Roadmap on asylum and migration and rotating Council presidencies: which implications for EU asylum and migration law?

The signature of the Joint Roadmap on Asylum and Migration by the Parliament and Council on 7 September heralds a busy legislative period that could have significant and lasting impact, not only on legislation, but on the philosophical direction European asylum and migration law takes in the future. The proposed large overhaul of the Common European Asylum System (CEAS) seems unlikely to pass before the end of the mandate of the Commission and Parliament and the Czech Council presidency is attempting to pass smaller, more consensual pieces of legislation as an alternative; but according to critics, these are also more problematic in their implications. It includes concepts such as the instrumentalisation regulation. This regulation, according to some, would make emergency opt-out mechanisms permanently accessible, weakening EU asylum law and the international asylum system as a whole. This article looks at: which reforms have the parliament and Council signed a joint roadmap over, what is the Common European Asylum Policy (CEAS), why is it being reformed, does the instrumentalisation regulation represent a new normal for EU asylum policy and with which consequences?

What is the CEAS and why is it being amended?

According to the European Council, the CEAS sets the minimum standards for treatment of asylum seekers and applicants during their application procedure in the European Union. Following the 2015 migration crisis, EU member states and critics alike felt the system to be in need of reform. Non-uniform treatment of asylum demands, highly variable acceptance rates and the poorly distributed burden of management of said demands on Member States are all cited as issues made salient by the crisis. On 23 September 2020 the Commission introduced a proposal for a new framework for asylum and migration. This was not the first proposal to amend the existing structure; others have already been put forward in 2016, 2018 and 2019, which were mostly integrated in the 2020 package; this proposal does not affect their status. This new proposal pushed by the Commission has the following objectives: to create a common framework for asylum and migration management, create a more efficient system, one better able to resist "migratory pressure", to eliminate so-called 'pull factors'[1], secondary movements[2] and fight abuse (what constitutes abuse not being specified) by supporting member states most affected by migration. As signified by the roadmap signed on 7 September 2022 by the president of the European Parliament and the permanent representatives of the Czech Republic, Sweden, Spain, Belgium and France among others, there is a common desire to see this restructure of the asylum system succeed. However, the EU is working on an extremely tight schedule, seeking to pass these legal packages by February 2024, when the Commissioners and Parliamentarians will end their current mandates, potentially changing the status quo.

What does the 2020 reform package propose?

The new regulation has 9 stated objectives: the replacement of the Dublin system, the provision of temporary extraordinary measures in crisis situations, the reinforcement of the Eurodac regulation, the establishment of an EU asylum agency, the establishment of a new compulsory pre-entry screening, the replacement of the asylum procedure directive, the replacement of the qualification directive, a reform of the reception conditions directives and the creation of a permanent EU resettlement framework.

Replacement of the Dublin system

The Dublin system came to life in 2013 as a means of distributing the burdens of the management of migration between Member states and regulating the ability of incoming migrants to apply for asylum, making it mandatory to apply in the country of arrival. This placed a large burden on certain countries such as Greece or Italy. According to the European Council, replacing Dublin would result in better allocation of asylum applications between Member states via a new solidarity mechanism which would allow for an optimization of the processing times for applications and hopefully alleviate pressure from the countries most affected by the "first country of entry" policy.

The New Pact of Migration and Asylum is the proposed framework to replace the Dublin system. According to the Parliament, it has four main objectives. Firstly, to create a

1 The condition(s) or circumstance(s) that attract a migrant to another country.pull factor (europa.eu)

2The movement of migrants including refugee and asylum seekers, who for different reasons move from the country in which they first arrived to seek protection or permanent resettlement elsewhere. secondary movement of migrants (europa.eu)

common framework for the management of asylum and migration based on solidarity and fair sharing of responsibilities. This would include a possibility for Member states to contribute help at any time, setting voluntary solidarity measures to contribute as well as a mandatory contribution share based partially on GDP and partially on population size. This seeks to ensure all contribute a fair amount. Secondly, ensuring sharing of responsibility via a "new solidarity mechanism" in order to normalise cooperation in stable periods and agree on the provision of effective measures in case of outstanding migratory pressure. Thirdly, to facilitate the identification of the state responsible for processing the application of the asylum seeker so as to avoid delays in the procedure and fourthly, to prevent abuses and limit the ability of the applicant to move within the EU without authorization.

New temporary crisis and *force majeure* regulation

The new system would accommodate specific regulations in cases of "crisis and force majeure". A situation of crisis is understood as one where a Member states' or the Union's Asylum system as a whole might become overwhelmed to the point of dysfunction. Be it due to large influx of arrival or scenarios such as the coronavirus pandemic. In case of emergency, this mechanism provides both possibilities for extension of standard granted procedure times, as well as the possibility of granting instant asylum status to groups facing high degrees of violence rendering them unable to return to their country of origin. This status would be granted by the commission for a duration of one year and allow for application procedures to be suspended for the same amount of time to avoid backlogs. It also accommodates faster forced return after a period of 4 months, instead of 8, if voluntary return after denial of entry has not taken place.

Reinforced Eurodac

The Commission also intends to expand the Eurodac.[3] The proposed change to the system dates back to 2016 and seeks to add further biometric identifiers to the database, including facial images and facial recognition software. It also proposes to allow Member States to use Eurodac data to search for third country nationals or stateless persons, found staying irregularly in the EU via a centralised database. Overall it seeks to give the tools to Member States to document a third country national so as to return them. The changes would allow far-reaching personal data to be stored for ten years and fingerprints for five. It would also extend the collection of said data to children, especially unaccompanied minors. These reforms would bypass the EU's own General Data Protection Regulation (GDPR). The provision also allows for Member States to include sanctions for those who refuse to comply with the collection of data as long as said sanctions are in line with "respect of fundamental rights"; recommending that coercion or detention should remain 'last ditch measures'. This would mean that persons refusing to give personal data could end up in prison, if the member state deems it necessary.

establishment of an EU Asylum Agency

The establishment of an EU asylum agency reflects a proposal put forward by the Commission in 2018 that came to fruition in 2019, with the creation of the European Union Agency for Asylum that completely replaced the previous European Asylum Support Office by January 2022. The new entity describes itself as "a resource for Member States in the field of international protection, with the ability to provide practical, legal, technical, advisory and operational assistance in many formats." Ultimately the agency says that it strives for a harmonisation of Member States asylum practices following the line of conduct dictated by

[3] « Under the Eurodac system, participating States have to promptly take the fingerprints of each asylum seeker over the age of 14. These fingerprints are then compared with fingerprint data transmitted by other participating States stored in the central database AFIS. If Eurodac shows that the fingerprints have already been recorded, the asylum seeker can be sent back to the country where their fingerprints were originally taken." Eurodac (europa.eu)

their EU obligations; allowing an applicant to follow the same procedure independently of where their asylum procedure is filed.

Establishment of a pre-screening procedure

The Commission proposes the adoption of a pre-screening procedure. It intends that this would allow for rapid identification of most at risk individuals and, again, more effective return policies. This comes in response to what the EU describes as a shift in populations arriving at EU borders. The EU claims there is a transition from populations in clear need of international protection towards more mixed migration flows. The EU believes pre-screening could quickly separate out refugees from other migrants, without a thorough screening procedure taking into account individual circumstances. The proposed procedure would include the following: a health and degree of vulnerability check, a comparison of identity with European databases, a registration of biometric data (if needed), and verification that the individual does not constitute a threat to internal security.

Replacement of asylum procedure directive with a regulation and introduction of a qualification and reception directive

The replacement of the asylum procedure directive by a regulation and the introduction of a qualification and reception directive seeks to enforce standardisation of practices between member states. These proposals by the Commission all date back to 2016 and wish to address the differences between Member States. The reforms would limit incentive for what the EU calls “asylum shopping” [4], protect the rights and dignity of migrants and refugees during their asylum procedure, prevent any abuses of existing frameworks, hasten the process of applications and returns as well as increasing the ability to detect those the EU deems ‘in genuine need’ of protection. Furthermore, it would introduce the right to work for asylum seekers no later than 9 months after their application and ensure the right to education for minors as well as the provision of guardians for unaccompanied minors. By restricting those rights to specific geographic areas it is hoped this will prevent “secondary movements”, especially via the restriction of the issuing of travel documents; with the exception of humanitarian purposes.

The Asylum Procedure Regulation is supposed to achieve four main goals. First, simplified, unified and faster procedures: 6 months is set as the time for an asylum application to be reviewed and potentially appealed, providing for the possibility to prioritise or extend durations in cases of emergencies when Member States receive overwhelming amounts of applications. Procedures involving detention at the border are capped to a maximum of 4 weeks after which the applicant is to be allowed to enter the territory of their country of application. Second is the inclusion of elements in the procedure ensuring that the rights of the applicant are respected: applicants are to be made aware of all tools available to them as well as their obligations in the context of the procedure. They are to receive legal help, free of charge (except when personal wealth justifies not to or in ‘hopeless’ application cases). The applicant must be granted entry into the territory within 3 working days from lodging their application and should be provided with documents allowing his stay on the territory (not valid travel documents). Unaccompanied minors are to be given a guardian within 5 working days; and as pertains to all children their best interest should at all times remain the guiding principle in respect to the procedure. Third entails the insertion of rules to prevent abuses of the system, most notably by sanctioning abusive claims and removing the incentive for second movements, which is set to be achieved through the insertion of

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4 In the context of the Dublin Regulation, the phenomenon where a third-country national applies for international protection in more than one EU Member State with or without having already received international protection in one of those EU Member States.asylum shopping (europa.eu)

conditionality throughout the processing of the application. Failure of the asylum seeker to do so potentially resulting in the rejection of the claim. Fourth, the regulation hopes to achieve a harmonised rule on safe countries. This implies the creation of a European list of safe third countries replacing existing national ones. It would mean that applicants coming from countries on this list would automatically see their asylum demand rejected on grounds that they are not in need of international protection.

The qualifications directive establishes 6 objectives. First, increased harmonisation of the criteria for recognition of applicants for asylum. This would mainly take place around a material scope (allowing states to grant national humanitarian status to those who may not qualify with the new rules and introduce new rules so long as they do not interfere with the regulation). The applicant must provide all required information and remain available throughout the procedure. The Member State must then prove the country of origin is not safe for return; this usually implies proving that the cause for persecution is indisociatable from the applicant and that the applicant has not committed certain crimes which would make them ineligible. Second, central analysis of the situation in the country of origin would be provided by the European Union Agency for Asylum. Third, Member States would have the obligation to go through status reviews when a significant change in the country of origin occurs as well as when status is to be renewed. The regulation also seeks to promote active integration and grants discretion to Member States to make the provision of certain social assistance conditional to it. Fourth, in case of secondary unauthorised movement, the duration of obtaining more permanent residence documentation will be reset, in hopes this will dis-incentivising disobedience to the obligation of remaining in the country of entrance. Fifth, standardising the rights provided to recipients of international protection; ensuring that they receive residence and travel documents as well as social security. Finally, increasing the incentive to integrate in the host society for the beneficiaries of international protection. This is seen as achievable via the conditionality of state assistance to active participation in integration measures, granting access to integration facilities.

As pertains to the reception conditions directive, it provides the minimum reception standards that all Member States should provide. To achieve this “better” standard there are three main lines of action that will be promoted. All migrants and refugees should be entitled to healthcare and a dignified standard of living; they may however be entitled to further benefits when complying with regulations. There is also an extension of the notion of family members to include links created after departure from the starting country, to better reflect the realities of modern migration; often resulting in longer stays in third countries before reaching the European Union. The European Asylum Support Office will develop a list of reception criteria that may only be deviated from to accommodate for the specific needs of certain applicants. Beyond this, there remains a clause where in case of emergencies a Member State may put in place a contingency plan, previously communicated to the Commission and European Union Agency for Asylum, which are to be notified when it is activated. Second, there is a drive to reduce incentives for “asylum shopping” linked with reception conditions. There is an obligation to make the applicant aware of their rights and obligations and Member States must keep in mind the principle of proportionality when restricting movement. Finally, there is a call to increase self-reliance of the applicant as well as increasing their opportunity for integration. The applicant should be quickly allowed to work during the application’s processing. Furthermore, rules to access the labour markets should be harmonised to reduce incentives for “asylum shopping”. The applicant should be granted rights analogous to ones of a third party national working in the Union. The proposal however provides opportunity for some degree of discrimination. The opportunities for education and vocational training can be restricted to areas directly linked to a specific employment activity and the eligibility regarding family benefits and unemployment could be limited.

Creation of a permanent EU resettlement framework

Finally, the permanent European resettlement framework is part of the reforms. The objective is to see a certain number of refugees or stateless persons being resettled onto the territory of the Union every year, granting them international protection. The Commission and Council would be in charge of deciding which countries' nationals will be eligible for this procedure. Eligibility for individuals will be based on genuine fear for their well being as well as their relatives' exclusion being based on the qualification regulations. There is an ordinary procedure, taking between 8 and 12 months, and an expedited procedure, activated on grounds of humanitarian or protection needs.

Critiques of the proposed reforms

Critics have expressed serious concern with some of the proposed revisions. In addition, many point out that passing these large overarching changes will be almost impossible to achieve in the designated amount of time. It therefore becomes increasingly likely that there will be an attempt to pass small change packages, according to the EUObserver. The newspaper states that it is likely that we will see small, easier to pass, regulation put forward, one of which is particularly hard to swallow for many activists.

The instrumentalisation regulation as a symbol of what is to come

The instrumentalisation regulation is described as what could represent the "final blow to a Common European Asylum System", says the European Council on Refugees and Exiles (ECRE). In December 2021 the Commission put forward a plan that would create a permanent mechanism allowing member states to derogate from their obligations under the EU asylum law system in situations where migration flows would be 'instrumentalised'. There seems to be broad support for said proposal among member states and the current Czech presidency of the Council appears determined to push the draft through by December. This would drastically affect the rights and outlooks of those looking for protection, says ECRE.

What is the instrumentalisation regulation?

According to the "Proposal for a regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum", published on the 14/12/2021 by the Commission, a "highly worrying phenomenon" has increasingly been observed whereas state actors are creating or facilitating migration flows for political gains. This proposed regulation, according to the Commission, essentially constitutes a direct response to the actions of the Belarus regime and would allow Member States to suspend their legal obligations towards migrants and asylum seekers as defined under the CEAS. But what would be considered instrumentalisation? In the Commission's proposal it is defined as follows: "a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third-country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security". The document repeats multiple times that the measures are "in line with the Union's fundamental rights values" or "in full respect of fundamental rights (of the migrants)." Overall it is perceived by the EU, in their own words, as "fully consistent with the New Pact on Migration and Asylum adopted by the Commission in September 2020" and is placed on the same level as the force majeure proposal discussed previously.

What could be dangerous about the instrumentalisation regulation

ECRE and other critics, on the other hand, believe that this decision would affect the right to human dignity, the right to asylum, the prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security, protection in the event of removal, expulsion or extradition, the rights of the child and the right to effective remedy. ECRE highlights the notion that this policy would be in continuation of a trend promoting the containment of people at the European border, putting increased pressure on those states at the border. Although the EU claims principles of non refoulement, best interest of the child, right to family life and protection of health will be upheld, ECRE counters that, in practice, there is no guarantee that those rights will be safeguarded.

A collective of NGOs put forward the following reasons to fear the potential passage of such a regulation. It is deemed to be disproportionate, and excessively restricting the fundamental rights of those affected by it. It is seen as counterproductive, and there is a notion that permanently available derogations would undermine the CEAS as a whole. They also pose that the EU seeks harmonisation yet this measure promotes arbitrariness in an already existing climate of continuous disregard for EU standards. According to said NGOs, it is both unnecessary and misguided as there are already a plethora of flexibility mechanisms allowing Member states the wiggle room needed to adapt to changing migrations flows. States manipulating migration flows for political gains is not new and should not be combatted this way, where it victimises refugees and migrants, but via policies aimed at said third country. Beyond the scope of Europe, warn the NGOs, this drop in standards could only be detrimental to the global asylum system and does not bode well for the respect of the EU legal system as a whole, setting a precedent of opt out procedure.

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