 29217/12; EJC, judgment (grand chamber) of December 21, 2011. N. S. (C-411/10) v. Secretary of State for the Home Department and M. E. and Others (C-493/10); judgment of February 17, 2017, C.K., H.F., A.S. v. Republika Slovenija (C-578/16).

Concern: The Dublin System is not overcome

In general, therefore, far from overcoming the State of first entry criterion, the measures analysed above entail a radicalization in the application of this criterion. **This may lead to a paradoxical increase in so-called unauthorized secondary movements and an increased burden on border countries in terms of reception and application examination.**

In fact, the partial expansion of the family criterion and the introduction of the diploma criterion is not enough to mitigate the first entry criterion's strong impact on determining responsibility. The same can be said for the expansion of the criterion for issuing residence permits and entry visas, which determines responsibility for up to three years after expiry (instead of the current 2 years for residency permits and 6 months for visas).

In this regard, it should be noted that the exclusion of the first entry criterion's application in relocation cases may not be particularly effective. In fact, the implementation of relocation procedures is encumbered by a wide margin of discretion and by the absence of effective guarantees for the persons involved. The risk is that these procedures remain limited, and that the State of first entry criterion continues to be prominently applied.

The longer time frame and the abrogation of the measures for mitigating the criterion's impact could entail an additional obstacle to the possibility for legal movement on the part of asylum seekers and protection holders. This would have a clear detrimental effect on their possibility to settle down and carry out their life projects. In this regard, **ASGI expresses its strong disagreement with the inclusion of protection holders in take charge procedures as laid out in art. 26. On the contrary, we hope that steps are taken toward a mutual recognition of international protection statuses.** All guarantees provided for by the proposal should be recognised to all persons involved in transfer procedures. The provisions described above increase the risk of secondary movements and negative impacts on countries of first entry (also in relation to the costs, organization and planning of assistance and reception services).

Serious concerns have been raised moreover by the application of the State of first entry criterion to unaccompanied minors: this application is at odds with the principles laid down by the Court of Justice in its judgment of 06.06.2013, case C-648.

ASGI also believes that the provisions regarding the consequences for non-compliance with the obligations imposed on the applicant should be repealed. In particular, the proposal to exclude asylum seekers from access to reception measures when present in a non-responsible Member State seems highly detrimental to fundamental human rights. The obligation to ensure, in all cases, living conditions in conformity with Union law and international obligations seems completely devoid of concrete meaning. The fact that no

procedural consequences are envisaged for the violation, on the part of the State, of the obligation to provide information and a personal interview to the asylum seeker involved in the procedure seems inconsistent. The new formulation, identical to the current one, gives rise to different implementations of the information obligation in the different Member States. As happens in Italy, this can lead to real violations of the asylum seeker's right to information.

ASGI is also deeply concerned about the provision laid down in comma 4 of art. 8 which could allow Member States to postpone access to the procedure in a discretionary manner, particularly in those internal border zones already characterized by unlawful practice. Beyond delaying access to the asylum procedure, this provision could pose a serious risk to human rights relating to the gathering of personal data and information, as well as the seizure of documents and personal belongings such as cellphones. These concerns are exacerbated by the fact that, while controls are aimed at verifying the person "do not constitute athreat to internal security" under art. 11 of the proposed regulation introducing the screening for third country nationals, art. 8 comma 4 of the current proposal makes reference to the broader case of "danger to national security or public order."

In conclusion, the reinforcement of the State of first entry criterion produces worrying **effects on the fundamental rights** for the persons involved. With the intent of limiting secondary movements, it **envisages an unjustified and discriminatory reduction of the asylum seeker's right to reception** when he or she is in a Member State other than the one deemed responsible for the examination of the protection application. Furthermore, States with an external border such as Italy would be responsible for examining the majority of applications.

As far as **the application of discretional clauses** is concerned, while the Resolution emphasizes that these clauses provide reasonable solutions for family reunification and relocations (even following disembarkation), and calls for a wider use of them, **the proposed Regulation follows an altogether different path.**

The possibility to keep persons together or reunify them is in fact reduced. Consequently, only the presence of parents and children will be taken into account, not that of siblings: a wider definition of who can be considered for the application of the family criterion was thus balanced with a limitation on the persons that can be reunited as dependants.

2. Procedural rules and obligations of the responsible Member State

The proposed regulation envisages the obligation to take back not only the asylum seeker but also the international protection holder and the "resettled or admitted person who has made an application for international protection or who is irregularly staying in a Member State other than the Member State which accepted to admit him or her (…) or which granted international protection or humanitarian status under a national resettlement scheme".

Moreover, the new provision on the cessation of responsibility makes the responsibility of a Member State effectively permanent: no longer provided for, in fact, is the cessation of responsibility in the event of removal from European Union territory for more than three months.

The time frame for the initiation of the procedure and the submission of take charge requests is reduced, with the stated aim of expediting the process. As far as the communication between States in take back cases is concerned, the requesting State shall simply send a "notification" of the take back to the requested State, namely a unilateral communication to which the requested State must provide confirmation of receipt within 7 days. In the absence of response the notification is deemed to have been received.

The Commission's proposal also abolishes the 18 month time limit for carrying out out the transfer in the event that the applicant subjected to such a measure absconds. However, art. 35 of the proposed Regulation provides that the Member States may suspend the time limit, which only begins to run again after the applicant has been traced.

Concern: Limitations to the right to an effective remedy

Of major concern is the part of the current proposal which essentially limits the possibility to appeal against the transfer decree to cases of violation of the family criterion, dependent persons or those at risk of inhuman and degrading treatment. This formulation, in fact, is in clear conflict with art. 47 of the EU Charter of Fundamental Human Rights and with article 13 of the ECHR on the right to an effective remedy. Moreover, the extremely short time frame makes it difficult to verify the reception conditions in the requested State and to assess the risk of chain refoulement.

Moreover, with regard to take back, the introduction of a unilateral take back notification and the short response times could create friction between the Member States. It could also be extremely difficult to respect for countries of first entry such as Italy.

These time frames could make the gathering of evidence difficult for the applicant and hinder the application of certain criteria such as the family one.

Solidarity mechanisms

If the current criteria for assigning responsibility for examining an application for international protection seem, with some marginal exceptions, to be confirmed by the reform proposal, the (apparently) innovative scope of the new regulation lies in the so-called solidarity mechanisms regulated by arts. 45 et seq.

The explicit aim of the solidarity mechanisms is to ensure compliance with the principle of solidarity between the Member States, enshrined in the Treaties as a fundamental principle of the EU. One of the major criticisms of the Dublin System is, on the other hand, precisely that it provides criteria and distribution mechanisms which are detrimental to said principle. As is well known, it is predominantly the first entry criterion which penalises the EU's external border States in violation of the solidarity principle, and this criterion will remain prevalent in the proposed regulation under consideration.

The Commission's proposal provides for solidarity contributions to one or more Member State that may be mobilised in exceptional situations, in so far as those States are subject to strong migratory pressures or situations of crisis.

The proposed Regulation seems to provide for different levels of support from Member States toward the beneficiary State, carried out on request of the concerned State or under the impetus of the Commission. In order for them to be mobilised, the concerned Member State must be subject to a situation of "*recurring arrivals of third-country nationals or stateless persons onto the territory of a Member State*" generated by SAR operations (art. 47), or in a situation of migratory pressure (art. 50); the Pact also provides for solidarity mechanisms intended to function in a "crisis" situation (Proposal Com(2020)613 on the management of situations of crisis and force majeure). It is up to the Commission to determine when a State is in such a situation.

The solidarity mechanisms are primarily based on the voluntary contributions of the Member States, and can be carried out through relocations – so-called "return sponsorship", namely support for the repatriation of migrants deemed to be irregular – but also through simple logistical support broadly interpreted. Only subsequently, and only when the possibilities for relocation do not correspond to the identified needs, is an intervention from the Commission possible.

In general, therefore, the Pact sets out a new system of "flexible" solidarity: in fact, the States may take part in the mechanism for sharing responsibility provided for by art. 80 of the Treaty on the Functioning of the EU in forms other than the assumption of responsibility for the examination of a protection application and the resulting reception obligations. The solidarity obligations laid down in the Pact for Member States – which, as mentioned above, are only intended to operate in exceptional situations – only cover 50% of the demands for solidarity identified by the Commission. Furthermore, their content and measure essentially depends on the will of the States themselves.

Concern: Optional mechanisms, broad discretion and excessive procedural complexity

The solidarity proposed by the Commission, rather than being a "baseline", only operates in exceptional situations of crisis or strong migratory pressure. Consequently, not only is the State of first entry criterion not overcome, but the proposal essentially reproduces certain criteria for assigning responsibility that have already proved to be detrimental to the principle of solidarity, and that lead to an unequal distribution of the protection applications. There is then an attempt to "correct" these effects with extraordinary solidarity mechanisms.

The solidarity mechanisms introduced by the Regulation are inadequate tools of dubious effectiveness also due to the **excessive complexity of the procedures governing them, and the extremely large margin of discretion** left to the Commission both in the implementation decision and in the management phase. Based on the results of the "*for early warning, preparedness and crisis management*" mechanism introduced in 2013 by the Dublin III Regulation, which was never implemented during the 2015 crisis, and in light of the complexity of the activation and management procedures, it can be assumed that **the new corrective mechanisms introduced by the Pact will remain proclamations of principle**, the result of delicate political and institutional compromises which **don't supply effective tools for promoting the solidarity principle.**

Moreover, there seem to be elements of excessive discretion left both to the Commission and to the Member States. It is up to the Commission to determine whether a State is in a situation requiring the activation of solidarity mechanisms, and it enjoys a wide margin of discretion for doing so. This is clear from the criteria that, pursuant to art. 50, the Commission must consider when determining whether a State is heading toward a situation of migratory pressure. These criteria are extremely vague and based on data that is difficult to obtain (particularly current data) and on circumstances that are difficult to measure (think, for example, of the relations of the State with the migrants' countries of origin or of the support provided by EASO to their institutions).

A wide margin of discretion is reserved for the Commission even when establishing whether the intervention offered by the States is "proportional" to the relocation needs: in fact, the proposal does not specify the criteria on which the Commission should make its assessment. The Commission's intervention is therefore compromised.

It is also important to note that the Member States are only obliged to meet 50% of the needs identified by the Commission, and that the States may reach this percentage though the "return sponsorship" mechanism. This mechanism provides for extremely different levels of intervention, up to and including the mere assistance to the beneficiary State. It is

therefore exceedingly easy for Member States to evade their already slim quota for "compulsory solidarity".

Concern: Rights of asylum seekers in last place

The relocation system is cumbersome and harmful to the persons involved. Relocation is only envisaged for international protection applicants when the State is exposed to recurring arrivals as a result of SAR arrivals, while for beneficiaries of protection it is also envisaged in situations of migratory pressure.

As far as the relocation mechanisms are concerned, the Commission's proposal reproduces one of the major criticisms of the Dublin System, namely that of not involving the applicant in the procedure and not taking his or her intentions into account, instead relying solely on the debatable "meaningful links" criterion.

There is, in addition, **the risk of an unjustified double transfer of the asylum seeker involved in this procedure**. In fact, the proposal envisages that the relocation State shall evaluate the criteria and determine the responsible State for the examination of the application. The beneficiary State of the intervention is, on the other hand, only required to carry out a "pre-screening" aimed at verifying the absence of circumstances that would exclude the applicant's possibility for relocation. This possibility is excluded not only when the applicant is subject to border procedures, but also when there are "meaningful links" to the same beneficiary State (art. 57, para 3). If the relocation State's full examination of the criteria for allocating responsibility results in another State being responsible, the applicant must be transferred again. Only then, after having been subjected to at least three verification procedures (pre-screening for responsibility allocation criteria, screening to identify the relocation State, and new screening for the criteria in that State) and two transfers, may he or she finally access the procedure for international protection application examination.

The contents of the asylum seeker's right to information and of defence under the redistribution procedures are unclear, particularly in relation to the processes by which European agencies allocate the asylum seeker to one of the Member States available for transfer. This formulation completely reproduces what already occurs during redistribution procedures, namely that the asylum applicant is not given a transcript of the hearings aimed at "matching" the applicant and "voluntary" Member State. This seriously compromises the right to information regarding the administration procedure the applicant is subject to.

Lastly, **it is unclear whether and under what conditions the applicant for asylum is held during the redistribution procedures**, with the risk of restricting the personal freedom of those involved in the relocation. Of major concern is the "return sponsorship" system, which

is excessively vague in the proposal, particularly in terms of the concerned foreign citizen's possible detainment: unclear, in fact, are both the duration and the conditions of the detainment, as well as the applicable procedural guarantees, particularly in the case of transfer to the sponsor State due to non-performance of the repatriation within the 8 month time limit.

In conclusion, it can be said that, as has already been the case, the so-called solidarity between States will continue to rest upon a voluntary basis, leaving the main burden of examining the protection applications of arriving migrants to the border States, mainly Italy, Spain and Greece. In fact, it should be noted that the provision for the relocation of only those asylum applicants who are not subject to border procedures introduces a burden on the border States. A comprehensive evaluation of the reform proposals approved by the Commission suggests that the border procedure shall be widely applied to the majority of applications submitted in the Union's territory. It therefore does not represent an exceptional scenario.

The mechanism which emerges from the proposed regulation is extremely complex and based on the Commission's ability to predict arrivals and to intervene if necessary, the effectiveness of which is reasonable to doubt.

The solidarity system described by the Pact is clearly based on a distortion of the principle and very meaning of *solidarity.* It is aimed more at placating the concerns of the various Member States than ensuring the effectiveness of a common asylum system.

The solidarity mechanisms entirely disregard the intentions and preferences of the asylum applicants, maintaining a system that has already shown to be ineffective and harmful to the rights of the persons concerned. Furthermore, the implementation of these mechanisms exposes applicants to the risk of being transferred a second time from the relocation State to the one identified as responsible by the application of the criteria contained in the proposal.

ASGI's Recommendations

The proposed reform – which aims, inter alia, at overcoming the Dublin III Regulation – **takes substantial steps backwards with respect to the reform text that was approved by the European Parliament in 2017**. Despite the persistence of certain concerns, the 2017 proposal was based on a new **conception of how the applicant enters the Union, one in which the Union is considered as a whole and not as the territory of a single State.** It fully implemented the principle of solidarity and the fair sharing of responsibility and reduced the pressure on states with external borders such as Italy.

ASGI believes that only this type of conception can allow for a swift, equitable and proper distribution of asylum seekers on Union territory. On the contrary, the proposal under discussion not only risks exacerbating existing critical issues but also puts the fundamental rights of migrant persons at additional risk.

In particular, with regard to the strict obligations for migrant persons, the proposed regulation introduces mechanisms which do not seem binding to the States. In addition, it intervenes on already existing rules by accelerating the procedures for determining the responsible Member State, showing complete disregard for the current difficulties in operating the Dublin System.

Finally, in view of the new regulation's strongly penalising character in regards to Italy, it should only be approved with consent from Parliament.

ASGI therefore wishes to make the following recommendations:

- Very careful attention must be paid to to the rights of the persons affected by relocation procedures: it is necessary to ensure **the full right to information relating to the conduct of the procedure, the possible distribution criteria, the full exercise of the right of defence** and the right to participate in the procedure. The foreign citizen must be considered an active part of the procedure and not a passive subject on which to pass decisions. Furthermore, it is absolutely **essential to avoid arbitrary restrictions on the personal freedom of the involved applicants**. Lastly, all the provisions concerning the exclusion of asylum applicants from accessing reception measures when in a Member State other than the one deemed responsible should be deleted.
- **A simplified application of the criteria for determining responsibility is needed**, first and foremost in regards to the family criterion: in fact, the enlargement of the family definition for the purpose of family reunification between asylum applicants is likely to prove useless without a simplification of the procedure for proving family ties and an effective limitation of procedure times. It is furthermore suggested that reunification should not only be possible for protection applicants and holders, but also for those

who reside regularly under other titles. The criterion for obtaining educational qualifications in a Member State seems difficult to apply and therefore **the relevance of any type of cultural link with a Member State, such as knowledge of the language, should be provided for.**

- The right to appeal against the transfer procedure must be full and effective and it must involve all the implementation aspects of the Regulation, including any procedural violations.
- It is necessary to provide clear and proportionate sanctions for the violation of the rights of asylum applicants subject to the procedure, primarily in regards to the right to information and the right to a personal interview.
- International protection holders should be excluded from the application of the rules provided for in the regulation, and they should be guaranteed freedom of movement within the Member States under the same conditions set out for European Union citizens.
- The solidarity mechanisms should be generalised; they should not refer only to asylum applicants rescued during SAR operations, nor should they be limited to cases of "migratory pressure". Furthermore, ASGI believes that the return sponsorship should be excluded from the solidarity mechanisms, as it seems exceedingly complex, unpredictable and, above all else, harmful to the rights of the persons involved, as they would be exposed to prolonged and unjustified periods of detention aimed at that person's transfer.