



SOC/669

Asylum management under the New Pact on Migration and Asylum

OPINION

European Economic and Social Committee

Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]

[COM(2020) 610 final – 2020-279-COD]

Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum

[COM(2020) 613 final – 2020-277-COD]

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1. Conclusions and recommendations

- 1.1 Ensuring balance in dealing with asylum applications, so that those in need of international protection receive it or those not in need of protection are effectively returned, should not have to be the responsibility of individual Member States alone, but should be managed by the EU as a whole.
- 1.2 The EESC recognises that migration is a human, structural phenomenon, that asylum and international protection are fundamental rights for persecuted people and a legal obligation under international law for the States Parties to the Geneva Convention. The EESC draws attention to the fact that fundamental rights and personal data should be protected under the proposals for regulations discussed in this opinion.
- 1.3 The EESC welcomes the improved information for asylum-seekers about the application process envisaged in these regulations and their rights and obligations under it, which will enable them to better defend those rights. The right to appeal is strengthened by defining the scope of the appeal and setting a target for court decisions to be taken within a harmonised time limit. The rules on remedies have also been adapted in order to considerably speed up and harmonise the appeal process.
- 1.4 The EESC is also pleased to note that the right to private and family life and the rights of unaccompanied minors are strengthened by expanding the scope to include siblings, as well as families formed in transit countries, within the criteria for family reunification and by applying the principle of the best interests of the child.
- 1.5 The EESC recognises the importance of the proposals having the legal status of a regulation – as opposed to a Directive – which is binding in its entirety and directly applicable in the Member States under the Treaties. However, all the relevant proposed regulations need to be adopted concurrently in order to represent a fully-fledged policy: if one of them should not be adopted, that would have a dire impact on the implementation of the others. Furthermore, past non-compliance with binding EU law on the part of some Member States leaves ample room for doubt as to the implementation of several provisions of the proposed regulations.
- 1.6 The EESC welcomes the fact that the proposals are a product of thorough consultations with stakeholders, national and local authorities¹, civil society organisations, and non-governmental and international organisations, such as the United Nations High Commissioner for Refugees (UNHCR)² and the International Organisation for Migration (IOM)³, as well as think tanks and academia.
- 1.7 The EESC is pleased that the regulations invoke the principles of solidarity and fair sharing of responsibility, but feels that this burden is not sufficiently balanced by a corresponding degree

¹ For example, the Berlin Action Plan on a new European Asylum Policy, 25 November 2019, signed by 33 organisations and municipalities.

² UNHCR Recommendations for the European Commission's proposed Pact on Migration and Asylum, January 2020.

³ IOM Recommendations for the new European Union Pact on Migration and Asylum, February 2020.

of solidarity. Put simply, solidarity, in the form of relocation, cannot be voluntary. Solidarity needs to be binding, in the form of mandatory relocations.

- 1.8 The EESC shares a dual concern for the safety of people who seek international protection or a better life, on the one hand, and the well-being of countries at the EU's external borders, which worry that migratory pressures exceed their capacities, on the other.
- 1.9 The EESC agrees that the Dublin III Regulation was not designed to deal with situations of migratory pressure or a fair sharing of responsibility across the Member States. Nor did it take into account the situation of migration management of mixed migratory flows and the consequent pressure those flows put on Member States' migration systems.
- 1.10 However, because the overall concept of the Pact on Migration and Asylum (PMA) relies on border control and avoidance of secondary movements, it increases the burden of responsibility and inconvenience for the countries of first entry, along with obligations envisaged in the pre-screening and border control proposals. These obligations are onerous for those countries, since they increase the numbers of people that should remain at the border, with possible grave consequences for their own well-being, but also for that of the host societies.
- 1.11 The EESC is encouraged by the recognition that a wider solidarity concept is needed and that solidarity should be compulsory in nature to guarantee a predictable and effective response to the changing situation, in which an increasing share of mixed migration flows towards the Union, and to ensure fair sharing of responsibility in line with the Treaty. However, this falls short of expectations for a solidarity mechanism that would really alleviate the burden of the states of first entry.
- 1.12 The EESC proposes that the proposed return policy to countries of origin is backed by a system of clear incentives and disincentives to third countries. In addition, the return policy should be dealt with by providing for a stronger role and involvement from the EU, with national policies assisting in cases where the Member State concerned has leverage over a particular third country. More effort needs to be made regarding the so-called triple nexus of humanitarian action, development and peace in the countries of origin of asylum seekers.
- 1.13 The EESC would endorse immediate and mandatory action as provided for in the European Commission proposal, given that a continent as big and wealthy as Europe should be able to contribute more to the effective protection of refugees.
- 1.14 Given the voluntary nature of the choice between relocation and sponsored returns, the EESC could accept a mandatory allocation of relocations, in the sense that if all states choose to finance returns but do not choose to relocate or only accept a very small number of relocations, this will further aggravate the current situation in the countries of first entry.
- 1.15 The EESC would give consideration to the proposal concerning the need to establish monitoring mechanisms in order to oversee the procedure, from screening to return, and its compliance with fundamental rights. Such mechanisms could, among other things, avoid the use of so-called pushbacks. In addition, sufficient time must be given for the mechanism to be set up, as the

overall procedures proposed in the screening regulation and the asylum procedures regulation and the timeframes involved appear somewhat difficult to achieve.

- 1.16 The EESC favours strengthening the crisis and *force majeure* regulation by introducing substantive legal provisions on personal data protection. Furthermore, it would suggest extending the time limit for the suspension of the international obligations of a state that is in crisis, for as long as the crisis lasts.
- 1.17 The EESC expresses its scepticism concerning the effective application of the provisions envisaged in the proposed regulations under scrutiny, and voices its concern that people in need of asylum might not be able to benefit from their rights due to the dysfunctional procedures envisaged.

2. **Background**

- 2.1 The 2015 crisis exposed significant structural weaknesses and shortcomings in the design and implementation of the European asylum and migration policy, including the Dublin system, which was not designed to ensure a sustainable sharing of responsibility for applicants for international protection across the EU. The conclusions of the European Council of 28 June 2018 called for a reform of the Dublin Regulation based on a balance of responsibility and on solidarity with respect to persons disembarked following search and rescue operations.
- 2.2 The New Pact on Migration and Asylum, presented together with the proposal for a new Regulation on Asylum and Migration Management, is intended to represent a fresh start on migration based on a comprehensive approach to migration management. This proposal puts in place a common framework for asylum and migration management at EU level as a key contribution to the comprehensive approach and seeks to promote mutual trust between the Member States.

The following challenges in particular are highlighted from recent migratory crises.

2.2.1 Lack of an integrated approach to implementing the European asylum and migration policy:

- lack of a level playing-field across Member States, hampering efforts to ensure access to procedures, equal treatment, clarity and legal certainty.

2.2.2 National inefficiencies and lack of EU harmonisation in asylum and migration management:

- challenges of the return and asylum nexus;
- limited use of assisted voluntary return programmes;
- lack of streamlined procedures on arrival;
- delays in accessing the appropriate asylum procedure and slow processing of applications;
- difficulty in using the border procedure.

2.2.3 Absence of a broad and flexible mechanism for solidarity:

- relocation is not the only effective response to deal with mixed flows.

2.2.4 Inefficiencies in the Dublin system:

- lack of sustainable sharing of responsibility under the current system;
- current rules on the shift of responsibility contribute to unauthorised movements;
- inefficient data processing.
- procedural inefficiencies of the Dublin system create an administrative burden.

2.2.5 Lack of targeted mechanisms to address extreme crisis situations:

- difficulty for the EU of ensuring access to asylum or other procedures at the borders during situations of extreme crisis.

2.2.6 Lack of a fair and effective system for exercising fundamental rights and difficulties in defining new legal pathways to asylum and in effectively tackling the reasons for migration, including humanitarian, development and peace issues.

2.3 It is hoped that the proposals will address these challenges in the following manner.

2.3.1 A more efficient, seamless and harmonised migration management system:

- a comprehensive approach for efficient asylum management (the proposal for a Regulation establishing a common framework for the EU's asylum and migration management);
- a seamless asylum-return procedure and easier use of accelerated and border procedures (
- a coordinated, effective and rapid screening phase (proposal for a Regulation introducing the screening of third-country nationals apprehended in connection with irregular crossing of external borders, disembarked following search and rescue operations or who request international protection at border crossing points).

2.3.2 A fairer, more comprehensive approach to solidarity and relocation:

- a solidarity mechanism providing for compulsory solidarity with a broader scope (proposal for a Regulation on asylum and migration management).

2.3.3 Simplified and more efficient rules for robust migration management:

- a wider and fairer definition of responsibility criteria, limiting the cessation and shift of responsibility (proposal for a Regulation on asylum and migration management);
- more efficient data collection/processing, allowing for counting applicants rather than applications, and including a specific category for search and rescue operations (recast Eurodac Regulation);

- improved procedural efficiency (proposal for a Regulation on asylum and migration management).

2.3.4 A targeted mechanism to address extreme crisis situations (proposal for a Regulation addressing situations of crisis).

2.3.5 More effective upholding of the fundamental rights of migrants and asylum-seekers⁴.

3. **Comments on the proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]**

3.1 The PMA correctly highlights the inconsistencies between Member States' asylum and return systems, and emphasises the need to boost solidarity within the EU by overcoming shortcomings in implementation and to improve and strengthen cooperation with non-EU countries. However, it is not clear if the principle of voluntary and selective solidarity will help solve the major coordination challenges of the last decade, especially in the light of the fact that the burden falls to a disproportionately large extent on the states of first entry.

3.2 As noted in EESC opinion SOC/649⁵, under the new solidarity mechanism Member States would be able to participate in the relocation or sponsored return of persons in an irregular situation. The EESC doubts the feasibility of the mechanism, which is based on hypothetical voluntary solidarity. No mention is made of the incentives that would be needed to induce Member States to participate in this mechanism, especially following the refusal of some of them to participate in the previous relocation programme⁶, or of the lack of express obligation. This "solidarity-based" mechanism may also have the contrary effect of relocating the individual concerned to the sponsoring Member State, if the return is not actually carried out within eight months, resulting in accountability gaps regarding the rights of returnees. Furthermore, under the proposed new solidarity mechanism, Member States are incentivised to not participate in relocation – the more pressurising, difficult and costly option – but to choose return instead⁷. Therefore, binding solidarity measures in the form of compulsory action as provided for in the European Commission communication need to be put in place.

3.3 The EESC welcomes the shortening of the periods for securing long-term residence from five to three years for persons benefiting from international protection when they decide to stay in the Member State that has provided them with such protection. The aim is clearly to facilitate integration into local communities, although it could be deemed to be limiting mobility within the EU, thus confirming that the burden still remains with the countries of first entry.

⁴ SWD/2020/207 final.

⁵ [SOC/649 – EESC-2020-04226-00-01-AS-TRA \(EN\)](#) (scheduled for adoption at the plenary session on 27 and 28 January 2021).

⁶ Judgment in Joined Cases Commission v Poland, C-715/17, Hungary C-718/17 and the Czech Republic, C-719/17.

⁷ Unfortunately, there are no safeguards against situations in which some governments decide to become key players of return as part of populist mobilisation against migrants and refugees.

- 3.4 The EESC welcomes the concept put forward of fair sharing of responsibility; however it feels that the burden of this responsibility is not sufficiently balanced by a corresponding degree of solidarity.
- 3.5 The EESC welcomes the measures to improve coordination between national strategies on asylum and return policies, but regrets that more proposals have been made on coordinating return instruments than on coordinating asylum and refugee reception procedures.
- 3.6 The EESC notes the difficulties that EU countries face in ensuring effective returns, as well as the Commission's willingness to move towards a common and effective European system of returns. The proposal is based on improving operational support for returns and provides for national return coordinators to be appointed. The EESC regrets that problems in the operation of return programmes are not properly identified⁸, which makes this approach – considered to be of strategic importance – dependent on the willingness to collaborate of non-EU countries, whether of origin or transit. The EU therefore, should take on a stronger role in relation to an overall return policy.
- 3.7 The EESC suggests that solidarity needs to be automatic. The solidarity obligations of the states of first entry are disproportionate. Procedures remain complex and lengthy, and provide no assurances for relocation. There are only mandatory border procedures without an automatic sharing mechanism. The measures that Member States have to take are to strengthen infrastructure (tents, in-kind assistance, etc.), financial support or voluntary returns. There are no clear-cut criteria as to how each country is going to contribute. This is not effective – all it does is to increase pressure on the state of entry – and it takes a long time (8 months) to implement, so there is a risk of applicants absconding. What is required is a mechanism that is more automatic and provides for a better distribution of applicants to all Member States.
- 3.8 In the same light, the EESC suggests that having three different categories of emergencies (cases of pressure or threat of increased pressure, cases of crisis, and cases of search and rescue operations) for solidarity purposes is not practical. Member States will have to apply for support in one of the three categories. The Commission will determine whether the request is valid (with 21 evaluation criteria) and will ask other countries for practical assistance, which can take two main forms: relocation and return sponsorship. It is a dysfunctional and time-consuming process: first one has to request solidarity, then the opinion is formulated, then one can contribute in voluntary solidarity and then the decision for mandatory solidarity. Even in the case of mandatory solidarity, the Commission's decision depends on the opinion of a special committee and if that committee does not give a positive opinion then no measures are taken.
- 3.9 According to the EESC, apart from the lack of precision in the definitions provided (especially in the crisis and *force majeure* regulation), the concept of migration pressure is not clearly defined, despite the frequent reference to it throughout the proposed text of the regulation.
- 3.10 Although the idea of returns by Member States according to their relations with third countries may be appealing, this may not work because conditions in the country of origin may change or

⁸ [Communication COM\(2017\) 200 final](#).

the countries in question may just prohibit returns. There is also the issue of essentially creating detention conditions; inevitably those who are to be returned remain at the border, transforming the country of first entry into a large pre-departure centre. In practice, it is not even certain that fast-tracking the procedures (as envisaged in the screening regulation) will have a real impact in terms of increasing the numbers of returns, since returns depend mainly on the cooperation of third countries with whom the EU has yet to negotiate and bargain (for instance on visa issuance), increasing the chances for human rights breaches but also of pressure put on local communities.

3.11 The EESC understands that the country responsible for the asylum application – which constitutes the backbone of the new asylum management procedure – could be determined as the one in which an immigrant has a sibling or siblings, in which he/she has worked or studied, or the one in which a visa was issued. Although this broadening of criteria is welcome, it nevertheless only confirms the heavy burden that still falls on the shoulders of the countries of first entry.

4. Comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum

4.1 The EESC welcomes the introduction of a crisis and *force majeure* component in the field of migration and asylum. The EESC feels, however, that the very definitions are not clear or adequate. This fact, along with the absence or existence of objective indicators, creates a lack of legal certainty.

4.2 The EESC points out that although the crisis and *force majeure* regulation provides a window of opportunity for binding solidarity, it covers procedural support rather than emergency solidarity measures. Solidarity is undermined by the complex and bureaucratic procedures required to implement it. It is clear that in a crisis situation or situation of pressure, relocations need to be ensured. In addition, measures should be put in place to prevent Member States from reaching a crisis situation.

4.3 The EESC points out that establishing procedures and mechanisms addressing situations of crisis and *force majeure* in the field of migration and asylum should also be compatible with fundamental rights and the general principles of Union, as well as international, law.

4.4 The EESC welcomes the fact that in times of crisis, the Member State that activates the mechanism will be able to suspend its international obligations (e.g. for processing asylum applications) for up to three months. In addition, this timeframe should be extendable for as long as the crisis is in place. Clarity on how crisis situations will be determined and clear benchmarks for when a country's capacity is/might become overburdened might be useful.

4.5 The EESC welcomes the proposal to provide Member States with the additional time needed to deal with the crisis situations while also ensuring effective and prompt access to the relevant procedures and rights, and the Commission's ability to authorise the application of the asylum crisis management procedure and the return crisis management procedure for a period of six months, which can be extended up to a period not exceeding one year. After expiry of the

relevant period, the extended deadlines provided for in the asylum and return crisis management procedures should not be applied to new applications for international protection.

- 4.6 However, the EESC feels that the limited scope of the proposal, i.e. to extend or accelerate procedures, weakens its function as a mechanism to be deployed in the case of emergency solidarity measures.
- 4.7 Although, the EESC believes that this proposal may serve as an opportunity to make the case for binding solidarity, it is not included in the body of the relevant regulation. Therefore, the EESC feels that it should be incorporated in the body of the Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] to avoid any uncertainties and to remove the risk of it not been adopted, as the one cannot exist without the other.

Brussels, 25 February 2021

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