

THE REGULATION ON ASYLUM AND MIGRATION MANAGEMENT: GIVING WITH ONE HAND, TAKING BACK WITH THE OTHER

SUMMARISING ECRE'S COMMENTS ON THE RAMM, WHICH
PROVIDE OVERALL ASSESSMENT AND ARTICLE BY ARTICLE
RECOMMENDATIONS FOR AMENDMENT

I. INTRODUCTION

In September 2020, the European Commission (the Commission) presented a New Pact on Migration and Asylum (the Pact). It aims to develop a comprehensive approach to external borders, asylum and return, the Schengen area of free movement, and external policies. The Pact was presented along with a set of legislative proposals, including the Regulation on asylum and migration management (RAMM). The RAMM is the central proposal in the Pact and aims to provide a common framework to relaunch the Common European Asylum System (CEAS) and promote mutual trust between Member States.

There are also implications for relations with third countries: ECRE considers it unfortunate that the most important proposal on asylum in Europe starts with a section on responsibilities of non-EU countries. Unfortunately, the RAMM tries to do too many things, whilst still leaving unchecked many of the underlying problems it inherits; it provides a series of measures to compensate for other failures, with the Commission as arbiter. Despite being a Regulation, the RAMM also leaves a wide margin of discretion for Member States (and the Commission) concerning implementation, so its impact is difficult to predict. It could be implemented in a way that improves respect for fundamental rights or in a way that considerably reduces protection space in Europe. Given some Member States' current practices, there are clear dangers of new or continued violations of EU and international law.

Like Dublin IV before it, the overall approach of the RAMM to responsibility allocation is to maintain the status quo but add “corrective” solidarity mechanisms intended to compensate for the outcomes of the standard rules and make them fairer. ECRE believes that a deeper overhaul of the criteria on sharing of responsibility is vital to address the system's dysfunctions.

Although the RAMM includes some positive elements, these are often outweighed by related negative changes – it gives with one hand and takes back with the other, such as on family reunification. The Pact is not going away, however, so here ECRE’s recommendations focus on the parts of the RAMM that should be saved, and those to withdraw. Finally, the RAMM is a long and complex instrument, and not all aspects are covered here, so this policy note should be read in conjunction with the detailed Comments paper.

II. ANALYSIS

RAMM PART II: A COMPREHENSIVE APPROACH?

The EU and Member States should take actions on the basis of a comprehensive approach that addresses the entirety of “the migratory routes that that affect asylum and migration management”, including relations with third countries, visa policy, asylum procedures, determination of responsibility for an asylum application, reception, return, deportation, EU agencies, information systems, crisis preparedness, sea rescue and integration, some of which are also addressed in the RAMM. Tellingly, the approach begins with “mutually beneficial” relations with third countries, including on readmission – a move that puts non-EU countries front of stage in a central pillar of the CEAS. It is also unclear how “mutual” the relations will be, with a danger that the EU’s interest in readmission overpowers the needs and interests of third countries. In line with current trends, internal EU policy risks undermining EU external policies that have their own objectives, principles and working methods.

A much bigger role for the Commission is envisaged. This has positives and negatives, not least because of the Commission’s recent focus on some aspects of asylum and migration policy at the expense of others. In addition, the proposal is premised on Member States implementing the CEAS in line with their obligations in EU and international human rights law. Clearly not all of them do, which makes it difficult to see how some solidarity measures will work, even with the Commission’s increased leverage.

RAMM PART III: CRITERIA AND MECHANISMS FOR DETERMINING THE MEMBER STATE RESPONSIBLE

The rules on allocation of responsibility for the examination of asylum applications have been a major source of conflict between Member States for years and ultimately stymied the last CEAS negotiations. While there are some positive elements included in the proposal, it remains too close to the current Dublin system and some new elements, including those imported from Dublin IV, increase rather than reduce dysfunctionalities.

In the hierarchy of criteria, the first criterion covers “Unaccompanied Minors” but fails to incorporate jurisprudence which determines that the Member State responsible should be the one where the unaccompanied child is present unless this is found not to be in the best interests of the child. Meanwhile, the definition of family member has been widened to include sibling(s) and evidential requirements to demonstrate family connection have been lowered. These are positive changes and will mean more people can be reunited with family members, with beneficial effects for them and their prospects for integration. Paradoxically, the criteria on dependent persons have seen “siblings” removed, perhaps as they are now included as family members. As the family criteria are not implemented uniformly or widely, it is an unnecessary restriction to change the dependency rules. On provision of information, the proposal includes positive changes specifying the type and form of information to be provided but also falls short of including an obligation on national authorities to proactively question the applicant about relatives or family members or other elements that could trigger primary responsibility. The extension of deadlines in cases for unaccompanied children, whilst positive, could be expanded to cover all family cases to promote family unity and uptake of these criteria.

The criterion that the country of entry will be responsible if none of the other criteria apply (or are applied) remains and has been extended from one year to three. Although improvements in the other criteria above are good news, in reality Member States treat the “first country” criterion as the priority rather than default. This extension of the time period, therefore, places more burden on Member States at the borders, contrary to the aim of increasing solidarity.

The proposal introduces or repeats obligations on the applicant and sets out the punitive consequences of non-compliance including on onward movement, without acknowledging why this may be necessary in the first place. For example, applicants lose the right to reception in any Member State apart from the one in which they are required to be present, ignoring the fact that reception or other conditions could be inadequate in that country.

The scope of the take back procedure is also expanded to include beneficiaries of international protection and those who have arrived via resettlement under the proposed Union Resettlement Framework. This restricts the movement of beneficiaries of international protection, again without addressing why people may have needed to move.

Responsibility for an application in the current system ceases after a person has been absent from a Member State's territory for three months. The RAMM provides that the country where the application is first registered should continue the process of determining responsibility even if the applicant leaves the territory "without authorisation or is otherwise not available to the competent authorities of that Member State". This renders responsibility (near) permanent and exacerbates unfairness on Member States situated at the external borders as well as on applicants. Member States of first entry are deterred from fulfilling identification and registration obligations or investing in reception systems to avoid responsibility rules. Asylum seekers may also resort to irregularity to avoid being identified and confined to these countries.

Shorter time limits for submitting and replying to a take charge request aim to "speed up the determination procedure to grant swifter access of an applicant to the asylum procedure". However, take charge requests are the basis for realisation of rights to family reunification and help respond to humanitarian emergencies. As such, the original deadline should be maintained to encourage more successfully concluded take charge requests.

As in Dublin IV, the take back request becomes a mere "notification", shifting the nature of the relationship between the sending and the receiving country in the favour of the former. Where there is a take back notification following a Eurodac hit or of a person resettled to another Member State, remedies are restricted to an assessment of whether the transfer would result in a real risk of inhuman or degrading treatment for the person concerned, which unfortunately can still be the case in the EU today. However, according to the CJEU, the right to be heard must be ensured with respect to any adverse effect on an applicant so the RAMM may not pose limitations on the scope of the right to appeal a transfer decision. The right to an effective remedy should also be added for rejections of take charge requests. An increase in time limits for lodging an appeal to at least four weeks and the automatic suspensive effect of appeals would bring the provision in line with the right to an effective remedy under the Charter.

RAMM PART IV: SOLIDARITY

The RAMM introduces corrective solidarity mechanisms for two new situations 1) disembarkation following search and rescue and 2) migratory pressure. As the preferable option of deeper reform of responsibility sharing is not proposed, ECRE's comments consider whether the mechanisms would correct the unfairness of the rules and whether they are workable in practice.

SEARCH AND RESCUE (SAR) SOLIDARITY MECHANISM

Humanitarian emergencies at Europe's maritime borders are exacerbated by states' refusals to disembark. Ad hoc responses, while better than nothing, are time-consuming and unpredictable. The solidarity mechanism for SAR operations seeks to answer these needs. As such, the proposal is broadly welcome, but ECRE has concerns about the types of contributions available to Member States, the amount of solidarity, and procedural complexities. Ideally, all Member States should offer solidarity in the form of relocation: given that one of the objectives of "corrective" solidarity is to mitigate the unfairness of the rules on allocation of responsibility for examination of applications, solidarity should logically involve assumption of responsibility for people. Return sponsorship is not an acceptable option and should be withdrawn (see also below). Capacity building and operational support are useful solidarity measures but only so long as they focus on the asylum system in the country benefitting in response to needs identified, and not on external cooperation. In addition, the mechanism is highly bureaucratic but still does not guarantee that it will meet all the relocation needs of the benefitting country. It could be simplified.

MIGRATORY PRESSURE SOLIDARITY MECHANISM

The migratory pressure solidarity mechanism is welcome provided that some crucial amendments are made. In this mechanism, relocation and return sponsorship are brought together from the start and appear to have equal weight. There appears to be no corrective mechanism to ensure that all relocation needs are met. Again, ECRE believes that return sponsorship should be removed as a solidarity option completely because it distorts the idea of solidarity. Solidarity should be mutual support among Member States to meet the objectives of the EU acquis on asylum, which supporting returns does not achieve. In the proposal, if the person has not been returned after eight months, they will become the responsibility of the sponsoring Member State. However, if a person has not been able to return after so long, the case is likely to be more

complex and less suitable to be handed on for implementation by another state. There are also fundamental rights concerns relating to the prolongation of the return process and related detention measures; the state of limbo for the applicant; and the challenges attached to accessing an effective remedy, all of which arise when a person with a return decision is transferred to another Member State.

AMENDMENT TO THE LONG-TERM RESIDENCE DIRECTIVE

The RAMM reduces the period of “legal and continuous” residence before acquisition of a long-term right to remain from five to three years for beneficiaries of international protection. This allows for better integration, including enhancing job prospects, security and the prospect of a durable solution for beneficiaries of international protection. Given the prolonged periods of displacement experienced by most refugees (on average 16 years), this is highly welcome. Nonetheless, wider provisions on mobility for beneficiaries of international protection would better achieve the same ends of supporting durable solutions for refugees.

III. RECOMMENDATIONS

In the absence of the preferred option of a deeper reform of responsibility sharing, ECRE provides the following recommendations:

- » The “comprehensive approach” should be revised to focus on EU Member States’ compliance with asylum law rather than codifying attempts to shift responsibility to non-EU countries through capture of external policies. In particular, Article 3(a) should be withdrawn, with amendment of other parts of Articles 3 and Articles 4 and 7.
- » The extension of deadlines for unaccompanied children should be expanded to cover all family cases and siblings should be re-included as dependent persons to further support family unity.
- » The Member State responsible for an application for an unaccompanied child should be the one where they are present unless this is found not to be in the best interests of the child, in line with jurisprudence.
- » There should be an obligation on national authorities to proactively question the applicant about relatives or family members or other elements that could trigger primary responsibility.
- » The take back procedure should not be expanded to include beneficiaries of international protection or those who arrived under the proposed Union Resettlement Framework.
- » The criterion explaining that the country of entry will remain responsible if none of the other criteria apply should not be extended beyond its current term of one year.
- » Cessation of responsibility should be reinstated at 3 months.
- » Take charge deadlines should not be reduced so that maximum take up of family unity opportunities and humanitarian assistance is encouraged.
- » Limitations on the scope of the right to appeal should be removed for transfer decisions; the right to an effective remedy should also be secured in cases of rejection of take-charge requests and by providing at least four weeks for any appeal and automatic suspensive effect.
- » Return sponsorship should be withdrawn completely as it does not support the aims of the proposal and raises serious concerns for fundamental rights.