

The New EU Migration and Asylum Package: Breakthrough or Admission of Defeat?

On 23 September 2020, the European Commission presented its long-awaited draft of a new migration and asylum package to overcome the protracted blockade in this policy area. Central elements are the planned preliminary examinations of asylum applications at the external borders of the European Union (EU) and a new division of labour among the member states, which in the future will have the choice between accepting asylum seekers and returning those who have been rejected. The risk of human rights violations inherent in these suggestions is immense. However, since this also applies to the status quo – as the situation on the Greek islands shows – the pros and cons of the reform proposal must be carefully weighed up. Support for the reform package can only be justified if the combination of restrictive and protection-oriented elements, as intended by the Commission, is maintained in the intergovernmental negotiations.

Since the large-scale arrival of refugees in 2015, the fronts in the EU have hardened: The asylum systems of the countries on the EU's external southern borders – especially Greece's – are chronically overburdened; governments are therefore calling for a solidarity-based distribution of new arrivals in the EU. In contrast, the four Eastern European Visegrad states and Austria categorically reject any obligatory distribution of asylum seekers or recognised refugees. The governments of the other EU member states are under domestic political pressure and are therefore insisting on a pan-European distribution in order to achieve a long-term, sustainable solution. The devastating consequences of this blockade are well known: In 2020 there was a temporary suspension of the Greek asylum law, illegal pushbacks of migrants on the open seas and such a drastic undercutting of humanitarian standards in Greek reception camps that the fire in Moria seemed like an unavoidable consequence.

The Commission now seeks to break out of this dysfunctional situation with a great leap forward. Its reform proposal comprises an extensive, complex bundle of communications and legislative proposals that reflects the effort to take into account widely divergent positions. The Commission paints a picture of a three-

storied house, in which more extensive cooperation with third countries and stronger EU external border security should reduce the volume of asylum applications, and thus facilitate a solution to the most difficult issue to date: the distribution of asylum seekers and recognised refugees within the EU. Politically central is a new balancing of interests that aims to bring together what is supposedly incompatible: The goal is a common mechanism for all member states that provides relief for the countries initially receiving asylum seekers while also guaranteeing that the Visegrad states do not have to accept refugees from other EU member states. The key to this is reinterpreting the repatriation of rejected asylum seekers and irregular migrants as an act of European solidarity. All details of the comprehensive reform package are subordinated to the overarching goal of reducing the number of asylum applications already at the external borders, and of shaping the management of the remaining volume in such a way that every government within the EU can reconcile its contribution with its central political convictions.

The core elements of this approach are (1) the preliminary examination of asylum applications at the EU's external borders, (2) the introduction of a multilevel solidarity mechanism that takes into account different levels of pressure and (3) the Europeanisation of return, including the development of a complex institutional infrastructure.

Preliminary Examination and Acceleration of Asylum Applications

The European Commission wants to avoid conditions like those in the Moria camp by massively accelerating all procedures. All asylum seekers and irregular migrants are to be registered and medically examined within five days, according to a newly proposed "screening" regulation. In addition, the identification of those arriving at the external borders is to be improved by expanding European databases (especially EURODAC). At the same time, there is a plan to presort promising from less promising asylum applications. For asylum seekers from countries of origin whose asylum recognition rates are below 20 percent, accelerated procedures are to be obligatory and completed within a maximum of 12 weeks. Until then, entry will be refused, which should lead to a prompt deportation within an additional 12 weeks in the event of rejection.

The Commission leaves it up to the member states to decide whether asylum seekers are to be held in detention centres during screening, accelerated asylum procedures and before repatriation. This can result in detention periods of up to six months. Therefore, there is a justified concern that - as is currently the case on the Greek islands - large new long-term camps could emerge, with all the known challenges concerning the protection of residents' or detainees' human rights. In addition, there are strong doubts as to whether rule-of-law principles can be guaranteed during accelerated border procedures, such as the right to lodge effective appeals against asylum decisions. At the very least, however, the Commission is proposing an independent "monitoring mechanism" as an element of the screening regulation to monitor compliance with human rights in the respective member states that apply these procedures. In addition, particularly vulnerable persons, such as unaccompanied minors, should generally be excluded from the procedure.

New Distribution Mechanism

The Dublin Regulation, which has been controversial and dysfunctional for years and regulates responsibility for asylum procedures, is to be abolished. In its place, a new comprehensive regulation on asylum and migration management should not only regulate responsibility for asylum procedures, but also provide for a new solidarity mechanism.

As before, the states at the EU's external borders are to be primarily responsible for processing asylum applications, as was already the case under the Dublin Regulation. Time limits that define the responsibilities of the respective states are to be prolonged, and the definition of "family affiliation" - according to which a country other than the country of first arrival is already responsible - is now to be extended to include siblings.

The new Commission proposal is essentially aiming at a complex system of burden-sharing, in which the member states can, or must, participate in different ways, depending on the number of arrivals. For "normal situations", the Commission is planning an annual voluntary quota of places for intra-European distribution that will be reserved primarily for sea rescue operations. If individual states of arrival are under increased pressure, all other member states are

obliged to participate by making contributions that are calculated according to an EU-wide distribution key taking into account the size of the population and the gross domestic product of the countries, although certain exceptions to this quota are permitted. Those who do not take in asylum seekers or recognized refugees can contribute benefits to support repatriation (“return sponsorships”, see below) or other in-kind assistance for migration management.

The Commission aims to ensure that the required mix of support measures is guaranteed by the contributions of all EU member states. However, only during the third stage of a systemic crisis, such as in 2015, would all member states be obliged to participate in redistribution or return. Ultimately, it is a political decision to declare such a crisis, as was the case with the “Mass Influx Directive” (2001/55/EC), which was never used and is to be replaced.

This complex model aims to guarantee both “permanent” and “flexible” solidarity. However, the assumption that this can be implemented in practice and will be supported by the member states is based solely on the hypothesis that all parties involved should be interested in a compromise because all other approaches to ensure regular burden-sharing have failed.

Europeanisation of Return

Since the start of the Covid-19 crisis, and in view of recent events in Moria, the willingness of many EU member states to commit themselves to taking in refugees from states at the EU’s external borders has again diminished. This also explains why “return sponsorships” are to be introduced as a new instrument. With this, member states shall commit themselves to taking responsibility for specific persons who have received legally valid return orders in overburdened states of first arrival. If states decide to contribute in this way, they will assume responsibility for coordination with the countries of origin.

In this context, the member states are called upon to use their bilateral influence to persuade third countries to conclude agreements on improved readmission cooperation with all EU member states. This would also enable measures that fall within national competence. In addition, the European Commission intends to appoint a “Return Coordinator”. If the repatriation of a person without the right to residency does not succeed within eight months (six months in crisis

situations), the “sponsoring” member state is obliged to take in this person – which ultimately amounts to redistribution “through the back door”.

It is unclear how authorities are supposed to deal with persons whose identities cannot be determined and what methods individual member states will use to persuade countries of origin to cooperate with the readmission of their nationals. An even tougher approach than before could seriously damage the effectiveness, legitimacy and sustainability of the EU’s external migration policy.

The Future of the Reform Package

After initial critical statements by the Visegrad states, the next conference of ministers of home affairs on 8 October 2020 will give a first EU-wide impression of the level of political support for the proposed reforms. Parallel to the negotiations on the package, the Commission is pursuing a pilot project that is intended to illustrate the advantages of the planned approach and dispel doubts about its feasibility: It has announced the formation of a task force to work with the Greek government to establish a jointly led reception facility on Lesbos. It is to replace the burnt-down camp in Moria and ensure the adequate accommodation and registration of asylum seekers.

It remains doubtful whether this will be enough to win the support of the member states for a comprehensive reform. There is a great danger that they will only agree to restrictive measures, as in the past. In this case, the EU’s lowest common denominator approach would boil down to the further tightening of external border controls and an additional reduction in irregular migration. This would cement the status quo. At best, a small coalition of “willing” member states would, as before, endeavour in a mini-lateral or bilateral framework to alleviate the humanitarian catastrophe on the Greek islands, the mainland, and in the numerous other camps along the Balkan route, and to provide appropriate support to the host countries outside the EU, especially Turkey. This would place a huge burden on Germany in particular.

The potential added value of the Commission’s proposal lies in its design as a package deal in which restrictive and protection-oriented elements are linked. This leads to an immensely complex negotiation process, which is just as monumental a political and institutional task as the implementation of the planned

measures. Ultimately, however, this is currently the only hope for substantial progress towards a European asylum and migration policy that could restore the necessary balance between pragmatism and fundamental values. Therefore, any “unravelling” of the reform package should be firmly resisted.

Nonetheless, many questions remain unanswered. What are the guarantees that the planned preliminary asylum examinations, processing facilities and returns are designed and executed in accordance with human rights laws? Once the legislative amendments have been adopted, what instruments would the Commission have to sanction member states that are not willing to implement them? How can it be ensured that the proposals announced for next year for reforming legal migration – which would be of paramount importance for reducing irregular migration and fostering genuine partnerships with countries of origin and transit – are not pushed into the background?

The intention underlying the Commission’s approach to build a bridge between the more migration-friendly states and the migration-sceptical states is to be welcomed. However, this will only be the case if the balance between restrictive and protection-oriented elements that the Commission is seeking is maintained in the upcoming negotiations. This is the only way to prevent a one-sided focus on deterrence, which would undoubtedly be accompanied by further serious violations of human rights.

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