

MAKING THE CEAS WORK, STARTING TODAY

ECRE'S IDENTIFICATION OF KEY IMPLEMENTATION GAPS AND RECOMMENDATIONS FOR EU MEASURES TO MAKE THE COMMON EUROPEAN ASYLUM SYSTEM FUNCTION EFFECTIVELY

I. INTRODUCTION

The stalemate in the negotiations on the reform of the Common European Asylum System (CEAS) over the past three years has demonstrated the inability of European Union (EU) Member States to find common ground on asylum policies. The persistent blockage in the Dublin IV and Asylum Procedures Regulation proposals in particular is caused by a proliferation of competing Member State interests with more divisions than in previous negotiations. Against that backdrop, withdrawal of the proposals is an increasingly likely move from the new European Commission.

ECRE maintains that the 2016 proposals tabled by the Commission constituted a worrying lowering of protection standards and were based on a flawed vision of outsourcing responsibility for refugees to regions outside Europe. ECRE therefore supports withdrawal of most of the proposals. The focus needs to be compliance not reform, with two exceptions: First, while Dublin IV should be withdrawn, ultimately legislative reform of the Dublin system is needed. Second, a new legal base for EASO and its transformation into the EU Asylum Agency (EUAA) remains necessary.

Real reform of Dublin is needed for the EU to break away from the intrinsically unfair, unworkable, and expensive mechanism for allocating responsibility among Member States. In the short to medium term, however, the CEAS will continue to operate under the existing legislative framework, including the Dublin III Regulation (604/2013). The law in force should be read and implemented in compliance with refugee and human rights law in order for EU countries to develop functioning asylum systems and to avoid the risk of a perpetual state of political crisis on refugee protection. The Commission holds the institutional power and responsibility to support for promotion of compliance. In this Policy Note, ECRE suggests the actions need to refocus resources and attention on compliance, rather than unnecessary reform.

II. ANALYSIS

URGENT IMPLEMENTATION PRIORITIES

Compliance with the CEAS is understood by ECRE as rights-based compliance. This means that the EU Regulations and Directives should be implemented in accordance with all applicable legal standards set out *inter alia* in primary EU law. Article 78(1) TFEU recalls the 1951 Refugee Convention and other relevant treaties, such as human rights instruments, while Article 80 requires the principle of solidarity and fair sharing of responsibility between Member States to be adhered to in asylum policy.

Evidence gathered by ECRE in the Asylum Information Database (AIDA), shows that in many instances Member States are not properly implementing their obligations under the CEAS. Non-compliance with asylum standards leads to suffering, litigation, and onward movement. Failure to comply with the CEAS stems from different factors, ranging from deliberate strategies to create a hostile environment for refugees, to mismanagement of asylum systems including that caused by a lack of resources.

Certain implementation gaps need to be addressed as a matter of priority. ECRE highlights the following:

1) **Inadequate reception provision (quantity and quality):**

Insufficient capacity to house asylum seekers in line with the standards of the recast Reception Conditions Directive persists across the continent. It exposes individuals to homelessness or emergency accommodation in overcrowded and unacceptable conditions in many countries (e.g. Ireland, Italy, Cyprus, Spain, France, and Greece). For some (France, Greece), deficiencies in reception are a chronic problem irrespective of numbers of arrivals.

2) **Barriers to registration:**

In violation of the recast Asylum Procedures Directive (APD), asylum seekers are faced with obstacles to lodging an application in many countries (e.g. France, Italy, Greece, Cyprus, Spain, and Belgium). These include long waiting times to register, practical obstacles to contacting authorities, and arbitrary denial of access to the procedure for certain applicants.

3) **Lack of special procedural guarantees:**

The APD obliges Member States to set up a mechanism to identify vulnerability and to exempt asylum seekers requiring special guarantees and unaccompanied children from accelerated and border procedures. Transposition of these provisions is still pending in many countries (e.g. Germany, Spain, Hungary, Italy, Poland, and Sweden). Non-compliance results in vulnerable groups undergoing truncated procedures, often entailing deprivation of liberty; the guarantees to enable them to receive fair status determination are absent.

4) **The "Asylum Lottery":**

Despite common criteria in the recast Qualification Directive, international protection continues to depend on the country examining an asylum application. There are persistent discrepancies in Member States' decision-making which cannot be explained by objective factors related to the cases considered. These affect particular cohorts: in the first half of 2019, protection rates for nationals of Afghanistan ranged from 8% in Bulgaria to 63% in Germany to 97% in Switzerland. For Turkish nationals, from 0% in Bulgaria to 50% in Germany to 93% in Norway. Similar claims are treated unequally across the EU so refugees risk being wrongly denied protection and returned to their country of origin by some Member States. There is evidence that this contributes to onward movement, as well as litigation. Case law from domestic courts show suspension of Dublin transfers of rejected asylum seekers to other EU+ countries due to the risks of removal to their home country.

5) **Harmful and inefficient use of Dublin:**

Germany and France continue to be the main users of Dublin III, with nearly one in three asylum seekers in these countries placed in a Dublin procedure in 2018. However, more than 80% of these procedures did not result in a transfer. Many Member States initiate procedures to transfer applicants to countries such as Hungary, Greece, Bulgaria and Italy where their rights are at risk due to poor reception and refugee status determination, despite suspensions from courts. At the same time, family provisions and the humanitarian clause are marginally used, partly due to restrictions imposed by receiving countries.

FOUR ACTIONS TO IMPROVE COMPLIANCE

Action 1: Monitoring compliance with the *acquis*

For effective monitoring of compliance to take place, a number of conditions need to be in place. First, up-to-date and reliable quantitative and qualitative evidence must be available. Statistics are one of many forms of evidence. The Commission (Eurostat) has been entrusted with the provision of asylum statistics since 2007. However, adequate data on areas such as Dublin are yet to be delivered by Eurostat in a timely manner, and only a handful of countries (Greece, Germany, Luxembourg, Poland, and Switzerland) regularly release figures on the activities of their Dublin Units. Persisting problems in the timeliness and reliability of publicly available statistics need to be urgently remedied. The European Asylum Support Office (EASO) compiles information on Member State practice but has no mandate to assess whether or not countries respect their obligations. In light of this, the Agency cannot substitute for the role of the Commission in monitoring compliance

Action 2: Evaluation of legislation

Member States' compliance with their legal obligations must be thoroughly and regularly analysed against available evidence. The institutional responsibility for this analysis lies with the European Commission (DG HOME). The Commission is bound under EU law to evaluate the implementation of the CEAS legal instruments. However, the evaluation report on the Dublin III and recast Eurodac Regulations due by July 2018 has not yet been delivered to the Council and European Parliament (EP). Similarly, evaluation reports on the recast Asylum Procedures and Reception Conditions Directives, due by July 2017, have not been issued despite express requests from the EP.

Action 3: Guidance to support compliance

Correct application of the *acquis* too often depends on individuals seeking judicial redress, i.e. in order to access their rights, they have to litigate, which in turn creates costs for state in question. Dublin in particular is one of the most heavily litigated aspects of the CEAS. Alongside countless individual cases before domestic courts and Strasbourg, the Court of Justice of the European Union (CJEU) has so far received over 30 references for preliminary rulings on the Dublin Regulation alone.

The Commission has the power to produce guidance in the form of Communications or Recommendations to assist Member States in properly implementing their legal obligations under the *acquis*, and has used it in the past for instruments on family reunification, fingerprinting and return. Guidance would help clarify how countries should apply EU legislation in line with human rights and would in turn better equip the Commission to monitor practice and initiate infringement proceedings when necessary.

ECRE believes that the Commission should produce guidance on rights-based implementation of the Dublin Regulation, focusing on suspension of transfers to countries which do not comply with the asylum *acquis*. The legality of Dublin transfers is a highly contentious and litigated aspect of the Dublin system. Article 3(2) of the Regulation, which codifies the CJEU judgment in *N.S. / M.E.*, is not fully consistent with human rights law. The provision refers to the existence of "systemic flaws" in a country's asylum procedure or reception conditions, even though the source of the risk of ill-treatment is irrelevant to refoulement. Obstacles to transfers can stem from any source of risk, including a person's medical condition, unfair refugee status determination, and risk of onward deportation to the country of origin. The correct human rights test has now been affirmed by the CJEU in *C.K.* and *Jawo*, but has yet to uniformly trickle down to domestic courts. The legacy of "systemic flaws" lives on in several jurisdictions, where courts still uphold transfers on the ground that risks of hardship facing individual applicants do not stem from systemic deficiencies in asylum systems of the countries concerned (see ECRE documentation of jurisprudence). Human rights violations are likely to follow this continued flawed interpretation of the law.

Furthermore, the Dublin system should not be used in a way that undermines the broader objectives of the CEAS, such as fair procedures and adequate living conditions for refugees. Within the existing law, Member States have considerable discretion; if they decide to prioritise transfers regardless of context it often demonstrates complacency about poor treatment in other countries. They are not just tolerating but legitimising sub-standard conditions and disregard for the objectives of the CEAS in the transfer countries.

Human rights law provides a floor not a ceiling in protection standards. Thus, Member States should take into account wider implementation of the CEAS and not simply whether or not the conditions are "bad enough" to trigger a human rights prohibition on transfers. Dealing with these issues at the policy level would also reduce the time and resources dedicated to litigation, which is where the burden currently lies. Appellants and judges have to enter into minute details in transfer-related litigation: Does foreseeable family separation in a country's reception system happen for long enough to amount to inhuman or degrading treatment? Can a homeless status holder prove that they cannot turn to church services or soup kitchens for food? The issue could be simplified through guidance to administrations on transfer suspension where standards are not up to scratch.

Beyond administrations, courts often look to EU institutions for guidance as to whether transfers should be suspended, as happened recently in Belgium where an appeal against a transfer to Italy was dismissed *inter alia* due to the fact that “European authorities have not called for suspension, even partial, of the rules of the Regulation” *vis-à-vis* Italy.

In its 2008 proposal for the Dublin III Regulation, the European Commission – unsuccessfully – proposed a mechanism for temporary suspension of transfers where “the circumstances prevailing in a Member State may lead to a level of protection for applicants for international protection which is not in conformity with Community legislation”, in particular the Asylum Directives. The mechanism would have rendered the use of the transfer procedure conditional on respect for CEAS standards but unfortunately it was not adopted.

Nonetheless, the Commission can and should provide guidance to Member States on the application of Articles 3(2) and 17(1) and set out the circumstances warranting suspension of transfers to countries which cannot guarantee asylum seekers treatment in line with the asylum *acquis* or facing particular pressure. This should include, at the very least and logically, countries subject to infringement proceedings on asylum (Hungary and Bulgaria). To further ensure legal certainty, Commission guidance should advise Member States to lay down transparent and clear instructions to their administrations on transfers of asylum seekers to other countries, based on a regularly updated assessment of the legal and socio-political context for asylum seekers and refugees therein. Member States should periodically notify the Commission of policies to suspend transfers to specific countries and the grounds on which they are based.

Action 4: Enforcement and infringement procedures

Finally, implementation gaps must be taken seriously and responses to persistent non-compliance must be adopted as appropriate. Where a Member State systematically violates its legal obligations, the Commission should initiate infringement proceedings and work towards restoring compliance. Infringement procedures take time, resources and effort. A Member State may well continue violating the law during the time a case is referred to CJEU and before a judgment is delivered. It is therefore crucial for the Commission to take action not long after identifying non-compliance so as to work towards remedying violations and restoring legality in a reasonable timeframe.

To ensure the Commission can effectively discharge its monitoring, evaluation, guidance and enforcement duties under the *acquis*, the Asylum Unit (DG HOME) should prioritise these actions and deploy appropriate resources to these ends.

III. RECOMMENDATIONS

ECRE MAKES THE FOLLOWING IMMEDIATE AND MID-TERM RECOMMENDATIONS TO THE EUROPEAN COMMISSION:

1. Withdraw the legislative proposal for a Dublin IV Regulation (COM(2016) 270) of 4 May 2016, the proposal for a recast Eurodac Regulation (COM(2016) 272) of 4 May 2016, the proposal for a recast Reception Conditions Directive (COM(2016) 465) of 13 July 2016, the proposal for a Qualification Regulation (COM(2016) 466) of 13 July 2016, and the proposal for an Asylum Procedures Regulation (COM(2016) 467) of 13 July 2016.
2. Finalise and publish reports on the implementation of the recast Asylum Procedures Directive (2013/32/EU) and the recast Reception Conditions Directive (2013/33/EU), which should have been presented by 20 July 2017, and reports on the application of the Dublin III Regulation (604/2013) and the recast Eurodac Regulation (603/2013), which were due by 20 July 2018.
3. Publish guidance on the suspension of transfers and assumption of responsibility for asylum applications pursuant to Articles 3(2) and 17(1) of the Dublin III Regulation where a country cannot guarantee that an applicant will be treated in line with the asylum *acquis* or is facing particular pressure. To ensure compliance with human rights, guidance should include the circumstances under which Member States should obtain individual guarantees from their counterparts before performing a transfer, and the content of such guarantees.
4. As an overall strategy, re-orient action towards compliance with the CEAS, rather than legislative reform (with exceptions of Dublin, where a reform will ultimately be required, and the EUAA proposal). Invest sufficient resources in compliance.