



RSA Comments on the Commission proposal for an Asylum and Migration Management Regulation

COM(2020) 610

October 2020

TABLE OF CONTENTS

General Comment	3
Analysis of key provisions	4
1. Criteria for the determination of the Member State responsible	4
Fundamental rights constraints on transfers.....	4
Hierarchy of responsibility criteria.....	5
2. Appeals	6
3. Deadline for “take charge” requests	8
4. Free movement of beneficiaries of international protection	8

General Comment

On 23 September 2020, as part of the package of legislative proposals of the New Pact on Migration and Asylum,¹ the European Commission withdrew its proposal to recast the Dublin III Regulation² and tabled a proposal for a Regulation on asylum and migration management.³

The text of the proposal dispels earlier Commission declarations of an abolition of the Dublin system as a framework for allocating responsibility between Member States⁴ and of a new approach to refugee protection across the European Union (EU). The Dublin system remains a priority and largely stays intact, in Part III of the proposal, despite its inherent flaws and inequalities, violations of fundamental rights, as well as serious and well-documented deficiencies in its application since its entry into force in Europe in 1997. On the contrary, solidarity measures between Member States lack clarity and binding effect, depend on complex and unduly bureaucratic procedures, and are restricted to situations of search and rescue and “migratory pressure”.⁵ The spirit and structure of the proposal reveals a lack of will on the part of the Commission to incorporate responsibility-sharing and solidarity as core parts of the EU mechanism on responsibility for examining asylum claims and corollary granting of international protection.⁶ The Commission’s intention to put in place “a system to deliver solidarity on a continued basis in normal times”⁷ is neither reflected in the provisions nor facilitated; even voluntary solidarity in the area of asylum at the discretion of Member States must follow the proposed procedure under Commission coordination.⁸

As regards the lingering Dublin system, the proposal attempts an unacceptable regression of common standards for fundamental rights compliance in the procedure. It **disregards and overturns the steady and significant development of the *acquis* achieved through the jurisprudence** of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and domestic courts. Particularly over the past decade, case law has played a crucial role in clarifying and interpreting the provisions of the Dublin Regulation in line with primary EU law, including the Charter of Fundamental Rights of the European Union. More specifically, the proposal

¹ European Commission, *New Pact on Migration and Asylum*, COM(2020) 609, 23 September 2020.

² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast) [2013] OJ L180/31; European Commission, *Proposal for a [Dublin IV Regulation]*, COM(2016) 270, 4 Mai 2016.

³ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management*, COM(2020) 610, 23 September 2020.

⁴ Agence Europe, ‘Ursula von der Leyen confirms that a system on migration management will replace “Dublin” asylum regulation’, 16 September 2020, available at: <https://bit.ly/33oAHzx>.

⁵ Articles 45 et seq. Asylum and Migration Management Regulation proposal.

⁶ Francesco Maiani, ‘A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact’, 20 October 2020, available at: <https://bit.ly/2Hfx0Ek>.

⁷ Asylum and Migration Management Regulation proposal, Explanatory Memorandum, 5.

⁸ See Articles 17(2) and 56 Asylum and Migration Management Regulation proposal, distinguishing the “humanitarian clause” from the possibility for a Member State to request relocation from another country.

disregards or directly contravenes multiple judgments of the CJEU relating to the interpretation of the Dublin system compatibly with the Charter, such as *MA*, *CK*, *Jawo*, *Ibrahim*, *Karim*, *Ghezelbash*, *AS*, *Mengesteab*, *Shiri*.

This comments paper contains observations from Refugee Support Aegean (RSA) on the elements of the proposal, with emphasis on provisions directly affecting the implementation of the Dublin system by the Greek authorities.

Analysis of key provisions

1. Criteria for the determination of the Member State responsible

Fundamental rights constraints on transfers

Article 8(3) maintains the current formulation of Article 3(2) of the Dublin Regulation, which prohibits the transfer of an asylum seeker to the Member State previously determined as responsible where “systemic flaws in the asylum procedure and in the reception conditions” lead to a risk of inhuman or degrading treatment. The restrictive reading of circumstances under which transfers are prohibited by the Regulation **continues to restrict the scope of and to contravene the principle of non-refoulement pursuant to Article 4 of the Charter, contrary to the jurisprudential development of EU law** from *NS* to the CJEU rulings in *CK* and *Jawo*,⁹ in line with Strasbourg case law.¹⁰ Both courts have now affirmed that Article 4 of the Charter and Article 3 of the European Convention on Human Rights (ECHR) **prohibit any deportation, including Dublin transfer, exposing the applicant to a real risk of inhuman or degrading treatment, regardless of the source of the risk** in systemic or non-systemic deficiencies in the procedure and reception conditions of the receiving Member State.¹¹

Furthermore, **Article 8(3)** only refers to “applicants”, thereby **ignoring the protection of beneficiaries of international protection** from deportation to countries where they face the aforementioned risks, **contrary to CJEU case law**.¹²

Finally, Article 4 of the Charter is not the sole basis for prohibition of *refoulement*. ECtHR case law, for instance, has accepted prohibitions on deportation of persons to countries where they face a flagrant denial of the right to a fair trial.¹³

For those reasons, RSA recommends the following amendments:

Article 8: 3. Where it is impossible for a Member State to transfer an applicant **or beneficiary of international protection** to the Member State primarily designated as responsible because there are substantial grounds for believing that ~~there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that~~

⁹ CJEU, Case C-578/16 PPU *CK v Republika Slovenija*, 16 February 2017; Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland*, 19 March 2019.

¹⁰ ECtHR, *Tarakhel v. Switzerland*, App No 29217/12, 4 November 2014.

¹¹ European Council on Refugees and Exiles (ECRE), *Comments on the Commission proposal for a [Dublin IV Regulation]*, October 2016, 18-20, available at: <https://bit.ly/3n8HVit>.

¹² CJEU, Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim v Bundesrepublik Deutschland*, 19 March 2019.

¹³ ECtHR, *Othman v. United Kingdom*, App No 8139/09, 9 May 2012; *El Haski v. Belgium*, App No 649/08, 25 September 2012; *Al Nashri v. Poland*, App No 28761/11, 24 July 2014.

Member State, resulting in a **the applicant or beneficiary would be subjected to a real risk of a serious violation of fundamental rights** inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter II of Part III in order to establish whether another Member State can be designated as responsible.

Recital 57: In order to facilitate the smooth application of this Regulation, Member States should in all cases indicate the Member State responsible in Eurodac after having concluded the procedures for determining the Member State responsible, including in cases where the responsibility results from the failure to respect the time limits for sending or replying to take charge requests, carrying a transfer, as well as in cases where the Member State of first application becomes responsible or it is impossible to carry out the transfer to the Member State primarily responsible due to **a real risk of infringement of fundamental rights** systemic deficiencies resulting in a risk of inhuman or degrading treatment and subsequently another Member State is determined as responsible.

Hierarchy of responsibility criteria

The proposal in no way remedies the flaws in the design of responsibility criteria in the Dublin Regulation which, according to consistent research findings since the advent of the Dublin system, have *de facto* led to prioritisation of the first country of entry or application criterion and to **minimal use of family unity provisions,¹⁴ through systematic rejection of “take charge” requests on family grounds, including for unaccompanied children.¹⁵** Beyond introducing new criteria of limited practical relevance such as the possession of diplomas or qualifications from a Member State education establishment,¹⁶ the Commission not only **maintains the first country of entry as a criterion** for the determination of the Member State responsible, but **adds more weight thereto by extending its duration of validity from one year to three.¹⁷**

In addition, following on from the earlier proposal to recast the Dublin Regulation, **Article 15(5)** provides that an unaccompanied asylum-seeking child with no family member or relative in another Member State is required to remain in the first country in which they sought protection, **in direct contravention of Member States’ duty to avoid transfers of unaccompanied children pursuant to the best interests of the child,** recalled by the CJEU in the MA judgment.¹⁸ The provision also marks failure on the part of the Commission to comply with the institutional responsibility it undertook to guarantee that the Dublin Regulation would be amended to bring EU legislation in line with the aforementioned ruling.¹⁹

RSA recommends amending Article 15(5) as follows:

¹⁴ European Parliament, *Dublin Regulation on international protection applications: European Implementation Assessment*, PE 642.813, February 2020, 42-49, available at: <https://bit.ly/30oq7H8>.

¹⁵ RSA, *Refugee families torn apart*, September 2019, available at: <https://bit.ly/3kVx2PM>.

¹⁶ Article 20 Asylum and Migration Management Regulation proposal.

¹⁷ Article 21(1) Asylum and Migration Management Regulation proposal.

¹⁸ CJEU, Case C-648/11 *MA v Secretary of State for the Home Department*, 6 June 2013.

¹⁹ Statement by the Council, the European Parliament and the Commission on the Dublin III Regulation.

Article 15: 5. In the absence of a family member or a relative as referred to in paragraphs 2 and 3, the Member State responsible shall be that where the unaccompanied minor **is currently present** ~~'s application for international protection was first registered~~, unless it is demonstrated that this is not in the best interests of the minor.

2. Appeals

Article 33 of the proposal introduces a number of restrictions on asylum seekers' right to an effective remedy against transfer decisions, including direct infringements of Article 47 of the Charter as interpreted by the CJEU in the context of the Dublin system. On the one hand, restricting the right to appeal to cases of alleged violation of Article 4 of the Charter or the family unity provisions²⁰ is all but an "increase" of the effectiveness of the right to an effective remedy.²¹ The proposal attempts an **unacceptable backwards step in the protection of the right to an effective remedy** under Article 47 of the Charter, which **requires the possibility for an individual to challenge a transfer decision based on any violation of the Regulation**, *inter alia* incorrect application of the responsibility criteria,²² incorrect application of cessation of responsibility clauses,²³ expiry of time limits for a "take charge" or "take back" request,²⁴ or expiry of the transfer deadline.²⁵

On the other hand, contrary to the withdrawn Dublin IV proposal,²⁶ this proposal omits measures to address a crucial legislative gaps in the existing *acquis* through the express provision of asylum seekers' right to challenge the refusal of a Member State to issue a transfer decision when the family unity provisions are applied. **As an act triggering legal effects on the rights of applicants, the refusal of a "take charge" request should be amenable to a remedy in order to ensure respect of the fundamental right to family life.** The need for such a remedy is all the more pressing, bearing in mind the **increasing tendency of arbitrary and/or poorly motivated rejections by other countries' Dublin Units of "take charge" requests submitted by the Greek Dublin Unit**, *inter alia* referring to Greece's obligation to produce official translations of documents proving family links and/or conduct DNA tests. These practices deprive asylum seekers of the only safe and legal channel to reunite with family members within the EU.²⁷

Finally, the repeal of automatic suspensive effect of appeals against transfer decisions,²⁸ coupled with denial of free legal assistance in cases where the appeal is not deemed to have a tangible prospect of success,²⁹ amount to an unjustified

²⁰ Article 33(1) Asylum and Migration Management Regulation proposal.

²¹ Asylum and Migration Management Regulation proposal, Explanatory Memorandum, 16.

²² CJEU, Case C-63/15 *Ghezelbash*, 7 June 2016; Case C-490/16 *AS*, 26 July 2017.

²³ CJEU, Case C-155/15 *Karim*, 7 June 2016.

²⁴ CJEU, Case C-670/16 *Mengesteab*, 26 July 2017.

²⁵ CJEU, Case C-201/16 *Shiri*, 25 October 2017; Case C-163/17 *Jawo*, 19 March 2019.

²⁶ Article 28(5) and Recital 24 Dublin IV Regulation proposal.

²⁷ RSA, *Refugee families torn apart*, September 2019; European Parliament, *Dublin Regulation on international protection applications: European Implementation Assessment*, PE 642.813, February 2020, 48.

²⁸ Article 33(3) Asylum and Migration Management Regulation proposal.

²⁹ Article 33(5) Asylum and Migration Management Regulation proposal.

restriction on the right to an effective remedy and entail additional administrative burden on appeal authorities.³⁰

For those reasons, RSA recommends the following amendments:

Article 33: 1. The applicant or another person as referred to in Article 26(1), point (b), (c) and (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision **or failure to issue a transfer decision**, before a court or tribunal. ~~The scope of the remedy shall be limited to an assessment of: (a) whether the transfer would result in a real risk of inhuman or degrading treatment for the person concerned within the meaning of Article 4 of the Charter of Fundamental Rights; (b) whether Articles 15 to 18 and Article 24 have been infringed, in the case of the persons taken charge of pursuant to Article 26(1), point (a).~~

2. Member States shall provide for a period of two weeks after the notification of a transfer decision within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.

3. The person concerned shall have the right to **remain on the territory pending the outcome of the remedy**. ~~request, within a reasonable period of time from the notification of the transfer decision, a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within one month of the date when that request reached the competent court or tribunal. Where the person concerned has not exercised his or her right to request suspensive effect, the appeal against, or review of, the transfer decision shall not suspend the implementation of a transfer decision. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based. If suspensive effect is granted, the court or tribunal shall endeavour to decide on the substance of the appeal or review within one month of the decision to grant suspensive effect.~~

4. Member States shall ensure that the person concerned has access to legal assistance and, where necessary, to linguistic assistance.

5. Member States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved. Member States may provide that, as regards fees and other costs, the treatment of persons subject to this Regulation shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance. ~~Without arbitrarily restricting access to legal assistance, Member States may provide that free legal assistance and representation is not to be granted where the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success. Where a decision not to grant free legal assistance and representation pursuant to the second subparagraph is taken by an authority other than a court or tribunal, Member States shall provide the right to an effective remedy before a court or tribunal to challenge that decision. Where the decision is challenged, that remedy shall be an integral part of the remedy referred to in paragraph 1. In complying with the requirements set out in this paragraph, Member States shall ensure that legal assistance~~

³⁰ See by analogy RSA, *Comments on the amended Commission proposal for an Asylum Procedures Regulation*, October 2020.

~~and representation is not arbitrarily restricted and that effective access to justice for the person concerned is not hindered.~~ Legal assistance shall include at least the preparation of the required procedural documents and representation before a court or tribunal and may be restricted to legal advisors or counsellors specifically designated by national law to provide assistance and representation. Procedures for access to legal assistance shall be laid down in national law.

3. Deadline for “take charge” requests

Article 29(1) of the proposal suggests a reduction of the deadline for submitting a “take charge” request from three months to two months from the registration of the asylum claim. Such a measure would in no way address the problematic implementation of the Dublin system as regards compliance with rights and efficiency. Conversely, it is expected to entail **harsher effects on asylum seekers’ access to family reunification procedures from Greece to other countries, given the extreme difficulty – if not inability – of the Greek administration to observe the three-month deadline to submit “take charge” requests under the current framework.**³¹ Even in 2020, against the backdrop of lower numbers of new applications compared to previous years, a large number of asylum seekers are deprived of the possibility to enter such procedures due to the objective inability of the Asylum Service to ensure appointments for the lodging of applications before the expiry of the three-month deadline, even following intervention from the applicant or their legal representative.

4. Free movement of beneficiaries of international protection

Through an amendment of Article 4 of the Long-Term Residence Directive, **Article 71** reduces the minimum period of status holders’ lawful and uninterrupted residence from five years to three. Albeit a step in the right direction, the proposed provision maintains the possession of long-term resident status as a necessary pre-requisite for free movement of beneficiaries of international protection across the EU. **The EU legislature should recognise freedom of movement as a right stemming from international protection status and amend the Qualification Regulation proposal accordingly, to ensure compliance with the objective of a “single asylum status, valid throughout the Union” set out in primary EU law.**³² Such a measure would need to include provisions on **recognition of protection status in the Member State where the beneficiary exercises free movement**, including for the implementation of relocation of beneficiaries of international protection under **Article 45(1)(c)**.

³¹ Note the interpretation of the CJEU’s ruling in *Mengesteab* by certain Member States: European Parliament, *Dublin Regulation on international protection applications: European Implementation Assessment*, PE 642.813, February 2020, 68.

³² Article 78(2)(a) Treaty on the Functioning of the European Union (TFEU).



Refugee Support Aegean (RSA)

Efstratiou Argenti 7
82100 Chios, Greece
+30 22711 03721
info@rsaagean.org
<http://rsaagean.org/>