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NEGOTIATING THE COMMON EUROPEAN ASYLUM SYSTEM'S THIRD GENERATION – STUBBORN ON VISION, FLEXIBLE ON DETAILS...

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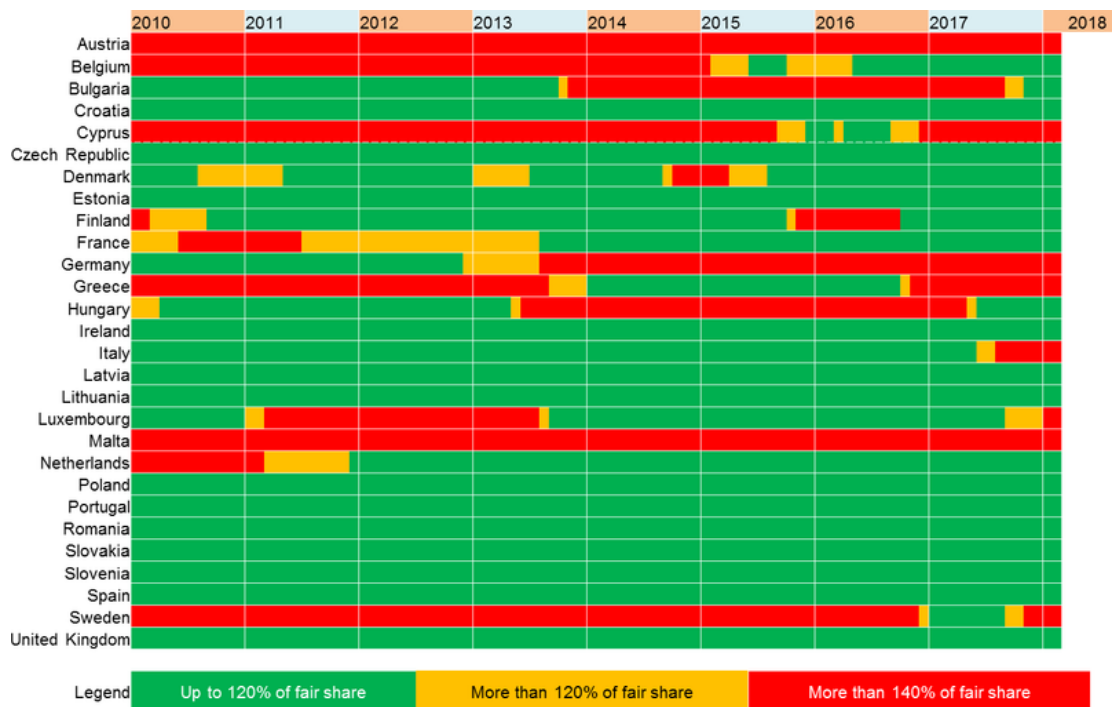
Only a few weeks left until the European Council's imposed deadline for finding an agreement on the third generation of the CEAS will be due. At the centre of discussions, once more, is the Dublin proposal.

In the public awareness there are two major opposing Member State blocs which have formed around it. On one side, the Visegrad group who opposes any kind of mandatory quotas. The bloc already opposed the mandatory relocation scheme of the Relocation Council Decisions from September 2015. Similarly, the bloc disagrees with the mandatory relocation scheme proposed as a part of the corrective allocation system of the currently discussed Dublin IV proposal, in case a country receives high numbers of asylum seekers. Council President Tusk has also been quoted as seeing no future for mandatory quotas. On the other side, there is Cyprus, Greece, Italy, Malta and Spain, who issued a position paper on the proposal to recast the Dublin Regulation for the fourth time. The countries on the EU's southern external borders request – among others – to acknowledge their efforts in managing migratory pressures by reducing their “fair share” of responsibility. They also call for a temporary suspension of the obligation to take back Dublin cases for countries (like theirs) that are already under pressure.

The current Bulgarian Presidency is trying hard to bring these two blocs together by suggesting a number of compromise solutions on the proposed Dublin Regulation in [this](#) presidency paper as well as in the [most recent one](#). Just like the approach proposed by the European Commission, the presidency approach is a commitment to the Dublin system. In turn, it does not include any consideration of the European Parliament's position, which has [proposed](#) a complete overhaul of the Dublin system that would be closer to the southern rim countries' request as it would exchange the Dublin-style first country of entry responsibility system with an equal distribution of all asylum seekers across all EU Member States. The Presidency compromise, however, does include a number of measures that should soften the obligations of the mandatory relocation mechanism of the Dublin corrective allocation system:

The EC proposal foresees an automatic trigger of the corrective asylum-seekers-relocation-mechanism once a country receives more than 150% of its “fair quota” (see forthcoming blog). By contrast the Presidency proposes a process consisting of several levels. The *first level is defined as 'normal circumstances' and depicts a scenario in which the number of applicants in a Member State is equal to or below its fair share; the second level describes 'challenging circumstances' where the number of applicants in a Member State is higher than 120% of its fair share; and finally, the third level is a "situation of severe crisis" in which the number of applicants exceeds 140% of its fair share. Thus instead of one fixed threshold a more gradual alarming system has been installed. An additional link to the population (i.e.: 0.15% of overall population for the 140% threshold and 0.1% of overall population for the 120% threshold shall guarantee that the system is only triggered in case of “mass influx”, thus linked as a percentage to the national population.*

While in the EC proposal a mandatory relocation scheme is triggered once a Member State received 150% of its fair share of asylum applications, the Presidency proposal does not explicitly mention relocation as the preferred solidarity measure but names an array of solutions where other Member States, EU Agencies, etc. should jointly work on supporting the Member State(s) under pressure. Remarkably, one of the first measures – alongside financial contributions and technical support – would be to search for solutions in third countries.



This graph depicts which MS were overburdened, at which time and to which extent based on the three levelled Presidency proposal as outlined above. Since 2010, 15 EU Member States received at least at some point in time more than their fair share. Some of the MS were only overburdened (either 120% or 140% of their fair share) for short periods of time, but ten MS received more than 140% of their fair share for periods exceeding two years.

Flexible on details

The approach of introducing flexibility to solve political disagreement is of course not specific to the Common European Asylum System context. Flexibility is in fact a term with a positive connotation and it embraces the nimbus of creativity in times of need. Evidently the approach taken is one of creating a maximum level playing field, making the solidarity measures blurry and thereby introducing a maximum of flexibility. The presidency thus shows an effort to first of all, bring all parties back to the table and to jointly find a compromise in the deadlock. The two crucial points proposed are thus: flexibility on the solidarity measures and flexibility on triggering them.

Flexible solidarity

Flexible solidarity in the context of the Common European Asylum System should enable Member States to decide on their specific form of contribution taking into account their experience and potential. A distribution mechanism in this context should remain voluntary as one of several “solidarity measures”. The term flexible solidarity was already discussed in 1997, when [Hathaway and Neve](#) developed an approach to include “common but differentiated state responsibilities” taking inspiration from comparable debates in the area of international environmental law. This proposal moves away from non-negotiable obligatory quotas towards a more flexible system, in which states can take responsibility at different levels (“flexible solidarity”). Recently, this concept was also tabled by German Interior Minister Horst Seehofer, [arguing](#) that “countries will participate in other ways, such as sending more staff to the borders or giving money for joint border security. We should be more flexible and rely on flexible solidarity.” Poland's governing Law and Justice (PiS) party similarly [claimed](#) that the country cannot accept refugees because of security concerns, suggesting instead a model of “flexible solidarity”, whereby each member state would independently determine what kind of support it could offer overburdened countries.

Some [concrete proposals](#) have been made on how such a system of flexible solidarity instead of the mandatory relocation scheme, could actually look like. One proposal is to channel the

financial resources from countries with low quota to those with higher quotas and to deploy experts and technical expertise to countries with high inflows.

Along these discussions and suggestions, the Bulgarian presidency proposes more flexibility in the measures of solidarity and lists an array of potential measures that EU Member States could pick to show solidarity with overburdened countries. The list hides well the red-rag relocation of asylum seekers from an overburdened country to a less overburdened one. Instead, the proposal moves into possibilities of “buying out” of relocation (in the proposal always referred to as “allocation”), either by financial means (sized down from 250,000 to 35,000-25,000 Euros per asylum seeker) or by engaging in resettlement instead.

Flexibility at the expenses of clarity

The Presidency proposed a complex system of decision making at the various levels which include joint agreements between the Commission and the MS being in challenging circumstances, partially proposing decision making by the Council based on ‘reinforced qualified majority’ (i.e.: Council acting without a Commission proposal whereas the qualified majority must include at least two-thirds of EU countries). Unlike an [earlier proposal](#), the European Council will not be involved in the allocation decision making process.

Again, flexibility (and complexity) is proposed to overcome the current deadlock, this time by deferring the decision making of triggering levels of EU reaction in challenging circumstances.

In times of a deadlock in negotiations on asylum and migration at EU level, [some predict](#) that “European action will increasingly follow the logic of a multi-speed Europe. Flexible coalitions are a way forward for a European Union whose members appear deeply divided.” The presidency proposal pushes this door wide open by postponing decisions on solidarity measures and putting it into the hands of complex decision making processes. Again, this approach not only adds considerable complexity, but it also postpones necessary decisions and the political impasse to a later stage. Either way, it does not solve the imbalance caused by an unfit Dublin responsibility sharing mechanism.

Stubborn on vision

Once more it seems that an opportunity to put the European Asylum System on fair and balanced footing is about to be lost. Once more it is discussed at length how to uphold the Dublin system (when perhaps it would be better to drop it). Negotiations focus on whether the solidarity contribution for every asylum seeker not taken in below the “fair share quota”

should amount to 250,000 or 30,000 Euros. Once more it is discussed when a country would be overburdened; is it once the Member States receives 100%, 120%, 140%, 150% or 160% of a fair quota? None of these discussions will make the CEAS more European or common.

As [argued previously](#), the Dublin framework leaves hardly any (real and not symbolic) place for negotiations. So with the Dublin elephant in the room all future-oriented vision seems blocked. Why not aim at a system outside of national politics and transfer its responsibility to the EU level? Why not think about how the different responsibilities entailed in the CEAS could be best shared in a fair manner among all EU MS? Why not task the countries along the external borders with first registration, the initial interview; making use of EU agencies and international organisations to organise the relocation for persons with a valid claim (i.e. not manifestly unfounded) from first (and over-burdened) countries of entry to other less burdened countries for the asylum process. Why not task the border countries with manifestly unfounded claims and focus on the return of those whose claims have finally been identified as unfounded indeed.

Many of these elements are part of the proposal of the European Parliament. It would be well worth to consider them more in depth and discuss whether this wouldn't bring us two steps ahead. Instead the compromise approach buys some time until the next reform will be necessary. Indeed the discussions show an utmost flexibility in details but a great portion of stubbornness in vision.

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