THE ASYLUM AND IMMIGRATION SYSTEM OF THE EUROPEAN UNION: DE LEGE LATA AND DE LEGE FERENDA – FROM THE DUBLIN III REGULATION TO ENFORCED SOLIDARITY

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ORDO IURIS ANALYSIS


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Central issues

- The Pact on Migration and Asylum prepared by the European Commission does not address the main issue, which is the blurring of the distinction between refugees and economic migrants.

- The proposed rules stipulate that, in principle, any immigrant must be admitted to the territory of a Member State if he or she applies for international protection. This also applies to persons who have crossed the border illegally. This creates the risk of abuse through a cascade of asylum applications by economic migrants for the sole purpose of being admitted to the territory.

- The establishment of a „solidarity mechanism", i.e. permanent pressure on Member States through forced relocation or financial or operational assistance, raises serious questions.

- It is true that member states that have already received many immigrants (such as Poland) can ask to be exempted from these burdens, but this is at the discretion of the EU Council.

- However, some solutions deserve a positive opinion, such as the establishment of an early warning mechanism for growing migration problems or the Regulation of the screening of immigrants.

Recommendations

The Ordo Iuris Institute recommends:

1) the introduction of provisions allowing the rejection as inadmissible of applications submitted by aliens who have crossed the border illegally. Any alien who is in danger of being persecuted in a non-EU country has the right to apply for asylum, but on condition that he or she submits an application to a diplomatic post, a border crossing point or possibly another place designated by a Member State. If an alien does not comply with this rule, he or she may be presumed to have crossed the border illegally, knowing that he or she does not meet the conditions for international protection;

2) the extension of the scope of the border and return procedure, in particular the abolition of the time limits after which a country is obliged to accept an immigrant even before the application for international protection has been examined;

3) the introduction of a specific provision establishing an explicit opt-out from the Solidarity Mechanism for Poland, which is in a special situation as the Member State that has received the largest number of refugees from Ukraine in the entire European Union (approximately 1.2 million). Poland's exemption from the Solidarity Mechanism should not be subject to the Commission's approval and should be granted for an indefinite period;

4) the introduction of a specific provision guaranteeing support to Poland under the Solidarity Mechanism for the reception of refugees from Ukraine;

5) clarification of the conditions for opting out of the Solidarity Mechanism for other Member States;

6) setting ceilings for the contributions to the solidarity pool that Member States are obliged to make under the Solidarity Mechanism;

7) maintaining the possibility of contributing to the Solidarity Pool in the form of operational aid in crisis situations;

8) clarification of the requirements for States to be able to make use of procedural facilitation in a crisis situation.

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1. Introduction

This study examines the main developments in the European Union's asylum and immigration system. It first discusses the current state of the law, followed by proposals for change in response to the 2015 migration crisis, with a particular focus on the European Commission's proposed 2020 Asylum and Migration Pact. Finally, recommendations are proposed.

2. Current status

Persons who do not have EU citizenship and do not have family members with EU citizenship may enter the EU according to the general rules applicable to non-nationals in the country concerned (usually subject, inter alia, to obtaining the appropriate visa, i.e. a travel or work permit). EU law does not generally intervene in this area, but focuses on a narrow segment of foreign immigration, namely asylum law.

EU asylum law consists of several pieces of legislation:

1) Directive 2011/95/EU of the European Parliament and of the Council (the Qualification Directive)[1];

2) irective 2013/33/EU of the European Parliament and of the Council (the Core Directive)[2]

3) Directive 2013/32/EU of the European Parliament and of the Council (Procedures Directive)[3];

4) Regulation (EU) No 604/2013 of the European Parliament and of the Council (the so-called Dublin III Regulation)[4];

5) Regulation (EU) No 603/2013 of the European Parliament and of the Council (Eurodac Regulation)[5].

The first three legal acts lay the foundations of the EU's substantive and procedural immigration law – as directives, they have to be implemented by the Member States, which by their very nature leaves them more regulatory freedom than in the case of Regulations. In the

1 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted,

2 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on the establishment of standards for the reception of applicants for international protection.

3 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

4 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 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 a stateless person.

5 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 concerning the establishment of ‚Eurodac' for the comparison of fingerprints.

Dublin III Regulation, the Union has regulated a well-defined substantive issue, namely the criteria for determining the State responsible for examining an asylum seeker's application – the most important of which is the so-called „first entry criterion", which means that the Member State whose border the person has illegally crossed for the first time is in principle responsible for examining an application for international protection (which in practice means that the States on the EU's external borders have the greatest responsibility)[6]. This rule is waived if the person concerned can prove some kind of connection with another country (e.g. has a family member with the right to reside there or holds a visa issued by that country), in which case that country assumes responsibility for examining the application[7]. The Regulation also deals with the technical issue of setting up a computerised database containing the fingerprints of foreign asylum seekers and illegal immigrants (Eurodac Regulation).

There is no doubt about the need for some harmonisation of asylum law at EU level. Without controls on the crossing of the internal borders of the European Union, a person who has crossed the external border of a Member State gains de facto almost unlimited freedom of movement within the EU (as implicit in Article 77(1)(a) TFEU)[8]. This requires the establishment of certain common rules for deciding who is to be granted refugee status.

Of particular note is the solution provided by Article 78(3) TFEU, which empowers the Council to impose on Member States the reception of a certain number of migrants ‚in the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of third-country nationals'. In 2015, on the basis of this provision, the Council took two decisions – first to forcibly relocate 40,000 and then 120,000 migrants ‚in clear need of international protection' (i.e. asylum) between EU member states[9]. With regard to the first group, it is not specified how many immigrants each country should receive.[10]. The second group was divided into three ‚pools' – 15,600 immigrants arriving in Italy, 50,400 immigrants arriving in Greece and 54,000 immigrants arriving in other countries. Two of the ‚pools' were to be distributed immediately, with quotas for each country (Germany, France, Spain and Poland being the largest), and the last ‚pool' was to be distributed proportionally at a later date[11]. The relocation process was to be gradual: each country was to announce regularly, at least every three months, the number of immigrants it was prepared to accept[12]. For each relocated immigrant, the state was to receive a lump sum of €6,000 from EU funds[13].

6 Article 13 of the Dublin III Regulation.

7 Articles 8, 9, 10, 11, 12 and 14 of the Dublin III Regulation.

8 Of course, formally speaking, third-country nationals can move within the Union with some important restrictions, without the right of long-term residence in the respective country. However, the lack of border controls within the Union makes it difficult to monitor effectively whether aliens are staying longer than they should in a given country.

9 Council Decisions (EU) 2015/1523 of 14 September 2015 and 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection in favour of Italy and Greece.

10 Article 4 of Decision No. 2015/1523.

11 Article 4(1) of Decision No. 2015/1601.

12 Article 5(2) of Decision No. 2015/1601.

13 Article 10(1)(a) of Decision No. 2015/1601.

The aim of these measures was to reduce the ‚asylum pressure' that Italy and Greece were experiencing at the time[14].

This was the first time in the history of the EU that a decision had interfered so deeply in the immigration policies of member states. While EU law had previously only laid down general rules for the processing of asylum applications, the Council's decision of 2015 imposed specific quotas on states for the number of migrants they were to receive, with a pre-emptive presumption that they were ‚manifestly in need of international protection'. The adopted decision derogated from Article 13(1) of the Dublin III Regulation, which made it clear that Italy and Greece, whose borders the migrants first crossed, were responsible for processing applications for international protection (i.e. asylum). The amount spent on the maintenance of the relocated immigrant was also disproportionate to the burden of reception borne by each State, which is contrary to the principle of Article 80 TFEU that States should have adequate financial resources to meet the obligations imposed on them.

14 Recital 26 of Decision No. 2015/1601.

3. 2016 and 2017 reform proposals

The migration crisis of 2015 prompted the start of work on major changes to asylum law. In 2016, the European Commission presented a proposal for reform[15]. Among the proposed changes was a proposal to take the responsibility for deciding asylum cases away from the Member States and give it to the European Asylum Support Office, which would become a first-instance decision-making body with national branches in each Member State (EU bodies, to be created if the reform is implemented, would also decide at second-instance)[16].

Another proposal was the draft of a new Dublin Regulation (Dublin IV) [17], which introduced the obligation for an applicant for protection to lodge an application in the Member State of first illegal entry or in the Member State of legal residence. The explicit principle was adopted that one state is responsible for processing the entire case from start to finish, even if the alien leaves its territory. In this way, states on the periphery of the continent would continue to act as the „gatekeepers" of the European Union[18]. The procedure for transferring the applicant to the responsible state was simplified and all sorts of deadlines were shortened, both for the states and for the applicants themselves.

In addition, the Dublin IV project envisaged the establishment of a ‚corrective allocation mechanism', i.e. a forced relocation triggered if a Member State at the EU's external border received more than 150% of the asylum applications than the allocation key based on the country's population and GDP. An offending country would face a penalty of €250,000 for each migrant allocated (defined as a ‚solidarity contribution' to the member states that allowed such a migrant into the EU).

The proposed changes have been heavily criticised by experts, NGOs and international institutions, who have highlighted the concentration of responsibility in the hands of a few

15 6 April 2016 Communication from the European Commission to the European Parliament and the Council COM(2016) 197 final, *Towards a reform of the Common European Asylum System and more legal migration to Europe*.

16 The proposal was, for the time being, subtly worded, without specifying the modalities of its implementation and only stating that „in the long term, the possibility" of such a solution could be considered (p. 9 of the Communication).

17 European Commission proposal for a proposed Regulation on the establishment of 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 a stateless person COM/2016/0270 final – 2016/0133 (COD).

18 F. Maiani, *The Reform of the Dublin III Regulation*, Brussels 2016, s. 36, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU%282016%29571360_EN.pdf (14.7.2023).

countries and the arbitrary criteria for applying the correction mechanism[19]. They were supported by Italy, Greece, Germany, Sweden and Malta, among others, and opposed by the Visegrad countries, among others.

The V4 countries put forward an alternative concept of ‚flexible solidarity', which is easier to reconcile with the principle of sovereignty. This concept foresees three scenarios for EU states to act in the face of migration challenges, depending on the intensity of migration. The Dublin III Regulation, which assigns responsibility for processing asylum applications to the states at the EU's external borders, would remain in place with minor modifications. Under normal circumstances, states would be encouraged to fully comply with their obligation to register migrants and prevent secondary movements. In a crisis situation, all states would have to engage in collective assistance to those member states facing the greatest migratory pressure. However, it would be up to the Member States to decide on the form of the assistance – it could be resettlement, but also financial contributions or increased support to EU agencies, or taking responsibility for the return of illegal immigrants, or providing reception centres for aliens while asylum applications are processed and joint procedures are carried out. In absolutely exceptional cases, the proposal allows measures to be adopted on the basis of Article 78(3) TFEU. However, it stipulates that recourse to such measures would require the prior agreement of the Heads of State or Government at a meeting of the European Council and that the measures themselves should be based on a voluntary basis[20].

In 2017, The European Parliament proposed to replace the first entry criterion with an allocation system whereby an alien could choose one of the four Member States with the lowest number of applications for international protection to which he/she would be allocated[21]. This proposal was also not supported by a majority.

19 S. Progin-Theuerkauf, *The 'Dublin IV' Proposal: Towards more solidarity and protection of individual rights?*, „Sui Generis" 2017 s. 65; UNHCR, *Better Protecting Refugees in The EU and Globally*. December 2016, s. 21, www.refworld.org/pdfid/58385d4e4.pdf , K. Strąk, *Reforma Wspólnego Europejskiego Systemu Azylowego – system dubliński* w: G. Baranowska, A. Gliszczyńska-Grabias, A. Hernandez-Połczyńska, K. Sękowska-Kozłowska (red.), O prawach człowieka. Księga jubileuszowa Profesora Romana Wieruszewskiego, Warszawa 2017, s. 451–464.

20 Biuletyn Polskiego Instytutu Spraw Międzynarodowych z 2 lutego 2017 r., *Perspektywy kompromisu w sprawie reformy wspólnego europejskiego systemu azylowego*, https://pism.pl/publikacje/Perspektywy_kompromisu_w_sprawie_reformy_wsp_lnego_europejskiego_systemu_azylowego (14.7.2023).

21 European Parliament draft legislative resolution on the proposal for a Regulation of the European Parliament and of the Council on the establishment of 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 a stateless person, COM(2016)0270. C8–0173/22016, 20160133 Wrocław

4. Reform proposal 2020. (Pact on Migration and Asylum)

A new approach to EU immigration has been under development since 2019. In 2020, The European Commission presented the Pact on Migration and Asylum, a set of legislative and policy proposals[22]. At the heart of the Pact are four proposed Regulations from the European Parliament and the Council:

1) proposal for a Regulation on Asylum and Migration Management and amending Council Directive 2003/109/EC[23],

2) proposal for a Regulation establishing a common procedure for applicants for international protection in the European Union and repealing Directive 2013/32/EU[24],

3) proposal for a Regulation introducing the screening of third-country nationals at external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817[25].

4) proposal for a Regulation on response to crisis and force majeure situations in the field of migration and asylum[26]

The EU Council amended the first three proposals and adopted by qualified majority a negotiating position for talks with the European Parliament, which will also be able to propose its amendments[27]. The EU Council has not yet adopted a position on the fourth proposal. The first three proposals will be discussed on the basis of the text as amended by the Council, which may be subject to further decisions by the European Parliament and the Council.

22 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the new Pact on Migration and Asylum, COM/2020/609 final.

23 COM(2020) 610. Original version from 2020: https://eur-lex.europa.eu/legal-content/PL/ALL/?uri=CELEX:52020PC0610 **Version dated 23.06.2023** after Council amendments: https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CONSIL:ST_10443_2023_REV_1

24 COM/2016/0467. Original version from 2020: https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A52016PC0467 **Version of 13.06.2023** after Council amendments: https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CONSIL:ST_10444_2023_INIT

25 COM/2020/612. Original version from 2020: https://eur-lex.europa.eu/legal-content/PL/ALL/?uri=CELEX:52020PC0612, **Version dated 22.06.2022** after Council amendments: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_10585_2022_INIT

26 COM/2020/613. Version from 2020: https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52020PC0613

27 EU Council press release of 8 June 2023, https://www.consilium.europa.eu/pl/press/press-releases/2023/06/08/migration-policy-council-reaches-agreement-on-key-asylum-and-migration-laws/

4.1. Proposal for a Regulation on Asylum and Migration Management

Key points

The proposal for a Regulation on Asylum and Migration Management is the most important and controversial part of the migration pact. The crux of the proposal is to correct the so-called Dublin system, which proved ineffective in the face of the 2015 crisis[28], and to supplement it with a so-called solidarity mechanism, whereby in principle all EU member states would contribute to the costs of border protection and the assessment of applications for international protection.

Clarifying key concepts

There are seven key terms: migration pressure, significant migration situation, solidarity mechanism, solidarity actions, solidarity pool, solidarity contributions, aliens.

The proposal divides the migration problems of the countries into three categories. The most serious are referred to as ‚migratory pressure', the less serious as ‚threat of migratory pressure' and finally there is a category of ‚significant migratory situation'. Migratory pressure refers to a disproportionate burden on the Member State concerned as a result of an influx of non-EU nationals which requires immediate remedial action (cf. Article 2(w)). In assessing the level of pressure, account is taken not only of the perspective of the Member State concerned, but also of the overall migration situation in the EU, including the level of illegal migration between Member States. The category of threat of migratory pressure is difficult to clarify as the proposal does not define this concept at all, leaving its interpretation to the Commission. The proposed Regulation distinguishes between the concept of a significant migratory situation and migratory pressure, which is the burden of an influx of non-EU nationals that causes even a well-designed asylum, reception and migration system to reach its ‚capacity limits' (cf. Article 2(wa)).

The Solidarity Mechanism is a procedure for agreeing on binding measures to be taken by Member States to assist countries experiencing migration problems. The proposal distinguishes between three types of alternative solidarity measures: relocation, financial assistance (cost sharing for countries facing such problems) or operational assistance (material, personnel, diplomatic support, etc.). Each year, a solidarity pool is established, i.e. the sum of solidarity measures that all Member States (except those which are themselves subject to migratory pressure and have been exempted from their obligations) must take to address ongoing migration problems. Each country must declare what solidarity contribution it will make to the pool, i.e. what specific solidarity measures it intends to take in a given year.

28 Polish Institute of International Affairs Commentary No. 70/2020, 25 September 2020: J. Szymańska, *Pakt w sprawie migracji i azylu – sprzężenie systemu azylowego z polityką powrotów*, p. 1.

Aliens are non-EU nationals who seek international protection in a Member State of the Union or who cross the borders of the EU illegally. The proposed Regulation uses the term „third-country nationals and stateless persons", but the concept of aliens seems clearer.

Revision of the Dublin III framework

The proposal for a Regulation on Asylum and Migration Management is intended to replace the Dublin III Regulation[29] mentioned above. The essence of the previous system was to place the main responsibility for examining an application for international protection on the EU country to which the alien was first sent. In practice, this means that countries on the periphery of the European Union bear the greatest burden.

Under the current Dublin system, as detailed in the Explanatory Memorandum of the proposal, aliens applying for international protection can wait up to 10 months (for take back applications) or 11 months (for take charge applications) before the actual examination of the application for international protection begins. The current system leads to a concentration of asylum applications in several Member States and overburdens the authorities responsible for processing them. Moreover, multiple applications for international protection remain a widespread problem in the EU. In 2019, 32% of applicants have already lodged applications in other Member States, despite the fact that this is prohibited by the Dublin III Regulation[30].

The Dublin system has long been criticised as unfair and inefficient. Unfair because it has "created winners and losers in the ‚asylum lottery' in Europe. The winners include countries on the periphery of migration routes, while the losers are countries on the EU's external borders"[31]. It is inefficient because the states formally responsible for processing applications, with overburdened asylum authorities and overcrowded detention centres, have turned a blind eye to the mass migration of illegal migrants (who formally have the status of asylum seekers) to other EU countries. Even when the authorities of one of these countries managed to detain an illegal immigrant and decided – under the Dublin III Regulation – to return him/her to the country of first entry, which is responsible for examining the application, it often happened that a national court, the EU Court of Justice or the European Court of Human Rights prohibited the enforcement of the expulsion decision on the grounds of the risk of violation of the immigrant's rights, i.e. the lack of sufficient comfort in the detention centre[32].

29 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 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 a stateless person.

30 Sec. 3.2 of the project justification.

31 B. Mikołajczyk, *Mechanizm dubliński na rozdrożu – uwagi w związku z pracami nad rozporządzeniem Dublin IV*, „Europejski Przegląd Sądowy" 2018, No 3, p. 9.

32 P.M. Huber, *O konieczności realistycznego i trwałego rozwoju Unii Europejskiej, odrobieniu przez Niemcy ich „pracy domowej" oraz o znaczeniu narracji*, „Forum Prawnicze" 2019, No 4, p. 10.

The proposed Regulation does not abolish the principle of responsibility of the first State of entry, but softens it by adding a solidarity mechanism, which obliges other States to assist the responsible State, and an early warning mechanism to ensure that assistance can be planned and coordinated well in advance. Unlike the proposal for the Dublin IV Regulation, it does not set rigid criteria for determining the level of assistance, but instead provides for a procedure for Member States to determine the level of assistance on an annual basis.

The State responsible

The general principle that the State of first entry is responsible for processing the application for international protection in cases of irregular border crossing (Article 21(1)) is maintained. While the Dublin III Regulation did not specify which State is responsible in the case of a legal border-crossing, the proposal for a Regulation on Asylum and Migration Management clarifies that every alien is obliged to lodge an application for international protection in the State of first entry (Article 9(1)) and to remain there pending the examination of the application (Article 9(4)(b)). In the case of relocation under the solidarity mechanism (see below), the alien is obliged to remain in the country to which he or she has been relocated (Article 9(4)(c)). Family members have the right to be reunited with members who are seeking or have been granted international protection in a given country (Articles 15-17). If one of these obligations is breached, the alien loses the right to family reunification (Article 10(1)).

The proposed Regulation also changes the duration of responsibility:

- the Member State of first entry would be responsible for the asylum application for a period of 2 years;

- if one of the Member States wishes to transfer the person to the Member State that is actually responsible for him/her and the person absconds (e.g. hides to avoid transfer), responsibility would pass to the transferring Member State after 3 years;

- if a Member State rejects an asylum seeker in a border procedure, its responsibility for that person would end after 15 months (in case of a repeated application).

Early warning mechanism

The proposal for a Regulation provides for the establishment of an early warning mechanism for problematic migratory movements. The mechanism provides for constant monitoring of the situation by the European Commission and systematic consultations between countries in so-called high-level and technical fora in order to draw up an action plan in response to the problem. Under this mechanism:

1) each year, the European Commission shall prepare a report containing an overall assessment of the migration situation in the EU and a forecast for the future, taking into

account, inter alia, information from the Member States themselves and the results of the monitoring carried out by the Asylum Agency and the European Border and Coast Guard Agency (Article 7a(1) and (3)).

2) in parallel, the Commission assesses the severity of the migratory situation in each Member State and classifies them into three categories: (i) ‚under migratory pressure', (ii) ‚at risk of migratory pressure', (iii) ‚facing a significant migratory situation' (Article 7a(4)). The first status entitles countries to receive support from the solidarity pool for the year in question (in accordance with the procedure set out in Article 44c). The second and third status do not guarantee access to the solidarity pool, but will be taken into account by the European Commission when deciding on the future inclusion of additional countries in the pool (according to the procedure set out in Article 44d). Countries that do not qualify for either group can also apply for access to the solidarity pool, but there is a risk that the Commission will give preference to countries to which it has previously granted status (ii) or (iii).

   In assessing the scale of a country's migration problems and whether it falls into one of the above categories, the Commission takes into account 28 criteria, including the number of asylum applications, the number of illegal border crossings and the geopolitical situation (Article 7b).

   If a country does not qualify for one of these three statuses, the Commission does not take a decision, which may make it difficult to challenge prima facie in a situation where the omitted country would like to have access to the solidarity pool. However, Article 265 TFEU provides for the possibility of bringing an action for failure to act ‚in breach of the Treaties' – a concept that is broadly interpreted in doctrine to cover not only a breach of the Treaties but also of acts of secondary EU legislation[33]. Thus, if a state that has been bypassed by the Commission believes that it is entitled to the status of a state under migratory pressure, it can bring an action before the ECJ against the Commission's failure to act. A judgment of the ECJ upholding such a complaint could result in the Commission granting the desired status, although much depends on how the operative part of such a judgment is worded (cf. Article 266 TFEU).

3. On the basis of its report, the Commission adopts a recommendation proposing the size of the solidarity pool for the coming year and the measures in the EU's permanent toolbox necessary to deal with the situation (Article 7c(1)). In other words, the Commission indicates to what extent the situation can be remedied by relocation and to what extent the allocation of additional financial resources or operational assistance is sufficient.

33 M. Szpunar, K. Pacula in: J. Barcik, R. Grzeszczak, *Prawo Unii Europejskiej*, Warsaw 2022, p. 370.

4) In response to the report and decision, the Council shall convene a High Level Forum on Migration within 15 days of the adoption of the Commission's report and decision (Article 7d(3)). The High Level Forum, composed of representatives of States at ministerial or equivalent level, has three main tasks: (i) to „take stock of the overall situation"; (ii) to agree on solidarity measures and the level of solidarity measures required, in accordance with the procedure set out in Article 44b; (iii) and, if it deems necessary, „other measures in the field of migration in terms of responsibility, preparedness and contingencies, as well as in the field of the external dimension of migration" (Article 7d(2)). The second task is the most important, as the results of this Forum will then be taken into account by the Council when determining the Solidarity Pool and Solidarity Contributions, as will be discussed below.

5) Convening of the Technical Level Forum on Migration by the Commission after a meeting of the High Level Forum composed of sub-ministerial representatives (Article 7d(4)).

Solidarity mechanism

As already mentioned, in order to address exceptional migration problems, the proposal for a Regulation establishes a so-called solidarity mechanism, a procedure for agreeing on measures to be taken by Member States to assist countries facing or at risk of facing particular migratory pressures. For the sake of simplicity, the countries participating in this mechanism can be divided into beneficiaries and recipients – the beneficiaries providing the assistance and the recipients benefiting from it. However, it is important to stress that the boundaries between these two groups will not always be clear: a beneficiary may be a donor and vice versa. The mere fact of being under migratory pressure does not automatically exempt the state from contributing to the solidarity pool.

According to Article 44a(2) of the proposed Regulation, States may choose between three types of solidarity measures:

1) relocation from the most burdened State to less burdened States – this will be for: (i) applicants for international protection; (ii) beneficiaries of international protection who have been granted international protection less than three years before the adoption of the Council implementing act establishing the solidarity pool, or for the return of illegally staying aliens. The minimum pool of persons to be relocated in a given year shall be at least 30 000 migrants for the EU as a whole (see Article 7c(2)), although the Council may set a higher pool;

2) financial assistance primarily targeted at projects in the area of migration, border management and asylum or in third countries which may have a direct impact on flows at the external borders or which may improve the asylum, reception and migration systems of the third country concerned, including assisted voluntary return programmes and rein-

tegration measures, as well as measures to combat trafficking in or smuggling of human beings. The minimum threshold for EU financial assistance shall be at least €600 million (Article 7c(2)), with the possibility for the Council to set a higher amount;

3) operational assistance, including alternative measures to enhance Member States' capacities in the areas of asylum, reception and return and the external dimension.

Some examples of operational assistance are the deployment of services at the EU's external borders, the dispatch of equipment, support for patrol boat services in the Mediterranean Sea, return and reintegration advice for illegally staying third country nationals, support for the voluntary return and reintegration of irregular migrants, support for substantive dialogue with third countries to facilitate the stay of irregular migrants in the beneficiary Member State.

The level of support required from individual states (the so-called solidarity pool) is determined by the Council, acting by a qualified majority, through an implementing act (Article 44b(1)), taking into account the agreements between states at the High Level Forum on Migration (as mentioned above). The solidarity mechanism is thus linked to the early warning mechanism.

Importantly, the current wording of the proposed provisions makes it clear that states are obliged to commit to some form of assistance, so they cannot refuse to provide assistance (unless they exercise the opt-out, as discussed below). However, States have „full discretion as to the type of solidarity measures" they are prepared to take (Article 44b(3)).

The proposal only lays down general rules for determining the level of solidarity contributions from Member States, without setting a ceiling. Member States will have to contribute within a share calculated on the basis of a distribution key based on 50% of GDP and 50% of population. The share of the beneficiary Member State is included in the distribution key to ensure that all Member States implement the principle of fair sharing of responsibility (Article 44k).

In principle, all Member States can apply for support from the Solidarity Fund, but priority is given to those Member States identified by the Commission as being under migratory pressure in the context of the early warning mechanism (see Article 7a). The remaining Member States may – if they consider that they have been unduly overlooked by the Commission or that the situation has changed since the Commission's last assessment – notify the Commission and the Council „of the need to be considered as a country under migratory pressure and to benefit from the solidarity pool" (Article 44d(1)). The Commission may then re-evaluate its earlier decision and classify the country as under migratory pressure (Article 44d(3)), but this decision – unlike a decision under the early warning mechanism – is not final. Indeed, the Council can veto the Commission's decision by means of an implementing act in two cases:

- if the solidarity pool for the year in question does not have sufficient capacity for the Member State concerned to draw on it;

- if there are other objective reasons why that Member State should not have access to the solidarity pool (Article 44d(5)).

If, on the other hand, the Commission re-evaluates its earlier decision and finds that the country is still not under migratory pressure, the decision is final. It should be noted that in this case, unlike in the case of the early warning mechanism (Article 7a), the Commission does not simply abstain from taking a positive decision, but takes a decision rejecting the Member State's request (Article 44d(6)).

The question of the possibility of challenging the Commission's decision therefore arises again. Although the provisions of the proposed Regulation do not provide for a right of appeal, it can be argued, with reference to the Treaty Regulation, that decisions of the Commission and the Council, as „acts intended to produce legal effects vis-à-vis third parties", are potentially subject to appeal to the ECJ under Article 263 TFEU. In previous case law of the ECJ, the concept of an „act intended to produce legal effects vis-à-vis third parties" has been interpreted very broadly to include, inter alia, a letter from the Secretary-General of the Commission stating that the institution does not have the requested documents or that such documents do not exist, a letter from the Commission containing a statement the effects of which directly affect the applicant's interest, a letter from the Commission rejecting an application for aid, or even an oral statement by a Commission spokesperson at a press conference[34]. The Commission's ‚decision' and the Council's ‚implementing act' are in writing, are adopted through a formalised procedure regulated by a secondary act and, most importantly, have the legal effect of denying entitlement to the solidarity pool. It therefore appears that they may be subject to review by the ECJ. However, it is important to remember that the ECJ's review is strictly limited to an assessment of legality. Objections may therefore be limited to (i) lack of competence, (ii) infringement of essential procedural requirements, (iii) infringement of the Treaties or of any rule of law relating to their application, (iv) misuse of powers (Article 263(2) TFEU). In the case of the Commission and Council acts in question, plea (i) is obviously out of the question and plea (iv) could only be justified in specific cases. Pleas (ii) and (iii) have the greatest potential to challenge such acts. For example, in the context of a plea alleging infringement of a rule of law relating to the application of the Treaties, it would be possible for the Court to review to some extent the correct interpretation of the conditions for a Council „veto" of a positive Commission decision (Article 44d(5)).

34 See K. Scheuring, Comment 263.5 on Art. 263 in: D. Kornobis-Romanowska, J. Łacny, A. Wróbel (red.), *Traktat o funkcjonowaniu Unii Europejskiej. Commentary. Volume III (Articles 223-358)*, LEX 2012, together with the cited case law

Possibility to opt-out of solidarity mechanism

Any Member State may request a partial reduction or total exemption from contributions to the solidarity pool in a given year (Article 44f(1)). The Member State's request is dealt with in two stages: first the Commission presents its assessment of the request (Article 44f(4)) and then the Council decides, by means of an implementing act, to reduce the contribution, exempt the Member State or reject the request (Article 44f(5)). The legislation does not imply that the Council is bound by the Commission's assessment, so hypothetically it could decide to grant a State's request even if the Commission's assessment is negative.

The opt-out option is more easily exercised by those states that have previously been granted the status of „subject to migratory pressure" by the Commission through an early warning mechanism decision. Such countries do not need to provide evidence of migratory pressure. On the other hand, countries that have not been granted this status will have to provide this evidence in order to apply for the opt-out (as follows from Article 44f(3)).

In any case, a country's request should always be substantiated in detail, including

1) a description of how a partial reduction or total exemption from the solidarity contribution could be instrumental in stabilising the situation;

2) whether the declared contribution could be replaced by another type of solidarity contribution;

3) how the Member State will address any identified shortcomings in responsibility, preparedness or resilience (Article 44f(2)).

It is important to stress that a positive act of the Council granting a State's request only guarantees the exemption of the contribution for a maximum period of one year. In fact, the act only concerns the exemption of contributions to the solidarity pool for a given year. It is not possible to exempt such contributions for an indefinite period.

Evaluation

Most of the solutions found in the proposed Regulation are essentially within the limits of Article 79 TFEU, which grants the EU broad competence to develop a common immigration policy. As pointed out in the doctrine, the use of the term „policy" instead of „measures" indicates a significant extension of the EU's competence compared to the previous legal situation. In this context, it is much more difficult to argue that an act in the field of the common immigration policy goes beyond the competence of Article 79 TFEU[35].

35 M. Wilderspin in: M. Kellerbauer, M. Klamert, J. Tomkin (red.), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, Oxford 2019, p. 841.

The introduction of an early warning mechanism is to be welcomed, as it may make it possible to better coordinate Member States' immigration policies, to identify potential outbreaks of immigration crises more quickly and thus to prevent such crises.

However, the proposal does not address the main problem, which is the mass application for international protection by economic migrants who are not in danger in their countries of origin. It maintains a vague legal position that blurs the line between refugee and immigrant, opening the door to abuse by the latter to obtain the right to stay in the territory of wealthier European countries (we will return to this problem in section 4.2).

The solidarity mechanism, which is reminiscent of the emergency measures adopted by the Council in response to the 2015 migrant crisis, including the forced relocation of some of the migrants received by Italy and Greece, raises serious legal doubts[36]. The legality of the 2015 measures was confirmed by the ECJ[37]. However, unlike these exceptional measures, the solidarity mechanism provided for in the proposed Regulation is not intended to be temporary, but to be a permanent legal construct involving permanent obligations for Member States.

Despite the EU's broad competences in the field of common immigration policy, the establishment of such a mechanism does not seem to have a sufficient legal basis. Firstly, the relationship between the arrangements of the High Level Forum on Migration and the Council Decision – whether and to what extent the Council will be bound by them – is questionable. Indeed, such binding would be incompatible with the Treaties, as the competences of a treaty body should not be limited by the competences of a body created by a derived act. Secondly, the adoption of the Solidarity Mechanism as a permanent legal construct can be seen as a circumvention of Article 78(3) TFEU. This provision empowers the Council to adopt „provisional measures in favour of the Member States concerned" if one or more of them „is confronted with an emergency situation characterised by a sudden inflow of third-country nationals". Meanwhile, the proposal under consideration establishes as a permanent mechanism what should be a temporary remedy for ad hoc immigration crises. Thirdly, the lack of a solidarity ceiling and of individual contributions, which could lead to an excessive burden for some Member States, should also be criticised.

It is true that the proposal gives countries the possibility of opting out, but the use of this provision has been made conditional on the existence of ‚migratory pressure', which is defined in the draft, but in such a broad way that it leaves a lot of room for interpretation. In essence, therefore, the possibility of exemption from participation in the Solidarity Mechanism is subject to the approval of the Council.

36 Council Decisions 2015/ 1523 and 2015/ 1601.

37 ECJ judgment of 6.09.2017, C- 643/ 15 and C- 647/ 15, Slovakia and Hungary v. Council.

4.2. Proposal for a Regulation on asylum procedures

Key points

The proposal for a Regulation on asylum procedures establishes a single set of rules for all EU Member States on the treatment of aliens seeking international protection (competence of asylum authorities, rules on the lodging, registration and examination of applications for international protection, time limits, general rules on appeals, procedural guarantees such as the requirement of a fair statement of reasons for the decision, the right to be informed of one's rights, the right to an interpreter or the right to legal aid).

Authorities responsible for processing the asylum application

The Member State shall designate, at its discretion, the authority responsible for taking decisions on applications for international protection (Article 5(1)). In the version presented by the Commission, the proposal provided that, in addition to the tasks of the national competent authority, four other public bodies should be responsible for receiving and registering applications, namely 1) the police, 2) border guards, 3) immigration authorities, 4) authorities in charge of detention centres. The text amended by the Council modifies this obligation by only exempting these institutions from the obligation to **register** applications (Article 5(3)), while these institutions remain obliged to **receive** applications (Article 5(3aa)).

Submission of the application

In the Commission's original proposal, an alien could lodge an application for international protection simply by „expressing a wish to obtain international protection to officials", not only to the national asylum authority but also to police officers or border guards. If there was any doubt as to the alien's intentions, the more senior national officials were obliged to ask the alien explicitly whether he or she wished to seek international protection (Article 25(1)). Pending a final decision by the national asylum authority, the alien was to be regarded as an applicant for international protection (Article 25(2)), which entailed, inter alia, the prohibition of expulsion from the territory, even in the case of illegal entry.

In the Council's amended version, an alien may only present an application for international protection in person and before a competent authority, including a police officer or border guard (amended Article 25(1)). However, contrary to the Commission's version, the officials are not obliged to ask the alien about his wish to seek international protection.

An alien's application for international protection must be registered within seven days of the date of the application (Article 27(1)), with the possibility of extending this to 21 days in the event of a disproportionate number of applications (Article 27(3)). The alien should then submit the application directly to the competent asylum authority „as soon as possible", but not later than 21 days from the date of registration of his application (Article 28(1)).

Processing the application

An application can be considered by the national asylum authority as

1) well-founded – resulting in the granting of asylum

2) unfounded – resulting in the rejection of the application if the applicant does not qualify for international protection (Article 37(2));

3) manifestly unfounded – if, at the end of the examination, one of the circumstances listed in Article 40(1) and (5) applies, e.g. the applicant has entered the territory of the Member State illegally and has not presented himself/herself „without good reason" to the competent authorities for international protection, comes from a safe country of origin, has given contradictory, manifestly false or manifestly implausible explanations (Article 37(3));

4) inadmissible – if, for example, the applicant is eligible for international protection in a so-called country of first asylum, i.e. a non-EU country where he/she fulfils the conditions for asylum (Article 36(1a));

5) implicitly withdrawn– if the applicant refuses to cooperate with the asylum authority: does not give his/her name, cannot credibly explain the lack of identity papers, refuses to answer questions during the interview, etc. (Article 39(1)).

Right of appeal

The proposal guarantees the applicant the right to challenge any negative decision before a court of law (Article 53(1)). The judicial review covers both points of law and points of fact (Article 53(2)). The lodging of an appeal suspends the enforcement of the decision, with the right to remain in the territory of the Member State pending the outcome of the appeal (Article 54(1) and (2)). In the exceptional cases listed in the proposed Regulation, the applicant does not have the right to remain in the territory (Article 54(3)).

Four types of procedures

The proposal distinguishes between four types of procedures: an ordinary asylum procedure, two special procedures (accelerated and border procedures) and a return procedure. In all procedures, the applicant is entitled to similar procedural guarantees as provided for in Chapter II; the differences mainly concern the length of the time limits (which are shorter in the case of special procedures) and the possibility for the alien to remain in the territory during the examination of the application.

Ordinary asylum procedure. In this procedure, the alien has the right and the obligation to remain in the territory of the Member State responsible until the determining authority has taken a decision (Article 9(1)). The application must be examined within six months (Article 34(2)).

The accelerated procedure is a special type of procedure in which the State is obliged to examine an asylum application in the event of one of the specific circumstances listed in the Regulation, which usually indicate bad faith on the part of the alien. These include situations where: the applicant for international protection makes manifestly inconsistent or false statements; he misleads the authorities; he submits an application with the sole purpose of delaying or obstructing the implementation of a removal decision; he comes from a safe country of origin; he comes from a country for which the percentage of positive asylum decisions does not exceed 20% (Article 40(1)).

The accelerated procedure implies shorter time limits for the examination of the application: as a general rule, 2 months (Art. 40 para. 1), 8 working days for applications whose sole purpose is to delay or obstruct the execution of a removal decision (Art. 40 para. 2 sent. 2).

It must be emphasised that the use of the accelerated procedure is not optional, but mandatory in the case of one of the circumstances listed in Article 40(1).

The border procedure is a special type of procedure in the case of an application for asylum at a border crossing point, in a transit zone, following an apprehension in connection with an irregular border crossing, following disembarkation on the territory of a Member State following a search and rescue operation or following a transfer in connection with relocation (Article 41). In contrast to the normal asylum procedure, the applicant is not allowed to enter the country while the application is being examined (Article 41(2)) – so he or she waits either at the border or „in other designated places in its territory", e.g. in a detention centre (Article 41f(1)). The application should be decided within 12 weeks, with the possibility of an extension to 16 weeks in special cases (Article 41c(2)). At the end of this period, the alien may enter the Member State (Article 41c(2), sent. 3).

The return procedure is a variant of the border procedure and applies when an application for international protection is rejected. The State then obliges the alien to stay for a maximum of 12 weeks in places at or near the external border, in transit zones or, if that is not possible, in another designated place such as a detention centre (Article 41g(2)). During this period, the State should issue a decision ordering the return to the country of origin or arrival, unless the alien decides to leave voluntarily (Article 41g(4)).

Evaluation

In general, the proposal for a Regulation under examination falls within the limits of the EU's competence, as laid down in particular in Articles 78(2)(d) and 79(2)(c) of the TFEU. The harmonisation of asylum procedures by means of a directly applicable Regulation (and not, as at present, by means of a directive) can help to increase their efficiency and facilitate the coordination of immigration policies between Member States.

Like the Asylum and Migration Management Project, this proposal does not address the main problem, which is the mass application for international protection by economic migrants who are not in danger in their countries of origin. Instead, it prescribes that documented claims by victims of civil war, religious or political persecution, and claims by persons acting in manifest bad faith, in particular illegal border crossers, should be treated with the same seriousness (and with the same procedural guarantees).

The hypothetical possibility of rejecting an application does not guarantee an effective selection of genuine refugees and genuine economic migrants among the applicants, since in principle the mere submission of an application – apart from exceptional cases – guarantees the applicant the right to stay on the territory of the Member State, usually with the possibility of free movement during the examination of the application. Even in the event of a negative decision, the migrant retains in principle the right to stay as long as he or she lodges an appeal. Even if the appeal is rejected by the court, most immigrants are likely to remain in the country due to the low efficiency of removal procedures in most Member States, where more than half of removal decisions are not enforced[38]. The use of border or return procedures, which allow an immigrant to be held at the border or in detention for up to 12 weeks, does not solve the problem either. Even if the national asylum authority examines the application within this timeframe, there is no guarantee that the court will hear the appeal within this timeframe, which in most cases suspends the enforcement of a negative decision.

Particularly problematic, therefore, is the requirement that applications for international protection submitted by people who have crossed the border illegally must be examined on their merits, even if they have done so after being apprehended by state services – in this way, aliens who are obviously acting in bad faith, who are in no way threatened, and who apply for asylum only after being caught in the act, are treated in the same way as honest applicants who did not intend to cross the border illegally. It is sufficient for an illegal immigrant to have a „valid reason" for not presenting himself or herself to the competent authorities for international protection, and his or her application for international protection must be examined on its merits and he or she must be granted a right to remain in the territory of the Member State pending the examination, which he or she may abuse, for example by changing his or her place of residence without informing the asylum authority.

However, the introduction of the possibility of rejecting an application from certain categories of migrants who act in bad faith: giving contradictory information, failing to provide reliable proof of their identity, refusing to cooperate with the authority, etc. is to be welcomed. The Council's amendment exempting national officials from the obligation to

38 According to a report by the European Court of Auditors, only 29% of the 500,000 migrants subject to a final removal decision were removed – *EU readmission cooperation with third countries: relevant actions yielded limited results*, Luxembourg 2021, p. 7.

inquire about the willingness of migrants to seek international protection is also to be welcomed: aliens should exercise a minimum of diligence in pursuing their interests (in line with the principle of *ius civile vigilantibus scriptum est*). An obligation to make inquiries could encourage some immigrants to abuse the system by submitting manifestly unfounded applications for international protection when they do not fulfil the conditions for entry to the territory of a Member State.

Some specific solutions are also questionable, such as making police and border guards responsible for receiving and registering asylum applications, regardless of the responsibilities of the relevant national immigration authorities. Uniformed forces are generally not prepared to carry out administrative tasks, and carrying them out in the field could prove excessively difficult. However, as mentioned above, this solution was modified at the stage of work before the Council, removing the obligation to register applications and leaving only the possibility of adding such a competence. However, uniformed forces will still have to accept such requests. This does not mean that the obligation to register requests will not be reintroduced by an amendment of the European Parliament.

4.3. Proposed Regulation on screening

Key points

The objective of the proposal is to introduce pre-entry screening (for identification, state of health and safety of migrants) of all aliens at the external border of the EU who do not fulfil the entry conditions or who have been disembarked following search and rescue operations.

The Explanatory Memorandum of the proposal states that the screening will facilitate the identification of aliens, contribute to the strengthening of the security of the Schengen area and allow for the channelling of all third-country nationals found at the external border who do not fulfil the entry conditions or who have been disembarked following a search and rescue operation into the correct procedural channel[39].

Material scope of screening

The screening should be carried out by the national authorities designated by the Member States and should consist in particular of:

a) initial health screening and identification of vulnerable persons;

b) identity checks using information contained in European databases;

39 Explanatory Memorandum, point 1.

c) enrolment of biometric data (i.e. dactyloscopic data and facial image data) in relevant databases, where this has not already been done;

d) security screening by searching relevant national and EU databases, in particular the Schengen Information System, in order to verify that the person does not constitute a threat to national security (Article 6(6)).

Personal scope of screening

At the external borders, checks should be carried out on aliens who:

1) cross the external borders outside border crossing points and for whom Member States are obliged to take fingerprints under the above mentioned Eurodac Regulation, including persons applying for international protection;

2) have disembarked following a search and rescue operation;

3) who have presented themselves at a border crossing point, do not fulfil the entry conditions and are applying for international protection;

4) apprehended in connection with the irregular crossing of the external border of a Member State by land, sea or air (Article 3).

Screening shall not be applied to aliens who fulfil the entry conditions set out in Article 6 of Regulation 2016/399 (Schengen Borders Code), namely that their intended stay on the territory of a Member State does not exceed 90 days within a period of 180 days, that they hold a valid travel document, that they justify the purpose and conditions of their intended stay, that they have sufficient means of subsistence and that they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States.

If, during the examination, it is established that the foreign national concerned fulfils the conditions set out in Article 6 of the Schengen Borders Code, the examination should be terminated immediately and the foreign national should be allowed to enter the territory of the Member State.

Independent control mechanism

The Commission's version of the proposal required Member States to „establish an independent supervisory mechanism" (effectively a separate public body) to ensure that fundamental rights are respected when screening is carried out. This mechanism was intended to:

- ensure that screening checks comply with EU and international law, including the Charter of Fundamental Rights;

- ensure compliance with national rules on the detention of a person, in particular on the grounds for and duration of detention

- ensure that complaints concerning non-compliance with fundamental rights in relation to screening, including access to the asylum procedure and non-compliance with the principle of non-refoulement, are dealt with effectively and without undue delay (Article 7(2)).

However, the Council has made significant changes to Article 7(2), replacing the requirement to „establish" with a requirement to „provide for" and deleting requirements (ii) and (iii). The first change can be interpreted as giving States the choice between establishing an entirely new institution or delegating a new task to one of the existing national institutions. The second change means that the powers of the mechanism in question may be narrower than envisaged in the Commission's plans, in particular that it will not have to review the legality of the detention of aliens, nor will it have to deal with individual complaints of non-respect of their fundamental rights. This does not mean, of course, that the violation of these rights is condoned – only that the protection of these rights can be ensured by the existing national institutions and not by a new, separate institution in the form of the mechanism outlined.

Evaluation

The proposed Regulation essentially falls within the competence of Article 77(2)(b) of the TFEU, which explicitly authorizes the Council and the European Parliament to adopt „measures concerning the control to which persons crossing external borders are subject." Overall, the proposal can be considered positive as the information collected by Member States in the framework of the screening will help the services to identify migrants, to assess the credibility of the information and motivations provided for the purpose of an application for international protection and to check for risks to public health and national security.

There may have been some doubts about the requirement to „establish an independent supervisory mechanism," i.e. a new and separate institution to ensure respect for fundamental rights during screening. Although this seems to be a disproportionate interference in the procedural autonomy of the Member States, which, according to established legislative practice, usually have a fairly wide discretion as how to implement their obligations under the EU law – in the case of Article 7(2) as proposed by the Commission, this discretion could be unduly restricted. However, all Member States already have institutions for the protection of fundamental rights (such as ombudsmen or courts). The same objective of ensuring respect for fundamental rights could therefore be achieved by requiring States to designate a national authority (or authorities) responsible for upholding these rights in the screening process. However, if the Council's amendment to Article 7(2) as described above is maintained, States should have the choice of establishing a new body or entrusting the task of monitoring screening to one of the existing bodies.

4.4. Proposed Regulation on Emergency Measures

Key points

This legislative act is a fallback solution in case all the standard procedures and mechanisms provided for in the three proposals discussed above fail. The proposal under consideration therefore „addresses exceptional situations of mass influx of third-country nationals or stateless persons arriving illegally in a Member State, the scale and nature of which would render a Member State's asylum, reception or return system unworkable and would be likely to seriously jeopardise or render inapplicable the functioning of the Common European Asylum System and the Union's migration management system"[40].

As stated in the preamble to the proposal, „Member States may be confronted with exceptional and unforeseeable circumstances beyond their control, the consequences of which could not have been avoided despite the exercise of due diligence. Such force majeure situations could make it impossible to comply with the time limits laid down in the Regulations" (point 7).

Crisis situation

This proposal applies only in the event of a crisis situation, which is understood to mean:

1) an exceptional situation of mass influx of third-country nationals or stateless persons – arriving illegally in a Member State or disembarking on its territory following search and rescue operations – the scale of which, in relation to the population and GDP of the Member State concerned, and the nature of which, is such as to render the asylum, reception or return system of that Member State inoperable and which is likely to seriously jeopardise the functioning of the Common European Asylum System or the common framework set out in the proposed Regulation on Asylum and Migration Management referred to above.

2) the imminent risk of such a situation (Article 1(2)).

Changes to time limits in the asylum procedure

The essence of the solutions adopted in the proposal is to modify the time limits in the asylum procedure in favour of Member States facing a crisis situation, while limiting the freedom of choice of the measures that States undertake to take under the solidarity mechanism. The changes to the deadlines can be divided into three categories: (1) ex lege modification of time limits, (2) modification of time limits with the approval of the Commission, (3) modification of time limits subject to notification of the modification to the Commission.

40 Explanatory Memorandum, point 1.

Ex lege modification of time limits According to the standard rules laid down in the proposed Regulation on Asylum and Migration Management, the Member State assisting the return undertakes to return irregular migrants on behalf of another Member State, taking all necessary measures directly from the territory of the beneficiary Member State. In a standard situation, Article 55(2) of the proposed Regulation on Asylum and Migration Management discussed above (point 4.1 of the Study) provides that if irregular migrants are not returned within 8 months, they should be transferred to the territory of the sponsoring Member State in order to complete the implementation of return decisions. In the event of a crisis situation, this period is reduced to 4 months (Article 2(7)).

Modification of time limits with the agreement of the Commission. A Member State facing a crisis situation may ask the Commission to apply more favourable time limits (Article 3(1)). The Commission may give its agreement by means of an implementing decision (Article 3(2)), specifying the period of application of the more favourable time-limits (Article 3(3)).

In the case of a positive decision by the Commission, the national authorities are given, for example, an additional 8 weeks to carry out the border procedure (Article 4(1)(b)). The standard deadline is 12 weeks, i.e. the authority has a total of 20 weeks.

Modification of time limits subject to notification to the Commission. If a Member State is unable to meet the standard time limit for registering an application for international protection due to force majeure (3 working days in the Commission version, 7 days in the Council version), it is extended by a further 4 weeks (Article 7(1) sent. 1). Member States must inform the Commission of this situation and give precise reasons for the use of the derogation (Art. 7(1) sent. 2).

If a Member State is unable to fulfil its obligations under the solidarity mechanism in accordance with the proposed Regulation on Asylum and Migration Management or under this Regulation due to a situation of force majeure in that Member State, the Member State may inform the Commission of the situation and extend the deadlines for the implementation of such solidarity measures by a maximum of 6 months (Article 9(1)).

Other procedural possibilities

Member States in a crisis situation may, with the agreement of the Commission, make use of procedural facilities other than the modification of deadlines. For example, it is possible to extend the scope of the border procedure to aliens with an EU first instance asylum rate of 75% or less, in addition to the grounds already provided for in the proposed Regulation on asylum procedures (Article 4(1)(a)). This solution allows more migrants to be detained at the border without being allowed to enter the territory of a Member State before their asylum application is processed.

Strengthening of the solidarity mechanism

The occurrence of a crisis situation, as defined in Article 1(2) of the proposal, leads to a strengthening of the solidarity mechanism, inter alia by limiting the choice of a Member State's contribution to two options: relocation or financial assistance (Article 2(1)).

Immediate protection

The proposal also allows international protection status to be granted with immediate effect to displaced persons who are particularly vulnerable to indiscriminate violence in their country of origin in situations of armed conflict and who are unable to return to that third country (Article 10).

Evaluation

The proposal falls within the competence of Article 78(2)(c), (d) and (e) and Article 79(2)(c) of the TFEU. In principle, it deserves a positive assessment as it allows for more flexible asylum procedures in the event of a crisis situation. The improvements provided for in the proposal – such as the possibility of applying the border procedure to aliens from countries with an asylum application rate of no more than 75 % – can make a real contribution to increasing the effectiveness of responses to the immigration crisis. On the other hand, it is questionable that many of the facilities are subject to the approval of the Commission, which takes its decision on the vague premise of the existence of an ‚emergency situation' in a given country).

The strengthening of the solidarity mechanism, which was already questionable in its standard version (see point 4.1), is also a cause for concern. This is all the more so as recital 9 of the Regulation explicitly confirms the possibility of cumulating the burdens resulting from the solidarity mechanism provided for in the proposed Regulation with additional burdens established by the Council under Article 78(3) TFEU. This could lead to a disproportionate burden for Member States.

5. Final remarks

Among the solutions proposed by the Pact on Asylum and Migration, the following are **particularly positive**

- the establishment of an early warning mechanism, as provided for in the proposal for a Regulation on Asylum and Migration Management, which has the potential to be a useful preventive tool in immigration policy;

- the harmonisation of asylum procedures, which should increase their efficiency and facilitate the coordination of immigration policies between Member States;

- the obligation for all countries to carry out checks on immigrants, in particular on those crossing the border illegally. The information collected by Member States through the screening process will facilitate the identification of immigrants, the assessment of the credibility of their claims and motivations for seeking international protection, as well as the screening of threats to public health and national security;

- the Council amendment rejecting the Commission proposal to make police and border guards responsible for receiving and registering applications for international protection when this is done by another national authority;

- the Council amendment exempting national officials from the obligation to ask immigrants about their wish to seek international protection. An obligation to ask could encourage some immigrants to abuse the system by submitting manifestly unfounded applications for international protection when they do not fulfil the conditions, in order to be admitted to the territory of a Member State;

- the Council's amendment rejecting the Commission's proposal that each Member State should set up a new body to monitor respect for fundamental rights in the screening process. Such a task could be carried out by one of the existing institutions, such as the Ombudsman.

The following should be assessed particularly **negatively**

- failure to address the key issue of blurring the distinction between refugees and economic migrants. In principle, the proposed rules require the admission to the territory of a Mem-

ber State of any migrant who applies for international protection. This creates a risk of abuse in the form of cascading asylum applications by economic migrants who, knowing that they do not meet the conditions for international protection, apply for it in the hope of being admitted to the territory of a Member State. Given the large number of applicants and the fact that most of them stay in private accommodation on the territory of the State (due to the limited number of places in immigration detention centres), beyond the control of the national services, there is a risk that many of them will disperse throughout the State or go to another Member State without waiting for their application to be processed. Such a risk is only mitigated by special procedures – the so-called border procedure and the return procedure – in which a state can accept an immigrant's application without admitting him or her to its territory, but even in this case it must admit him or her after a relatively short period of time;

- a requirement that applications for international protection made by persons crossing the border illegally must be examined on their merits, even after they have been apprehended by the authorities. It is sufficient for an illegal immigrant to provide a „valid reason" for not presenting himself or herself to the competent authorities for international protection and his or her application for international protection must be examined on its merits and he or she must be granted the right to remain on the territory of a Member State;

- the requirement to set up an „independent supervisory mechanism", i.e. a new and separate institution with the competence, inter alia, to verify compliance with fundamental rights in the detention of immigrants by national authorities. Such a solution appears to be a disproportionate interference in the procedural autonomy of Member States, which, according to established legislative practice, usually have a fairly wide discretion in choosing how to implement their obligations under EU law. In addition, such a solution duplicates the role of existing national institutions – such as courts – which, under the current legal framework, are usually already involved in reviewing the legality of detentions. While the Council's amendment has softened this requirement, allowing the monitoring mechanism to be integrated into the tasks of existing national institutions (without creating a new one) and removing their competence to review the compatibility of detention with fundamental rights, at this stage of the legislative process it is not certain that the original version of the mechanism will not return to the Regulation;

- the imposition of permanent burdens on Member States in the form of forced relocations and/or financial and/or operational assistance, under the guise of a ‚solidarity mechanism', which is questionable because of: i) the lack of ceilings for these burdens; ii) the inadequacy of the legal basis; iii) the circumvention of Article 78(3) TFEU, which allows for the establishment of partnership arrangements, but only in exceptional situations and on a temporary basis, not for an indefinite period;

- making the possibility for states to opt out subject to a Council decision based on the vague premise of „being subject to migratory pressure", which is open to arbitrary interpretation;

- making the possibility for states to avail themselves of certain procedural facilities subject to a decision by the Commission, taken on the vague premise of a ‚crisis situation'.

6. Recommendations

In view of the above, it **is recommended:**

1) to introduce provisions allowing the rejection as inadmissible of applications from aliens who have crossed the border illegally. Any alien who is in danger of being persecuted in a non-EU country has the right to apply for asylum, but on condition that he or she submits an application to a diplomatic post, a border crossing point or possibly another place designated by a Member State. The illegal crossing of the border by an immigrant gives rise to the presumption that he has not lodged an application for international protection because he knows that he does not fulfil the conditions;

2) to extend the scope of the border and return procedure and, in particular, abolishing the time limitsafter which the State is obliged to admit the migrant even before the application for international protection has been examined;

3) the introduction of a specific provision establishing an explicit opt-out from the Solidarity Mechanism for Poland, which is in a special situation as the Member State that has received the largest number of refugees from Ukraine in the entire European Union (approximately 1.2 million). Poland's exemption from the Solidarity Mechanism should not be subject to the Commission's approval and should be granted for an indefinite period;

4) the introduction of a specific provision guaranteeing support to Poland under the Solidarity Mechanism for the reception of refugees from Ukraine;

5) clarification of the conditions for opting out of the Solidarity Mechanism for other Member States;

6) setting ceilings for the contributions to the solidarity pool that Member States are obliged to make under the Solidarity Mechanism;

7) maintaining the possibility of contributing to the Solidarity Pool in the form of operational aid in crisis situations;

8) clarification of the requirements for States to be able to make use of procedural facilitation in a crisis situation.

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