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European Council
on Refugees and Exiles

THE ROAD OUT OF DUBLIN: REFORM OF THE DUBLIN REGULATION

ECRE'S OVERVIEW OF THE MAIN CHANGES IN THE PROPOSAL TO RECAST THE DUBLIN REGULATION, AND ITS RECOMMENDATIONS FOR THE COUNCIL AND EUROPEAN PARLIAMENT

I. I INTRODUCTION

Regulation (EU) No 604/2013 or the "Dublin III Regulation" is part of the Common European Asylum System (CEAS). It aims to regulate the Member State responsible for processing an application for international protection so that refugees are not left "in orbit" with no Member State accepting responsibility for their application. It should also ensure that only one Member State examines each application to discourage multiple applications. It uses a hierarchy of criteria to guide Member States as to who is responsible for an asylum application: from family considerations, to recent possession of visa or residence permit in a Member State, to whether the applicant has entered the EU irregularly or regularly.

The need for substantial reform of the Dublin system has been discussed for many years and the present refugee protection crisis has shone a light on just how dysfunctional it is. In-depth research by NGOs, UNHCR, academia, along with the evaluation of Dublin III for the European Commission has pointed out inherent structural flaws in the system, such as the allocation of responsibility without any responsibility sharing mechanism, complex administrative procedures, and little if any consideration of the individual circumstances of individual asylum seekers, which often leads to involuntary transfers or litigation, etc. The negative effects on the lives and health of individuals who have been subject to the Dublin system because of detention, long delays and separation from family members, are also well-documented.

The European Commission tabled a proposal to recast the current Dublin Regulation on 4 May 2016. What makes this reform particularly complex is that it is part of a broader reform of the whole of the CEAS as well as being part of an overarching strategy to end irregular migration flows into the EU. The EU has said that ensuring protection for refugees in their region of origin and resettlement from there to the EU should become the main protection model for the future. Following on from this approach, with the recast the EU is seeking to combine the way in which responsibility for asylum seekers is allocated within the EU with an overall policy framework that seeks to prevent entry into the EU in the first place.

II. ANALYSIS

I. AIMS OF THE RECAST

The European Commission identifies the current "refugee crisis" as the impetus for reform of the Dublin Regulation as it exposed significant weaknesses in both its design and implementation. In particular, the fact that Dublin was not designed to ensure responsibility sharing has put Member States where the majority of asylum seekers arrive under intense strain. The Commission also points to complex, lengthy procedures and the fact that responsibility shifts between Member States after a given length of time, as factors limiting effectiveness. The Commission also highlights that a lack of provisions on applicants' obligations and consequences for non-compliance has meant that the system is prone to abuse by applicants. This list of issues to be resolved has shaped the recast which aims to render the procedure simpler and more effective, as well as to ensure equality of efforts when states are faced with disproportionate pressure. At the same time, the recast supports the overall aim of current EU policy: to reduce the number of people seeking protection in the EU and at the EU borders. It does this by introducing obligations for Member States of first entry to assess whether there are grounds for inadmissibility of claims and to apply accelerated procedures prior to the Dublin procedure. This is alongside the existing objectives for Dublin III (rapid access of asylum seekers to the procedure and prevention of multiple applications).

What the recast does not address at all is the preferences of asylum seekers themselves. It also does not accept that the current situation is one of sometimes dramatic inequality in terms of reception conditions, access to protection, and possibilities for integration in different Member States, and that harmonisation will not occur overnight. Rather, it seems to assume that by making the system yet more punitive, it will be possible to make those seeking asylum in Europe stay in the first country of entry regardless. It is also weak on responsibility sharing and in ECRE's view would probably complicate procedures more and exacerbate the challenges noted above. Overall, this could discourage Member States from following the rules, rather than serving to fix the problems.

II. ANALYSIS OF THE RECAST

There are some positive changes in the recast in relation to broadening the scope of the definition of family members. Legal representation and guardianship rights have also been included for children in the country where they are obliged to be present and obligations have been enhanced in relation to tracing family members and on the best interests of the child. There have also been positive steps to reduce the length of detention for those in the procedure to be transferred.

However, ECRE has serious concerns about the overall direction of the reform.

Firstly, the proposal does not rethink the fundamentally flawed principles underpinning the current EU mechanism for allocating responsibility for asylum applications across Europe, but instead reinforces many of the mechanism's weaknesses.

With some limited exceptions, asylum seekers will face stricter and unfair rules, likely to further undermine their trust in the CEAS. These measures include far-reaching sanctions when people move between Member States and unlawful limitations on applicants' right to an effective remedy. There is a high likelihood that applications will be rejected before they ever reach the Dublin system because of the proposal's aim to require Member States of first entry to assess whether an asylum seeker can be transferred to a "safe third country" or a "first country of asylum", or be subjected to accelerated examination for "safe country of origin" or security reasons, before triggering the Dublin Regulation. The increased procedural complexities will also mean more delays in access to protection and less efficient procedures.

The proposal also contravenes key judgments of the European Court of Human Rights on the human rights test for suspending Dublin transfers, as well as EU Court of Justice rulings on the responsibility of a Member State in which an unaccompanied child is present to process their application and on asylum seekers' rights to reception conditions throughout the Dublin procedure.

Member States, for their part, would see the unequal distribution heavily exacerbated under the Dublin IV Regulation, as countries of first entry would be required to conduct admissibility and merit-related assessments before applying the Regulation. Given the deletion of existing clauses ceasing a Member State's responsibility after a lapse of time, these countries would face perpetual responsibility and have no means of relief from their obligation when a transferring country is not complying with time-limits for transferring an applicant.

At the same time, the proposal includes only limited provisions on responsibility-sharing. It outlines a corrective allocation mechanism but it is triggered at an unduly high threshold and raises a number of practical concerns for Member States and asylum seekers. This mechanism does not include a suspension of the Dublin Regulation – meaning transfers of persons back to a Member State can still be carried out while solidarity measures allowing transfers out of the same Member State are in place.

III. CONCLUSIONS AND ECRE PROPOSALS

There needs to be a fundamental rethink of the underlying logic of the recast Dublin Regulation. To generate understanding, trust and compliance – from both Member States and applicants – the Dublin system must be protective and fair to all parties involved in the asylum process. Despite the bleak political context, the rethinking of the Dublin system should be an opportunity to draw lessons from the failure of the current system and adopt a deeper reform that allows for responsibility sharing.

ECRE proposes bolder reform based on the following guiding principles:

- Guaranteed access to a fair and efficient asylum procedure in the EU where equivalent levels of protection can be found in each country.
- No responsibility shifting outside the EU or to States where refugees first arrive.
- Rights-based system in full compliance with international human rights law and the EU Charter of Fundamental Rights.
- Humane and equitable system: Individual circumstances of individuals and meaningful links to a Member State should be the starting point for allocating responsibility and "matching" applicants to Member States.
- Positive incentives for compliance for individuals including enhanced mobility within the EU, rather than punitive measures for non-compliance that could encourage irregular secondary movement, increase distrust in the system and potentially mean transferring people back to countries where there are insufficient reception conditions and few opportunities for integration.

III. RECOMMENDATIONS

1. Member State delegations and MEPs should demand bolder reform of the Dublin Regulation and that any changes are grounded in human rights, as required by primary EU law.

With regards to the present recast proposal, delegations and MEPs should ensure the following:

2. The obligation on Member States of first entry to assess certain admissibility criteria and apply accelerated procedures should be deleted.
3. The scope of discretionary clauses should not be restricted so Member States can retain their sovereign right to examine an asylum application on its merits.
4. The time-limit for Member States to cease being responsible for a claim should be reinstated, so that Member States of first entry are not further burdened.
5. There should be no sanctions on secondary movements of asylum seekers as they risk violating fundamental rights. Rather incentives should be included, such as freedom of movement within the EU at a certain stage.
6. The human rights test for suspending Dublin transfers should be broadened in line with the EU Charter of Fundamental Rights and decisions of the ECtHR and CJEU.
7. The definition of family members should be further extended to enhance integration prospects and to fully comply with the right to family life.
8. As a rule children should be allowed to apply for international protection in the Member State where they are present, unless their best interests dictate otherwise.
9. Limitations on the scope of appeal against transfer decisions should be rejected as they infringe upon the right to effective legal remedy.
10. Any solidarity mechanism must be accompanied by a suspension of Dublin transfers to the benefiting Member State.
11. Solidarity mechanisms must be triggered as soon as a Member State reaches 100% of its allocation capacity and should apply to all those seeking international protection in that country – not selected groups.

For a more in-depth analysis see ECRE Comments on the Commission Proposal for a Dublin IV Regulation, October 2016.