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REFORMING EUROPE'S COMMON ASYLUM SYSTEM – WILL MEMBER STATES BACK IT?

by Martin Wagner

The Common European Asylum System is in the process of being reformed. What about the system needs to change and can an agreement of the EU Member States be expected? A review of the Commission's new policy proposal.

Ever since its inception more than ten years ago, observers and practitioners have pointed to flaws of the Common European Asylum System (CEAS) . The large scale arrival of migrants and asylum seekers to Europe over the past months has aggravated (among others) the following shortcomings:

Limits to harmonisation: There has actually never been one common EU asylum system but rather 28 - more or less - harmonised national systems;

Implementation gap: Parts of the existing EU legal framework are not fully transposed and/or implemented in the same manner in different EU states;

Vulnerability to stress: The CEAS has proven to be ill-equipped for mass arrivals, especially when the Temporary Protection Directive is not invoked; and

Uneven distribution: The system lacks a mechanism for fair responsibility sharing of asylum claims and asylum seekers among all EU Member States.

On 6 April 2016 the Commission tabled a new policy proposal, a Communication, laying out its ideas on how to reform the Common European Asylum System and enhance legal avenues for migration to Europe. It intends to address fundamental flaws of the CEAS and make it more crisis-resistant.

The reform of the main legal instruments forming the CEAS is at the heart of the Communication, which outlines a shift in the direction of more binding rules, increasingly taking away national responsibilities in the area of asylum, a trend which is not favoured by all leaders of EU Member States:

To reform the Dublin system for determining the responsibility of an EU state for an asylum claim, the Commission puts forward two options: either to streamline the Dublin system and supplement it with a **corrective fairness mechanism** or replace it with a new system based on a **distribution key**.

The Dublin system, labelled as the "corner stone" of the CEAS, has successively lost support and been described as being ineffective, inefficient, costly and, last but not least, as "unfair" because it places the primary responsibility for examining asylum claims on the first state of entry.

Responsibility: frontline states remain challenged

Both proposed reform options aim to **move towards a more balanced distribution** of asylum seekers. While the first option would only be attached to the Dublin system and allow for a re-distribution once the number of applications exceeds a certain pre-set threshold, the second option is more radical, as it would entirely **replace the core principle of the Dublin system**, the "first country responsibility", by a quota based on a distribution key.

In both options countries with EU external borders would keep playing a central role. Registration, the initial screening of applicants and the return of people not fulfilling the criteria for international protection would remain under their responsibility.

As such, the proposals build on the underlying principles of the emergency relocation system currently implemented to the benefit of Italy and Greece. Lessons learnt from the implementation of hotspots and the emergency relocation scheme are likely to the guide further development of these options. On the positive side the Commission seems to be ready to open relocation to applicants "with a reasonable likelihood of being granted international protection", recognising the pitfalls of the currently applicable 75% status recognition threshold in order to be eligible for benefit for relocation.

Secondary movements: prevention through disincentives

Enforcing the principle that one country is responsible would remain difficult under the new system, especially in view of possible secondary movements (i.e. when asylum applicants move on to another country within the Schengen area).

The Communication wants to prevent **secondary movements**, through an array of disincentives for applicants who leave the EU state responsible for them. Measures put forward in the proposal to **sanction absconding asylum applicants** include the loss of the right

to remain during a pending appeal, detention, withdrawal of financial benefits and linking the fact that an application has not been lodged as soon as possible to the assessment of the credibility of the claim.

A more positive approach to prevent secondary movements, namely the prospect of a **protection status that is recognised in all, not just one EU state** is considered by the Commission only in the "long term". The status remains, according to the Commission's proposal, a national one with sanctions in place should the beneficiary of international protection move into another country (e.g. immediate review of the granted status and the 5 year waiting period according to the Long Term Residence Directive would be restarted).

Distribution: holding on to quota

The Commission leaves the question on how the **relocation of refugees within Europe** should be carried out in practice mostly unanswered. Which level of coercion is necessary and acceptable? How can an asylum applicant's preferences be considered? Taking an applicant's choice into account right at the beginning may limit secondary movements, but, unfortunately, does not seem to be backed by the Commission.

The Commission also proposes to review the distribution key. However, as long as the relative size of the population and the wealth of a country continue to be considered as the as the basis for a distribution key between all 28 EU member states, there is no need of deviating from the existing distribution keys (as indicated in the Council Decisions from September 2015) as the differences would be insignificant.

Harmonised procedures could stop the race to the bottom

To further harmonise asylum procedures and the qualification of asylum claims across all 28 EU countries, the Commission has proposed to transform the Asylum Procedures Directive and the **Qualification Directive into new regulations**.

Such new instruments could enforce harmonised procedures and (eventually) establish a **unified protection or refugee status** within the EU. It would significantly reduce the scope of individual states to make their national asylum systems less attractive unilaterally and could limit the current race to the bottom when it comes to protection standards. Given the significant differences in legal, judicial and administrative systems, obvious challenges remain in defining binding rules by way of a regulation.

Role of EASO, integration of refugees and legal migration

The proposal remains somewhat blurry with regard to the future role of the European Asylum Support Office (EASO). It is supposed to move from being a "support agency" to a policy implementing agency with a "strengthened" operational mandate. Here, the proposal falls short of expectations for a more ambitious role for the agency in the processing of asylum claims within the framework of the future "common asylum procedure".

Finally, the Commission's considerations are essential yet simultaneously vague when it comes to fostering legal paths towards international protection, such as resettlement, as well as the future focus on **legal migration**. If the CEAS wants to be open for those in need, **alternative routes** need to be offered for non-refugees, e.g. migrants being pushed to leave their countries due to poverty, dire life expectations, drought etc. Without such legal channels third country nationals will continue to make use of the only "open pathway": the asylum system.

Although the communication addresses **integration** by pointing to the possibility of developing an EU action plan, it unfortunately does not specifically tackle integration needs of international protection beneficiaries.

Putting the C(ommon) back into the CEAS – will Member States play along?

All in all, the proposed reform of the CEAS includes positive elements aiming to (finally) establish a Common European Asylum System that lives up to its name by unifying the EU's international protection systems.

This, however, is also the proposal's major flaw: the recent events and policy responses in the area of migration have tellingly demonstrated that the 28 member states appear to be further apart from each other than ever before and this **lack of solidarity** is a stark reality. It might well be that the EU will need to redefine the very basis of cooperation in the field of asylum before addressing the long-needed reforms of the Common European Asylum System. While many opportunities have been lost during the re-negotiation of the CEAS "recast-instruments", the current "crisis" whether of political or indeed of "protection" nature, might be a good **opportunity to truly reform the system, one that would hopefully be based on solidarity both globally and within the EU.**

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