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Sovereignty of Member States in New European Pact for Migration and Asylum

Introduction

Common European Asylum System (CEAS) is the legal framework within the European Union developed since 1999 and intended to harmonize standards of the asylum law in Europe. However, the migration burden sharing mechanism that is analyzed in this paper was already explicitly introduced in the Treaty of Amsterdam in 1997 (Thieleman, 2010: 83). CEAS legal basis consists of several legal acts: Qualification Directive on recognizing refugee status, Eurodac Regulation on biometric data sharing, Asylum Procedures Directive setting guidelines for asylum application process and Asylum Agency Regulation which established European Asylum Support Office (Peers, 2020). Nevertheless, the core regulation determining which Member State is responsible for the process in specific situations is until now the Dublin Regulation.

However, the scope of migration group under the framework of CEAS seems to be very narrow and limited only to the specific group of migrants. Recent increase in migration pressure and mounting number of asylum claims (both justified and unjustified) place the CEAS in the centre of irregular migration issues. Moreover, some Member States (foremostly Italy, Spain and Greece) challenge the current system as they are afflicted by migration inflows as EU entry countries, heavily burdened under Dublin Regulation, despite the fact that migrants actually aim for other EU countries. That situation generates further secondary irregular migration flows inside the EU and increases chaos with migrants claiming asylum in more than one country (UN Refugee Agency, 2012: 5). Whereas the current discussion concentrates on Mediterranean region, it should be remembered that in 90s increased migration pressure, caused by wars in former Yugoslavia, became a challenge for Germany or Austria.

Hitherto, the migration policy has been the domain of Members States, with the EU institutions (i.e. Frontex, EASO) playing supportive and reporting role. The Dublin Regulation determined the relations in that area between Member States, but it has not constituted common migration system on the EU level (Mitsilegas, 2014). Member

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States were autonomous in managing migration and determining the volumes of migrants' admission, depending on their inner policy and situation, in accordance with humanitarian laws and international conventions. Presented in September, the proposal of European Commission to reform CEAS is a step toward the EU-level migration system and can be considered, after analyzing the consequences, a gradual reduction of Member States sovereignty in the field of migration management.

The purpose of this paper is to explain the causes for the reform and to indicate at risks posed by EC's proposal, considering present circumstances and „on the ground” limits of migration management, and how it has been received by Member States.

Background of CEAS reform

CEAS is part of the EU's Area of Freedom Security and Justice established in 1999 with subsequent legislation concluded in 2005 by setting minimum standards and in 2013 by Dublin Regulation III. Its purpose is to promote safe access to the EU, to improve asylum procedures and create solidarity among Member States in dealing with asylum seekers. The Dublin Regulation, which is crucial part of the EU's legal framework for migration, can be viewed as the obstacle on the way of realizing solidarity mechanism (Guild, Costello, Garlick, Moreno-Lax, Carrera, 2015: 15).

The call for common asylum policy is included in the Treaty of Lisbon, however, it should not be misunderstood with uniformed asylum system across the EU. Under the current regulations, Member States are autonomous in determining asylum procedures and their outcomes (Mitsilegas, 2014: 182). The Dublin Regulation consists rules set up to establish which Member State is responsible for a particular asylum process. From that perspective, it does not constitute a common EU-level asylum system, but are merely an agreement between national states arbitrating responsibilities. Nevertheless, there are researchers, who consider CEAS as an ambitious promise of establishing common system managing migration on the EU-level (Chetail, 2016: 4).

The Dublin Regulation contains hierarchical criteria under which the responsibility for processing asylum claim is being established. Primary criteria here are: applicant being an unaccompanied minor, family reunification considerations or having legal relationship with the EU Member State (i.e. residence document) (Mitsilegas, 2014: 182-183). If none of the above criteria is matched, in case of irregular entry, and provided that asylum claim is made within 12 months of the date of irregular entry, the Article 13 of Dublin Regulation III entrusts the responsibility on Member State of the first entry. At the same time, the Member State may return an asylum applicant to the first entry Member State and refuse to examine her/his asylum claim. Hence, there are concerns that Dublin Regulation was designed primary to guarantee security of Member States at the expense of asylum applicants (Mitsilegas, 2014: 184).

The Dublin Regulation raises questions not only from the humanitarian point of view, but also from the European solidarity perspective. In the structure of Schengen

area, with the distinction between internal and external borders, Member States which are responsible for external EU borders are challenging the fairness of the regulation. Especially those with higher migration risk from underdeveloped, overpopulated regions that are exposed to economic, military and ecological crises. Still the concept of solidarity was criticized from the humanitarian, NGO side as exclusionary in “the state-centric and securitized framework”, because it was not covering the solidarity with the third-state nationals (Mitsilegas, 2014: 188).

Although concerns have been raised since the Dublin Regulation was implemented, the migration crisis from 2014-16 exacerbated tensions between Member States. The manner it was handled brought further objections to the migration regulations in the EU.

Even though migration crisis is mostly described as the crisis of 2015, its first signs could have been detected in 2014 with increased flow on the Central Mediterranean Route (from Libya and Tunisia to Italy) and on the Eastern Mediterranean Route (mostly from Turkey to Greece). In previous years, those routes were a humanitarian issue with concerns focused on search and rescue (SAR) operations by the EU or EU Member State (Triton, Poseidon, Mare Nostrum). Since 2015, it became a security issue for Member States due to 1.8 million detected irregular border crossings (IBC), which was a 650% surge to previous year. Next year, due to the agreement between Turkey and the EU to tackle immigration from Turkey to Greece, which went into force on March 23, 2016, IBCs were reduced to ca. 0.5 million.

Table 1. Detected irregular border crossings

Detected IBC (thousands)	2011	2012	2013	2014	2015	2016	2017	2018
Eastern Mediterranean Route	57	37	25	51	885	182	42	57
Western Balkan Route	5	6	20	43	764	130	12	6
Central Mediterranean Route	64	15	45	171	154	181	119	23
Western Mediterranean Route	8	6	7	7	7	10	23	56
Circular Route from Albania to Greece	5	6	9	9	9	5	6	5
Eastern Borders Route	1	2	1	1	2	1	1	1
Western African Route	0	0	0	0	1	1	0	1
Black Sea Route	0	0	0	0	0	0	1	0
Total IBC	141	72	107	283	1 822	511	205	149

Source: (Frontex, 2020).

Unilateral decision by German chancellor Angela Merkel to suspend the Dublin Regulation and to allow entrance of migrants into Germany relieved the pressure on the Western Balkan Route. The German administration took on itself the immense task to process the massive number of asylum claims. However, the question of irregular migrants and asylum seekers staying in Greece and Italy remained unsolved. Under the request from those countries, the European Commission proposed a mechanism of relocation that obliged each Member State to accept certain number of verified asylum ap-

plicants from nations with high probability (at least 75%) of being granted asylum. The nationalities encompassed under the relocation scheme were Syrians, Iraqis and Eritreans. Calculation was based on weighted factors of Member States' population, GDP and unemployment rate (Šelo-Šabić, 2017).

The proposition was temporary, one-time deviation from the Dublin Regulation, although there were speculations among decision-makers and Brussels bureaucracy that similar permanent mechanism was necessary. As a result, it created distrust and objections on the side of Visegrad Group. The reasons that caused skepticism against relocation and forced migration can be disputed. Situation in national politics, lack of openness in societies or recently regained sovereignty can be mentioned, nonetheless, there was no unanimity to pass the project through the European Council (Czyż, 2017: 154; 159). In an astonishing move, such important change to *acquis communautaire*, even though temporary, was delegated to decision of the Extraordinary Justice and Home Affairs Council and passed under qualified majority voting, with Hungary, Czech Republic and Slovakia objecting the proposal (*Extraordinary JHA Council...*, 2015).

One thing was passing the regulation, the other its actual fulfillment. First the number of asylum seekers satisfying criteria for relocation was finally, in fact, lower than the amount assumed in relocation calculations. Initially, decision was to relocate jointly 160 thousand of asylum seekers located in Greece, Italy and Hungary (European Commission, 2015). That number was reduced to 98 thousand, but final number of relocated migrants was just above 33 thousand (Nielsen, 2017).

Although only Poland, Czech Republic and Hungary openly objected the relocations, the realization levels were also low for other countries participating in the programme. Even such proponents of relocation like France and Belgium took ca. one fourth of declared relocation numbers (Šelo-Šabić, 2017: 6).

Not only Visegrad countries were objecting relocations due to concerns over Islamic radicalism. There was also no support for Muslim migration among citizens of the majority of the EU countries, given the fact that 55% of the EU citizens opted for stopping migration from those countries (Godwin, Raines, Cutts, 2017).

Concluding step of this stage was ruling by the European Court of Justice that Poland, Hungary and Czech Republic "had failed to fulfill their obligations under European Union law" (European Court of Justice, 2020). At the same time, Member States and European Commission have been already negotiating the reform of the CEAS to finish the crisis that tarnished EU's unity.

Member States proposals

The reform of the CEAS became one of the top priorities for the new European Commission under Ursula von der Leyen, as expressed in her *Agenda for Europe*. In the document she mentions such priorities as:

- strengthening the borders,
- modernizing asylum system,
- bringing back fully functioning Schengen area,
- creation of burden sharing mechanism among Member States,
- stronger cooperation with third countries in that area (Von der Leyen, 2019: 6).

The consultation with Member States have been initiated in April 2020 with the letter of interior ministers of Germany, France, Italy and Spain which called for a compromise on the asylum system. Ministers proposed binding mechanism of solidarity, however, as an exception, Member States could offer “other measures of solidarity” than relocation (Barigazzi, 2020a).

Two months later, seven Member States including V4, Estonia, Latvia and Slovenia objected any migrants’ quota. Their intention was to make clear before any scheme is designed that obligatory quotas are unacceptable (Denes, 2020). At the same time, five Mediterranean countries (Greece, Italy, Spain, Malta and Cyprus) called for obligatory mechanism entailing “the distribution among all Member States of all those who enter the territory” (Barigazzi, 2020b). The call was rejected by interior ministers of Austria and Denmark on the same day. Both countries were warning against creating “pull factors” for increased migration and inability to find common ground on new asylum and migration policy (Barigazzi, 2020b).

Evidently the obligatory relocation was the most problematic part of the new migration and asylum pact. Other proposals focusing on increasing border security, the EU-wide cooperation and data sharing, cooperation with third countries were generally supported by Members States.

Other controversial point discussed during debates on common migration management was Commission’s proposal that newly established European Border and Coast Guard, force of 10 000 board officers, will have rights to act independently at the borders, which some Member States took as step towards undermining their sovereignty. Nonetheless, the proposal was abandoned when Salzburg Group (V4, Austria, Slovenia, Bulgaria, Romania, Croatia) explicitly demanded that the institution will keep its role as supportive to Member States. Finally, Regulation on European Border and Coast Guard upheld that “Member States shall retain primary responsibility for the management of their sections of the external borders” (European Parliament, 2019, Article 7).

Commission’s proposal

The final proposition presented by Ursula von der Leyen on September 23, 2020 left unsatisfied all EU countries that were communicating previously their perspectives. The fact that the compromise on such tense issue will not meet all requests was expected by the Commission and verbally communicated during a conference.

That is not to say that the reform plan was rejected. The aspects increasing Member States' security and giving likelihood for better migration control were received warmly by Member States, for instance:

- prescreening (screening at the external border) of irregular migrants on the border and quick path (below 12 weeks) to decide whether a migrant is qualified to asylum procedure or return procedure (European Parliament, 2020a, Article 2; 2020b, Article 41);
- prescreening should also apply to irregular migrants detected inside the EU's territory (European Parliament, 2020a, Article 5);
- cooperation on biometric data gathering in the common Eurodac system that may lead to fraud detection and limit secondary movement inside the Schengen Area (European Parliament, 2020c, Article 11);
- focus on pull factor as illegal employment and tightening the control of employers (European Parliament, 2020c, Article 3);
- deployment of European Border and Coast Guard in accordance with Salzburg Forum's demand that the force will become supportive organization to national units;
- increased cooperation with third countries on effective return agreements and combating smugglers networks (European Parliament, 2020c, Article 3);
- increased support for asylum seekers in third countries and creating legal pathways for economic migrants to come to the EU (European Parliament, 2020c, Article 3).

Despite that agreement, the conflict over the reform has focused foremostly on the so-called model of elastic obligatory solidarity. On the one hand, it gives a promise to the southern EU countries that in case of high immigration pressure they will obtain obligatory support from other Member States. On the other hand, supporting countries can choose the way of help: to relocate asylum seekers, to sponsor return of irregular migrants, to support technically, logistically and financially countries under migration pressure (European Parliament, 2020c, Article 45). Thus, the Mediterranean European countries criticized the solution for not explicitly obligating Member States to relocate migrants (important – migrants not only asylum seekers).

The proposal is also not giving a full flexibility, although the Commission advertises it as flexible solidarity. The Commission informs that it prefers sponsored returns of migrants, as it believes that at least 2/3 of irregular migrants applying for the asylum protection qualify for return. Other forms of support are possible providing that relocation quotas declared by Member States reach 70% of the Commission's proposal. That solution is inadmissible for at least nine Member States mentioned above.

Moreover, there are objections as CEAS goes further than the rejected the one-off relocation mechanism from 2015. The idea of sponsored return presented by the EC limits the timeframe to eight months. During that time, the sponsoring country has a possibility to return an irregular migrant to the third country of transit or origin. Afterwards, a sponsoring Member State is bound to relocate a migrant to its territory and to pro-

ceed with further steps there. The idea was dubbed “a hidden relocation mechanism”, as the successful returns according to Frontex for 2019 were at a level as low as 46% of issued return decisions. Whereas that rate was achieved by high ratio of effective returns to Ukraine, Georgia or Albania, and moderate to Morocco; the countries like Afghanistan, Pakistan, Turkey, Iraq, Syria or Bangladesh perform at the level of 5-30% (Frontex, 2020: 33). In years 2015-2019, Member States returned 55% of irregular immigrants with return decisions, in absolute numbers out of 1,456 thousand of return decisions 663 thousand irregular migrants stayed in the EU (Frontex, 2020: 66).

Taking the above data under consideration, Member States are anxious that the result of sponsored return will be *de facto* accepting irregular migration to their countries. That stays in contradiction with the Article 79 point 5 of the Treaty on European Union, confirmed by Article 63a the Treaty of Lisbon that guarantees Member States rights “to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed” (Members States, 2007).

There is also a significant flaw in the Commission’s proposal. The majority of successful returns is achieved due to relations at the national level between Member States and third countries. For instance, due to its national policy, economic and security cooperation and historical connections, Spain is able to influence Morocco – the country of origin and transit – to support returns. Due to long-term relations between Italy and Tunisia, there is a cooperation on repatriation of migrants back to North Africa. However, Member States that will be sponsoring returns of immigrants from countries with which they have limited relationships are likely to perform far more poorly than countries with longstanding relations. Even though there is an option to choose nationality of migrants involved in the return procedure (European Parliament, 2020c, Article 52), for many countries it may prove not to be an actionable choice. The EC promises support in that procedure, but so far it is a promise only, and given the current number of agreements between the EU and third countries, it is doubtful that the EU has such capacity to fulfill it.

Whereas the EC portrays the new pact as written in the spirit of subsidiarity principle, as objectives of the proposed actions cannot be achieved by Member States alone, thus they are realized at the EU scale, in case of sponsored return the opposite situation takes place and ultimately it might violate the principle of subsidiarity. Actions taken on the EU level switching responsibility for return to the other Member State, will be less effective than action taken on a national level.

Given all the obligatory measures, the Commission seeks to empower itself in the whole structure. The Commission will preside Solidarity Forum whose objective is to ensure smooth provision of help for a Member State under migratory pressure (European Parliament, 2020c, Article 46). The Commission ensures for itself the following prerogatives:

- has the right to convene the Forum;
- assesses the migratory pressure (European Parliament, 2020c, Article 50);
- report on migratory pressure with presenting expected measures and timeframe of implementing solidarity (European Parliament, 2020c, Article 51);
- calculates numbers to be relocated by each Member State, basing on distribution key (European Parliament, 2020c, Article 54);
- collects Solidarity Plans from Member States and assess if they satisfy the needs;
- whereas the required number of relocations or return sponsorships submitted in Solidarity Plans is causing shortfall below 30% of the measure calculated by the Commission, it shall adjust relocations to Member States (European Parliament, 2020c, Article 52).

The proposal mechanism gives the Commission practically unlimited discretion at all critical junctures (Maiani, 2020). The Commission decides the scale and nature of a crisis, the needs of a beneficiary State, resolves if response of Member States was satisfactory and applies corrections.

Conclusions

The obligatory relocation mechanism and sponsored returns can be seen as overriding national sovereignty in the area of migration management, which so far has been left to the decisions of Member States by the TEU. The proposal reaches beyond creation of common standards for asylum, it *de facto* relocates migrants across the EU. From perspectives of countries which do not have postcolonial relations, were not stimulating their economy by inviting non-European migrants as a workforce and were running their migration policy without creating various pull factors, the proposal emerges not as a mechanism of solidarity, but rather an obligatory burden sharing scheme, and a one without profit sharing. For instance, Greece and Italy for years have been running contradictory policies of deterring migrants in order to address the sentiment of citizens, whereas at the same time governments were engaging in weak gate policy in order to satisfy needs of their economy (Triandafyllidou, Ambrosini, 2011).

But that situation is not necessarily a deadlock for the pact. Member States welcome many of pact's proposals and perceive them as necessary. As the Commission claims that 2/3 of irregular migrants are not suitable for the asylum, the main problem of the mechanism seems to be the effective return. Thus, if the EU wants to create a common asylum system which involves managing also the irregular migration (with the certain risk of migrants' staying permanently in Member States), it should focus exactly on effective return policies as a prerequisite (Pech, Tran This, 2020). If it wants national countries to cede their prerogatives in this area, the EU should guarantee better support and prove that the process at the EU-level will be more successful in terms of the subsidiarity principle.

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Abstract: The author of the article attempts to analyze the consequences for Member States' sovereignty arising from the European asylum system reform and harmonization proposed in September 2020 by the European Commission. The author believes that so-called solidarity mechanism, however designed with intention of burden sharing and help, *de facto* has the potential to become migrant relocation mechanism. That argument is already being raised by Member States that are opposing the European Commission's proposal. According to them, the proposal violates rules guaranteeing Member States' rights to determine volumes of admissions of the third country nationals, explicitly expressed in the Treaty on the European Union. The author also notices that decision-making power on the relocations is transferred to the Commission, leaving limited flexibility in gesture of Member States. Without being

opposed to subsidiarity principle itself, the article questions whether the details of the Commission's proposal are not actually against the principle and certain elements, like effective return, are not better achieved at the national level. In the research procedure, a method of critical analysis of the content of studies and the available sources was used.

Keywords: CEAS, Common European Asylum System, immigration, return procedures, asylum seekers, refugees, European Union migration policy, Dublin Regulation, sovereignty, migration crisis

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