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The planned reform of the Dublin system: Humanitarian flexibilities are to be removed

Over the course of 2015 an ever-growing number of people were declaring the Dublin system a failure. In a speech to the European Parliament on October 7, 2015, Chancellor Merkel declared the Dublin Regulation in its current form as obsolete in practice, and stated that it had not turned out to be viable. As early as Spring 2015, the European Commission started debating an allocation formula, which was to replace the Dublin system in its current form. The emergency redistribution of 40,000 asylum seekers from Italy and Greece formed part of the *ten-point plan for migration* as early as April 2015.¹

In September, the allocation formula – now for 120,000 asylum seekers – was adopted as mandatory by the member states. However, these resolutions were merely reactions to the acute migrant situation. After publishing its reform agenda for the entire Common European Asylum System in a statement on April 6, 2016², the European Commission produced a draft paper on the reform of the Dublin III Regulation on May 4, 2016.³ Contrary to initial declarations, the current Dublin system is not to be replaced in its entirety by an allocation formula. Redistribution of asylum seekers from the EU's initial reception countries will only take place when the countries in question have fulfilled 150% of a – purely arithmetical – quota, which means that the allocation formula would automatically come into force if numbers at the EU's external borders were to rise. It is problematic in this context that this form of reallocation does not take into account refugees' interests and wishes, and that a purely mechanical allocation does not take into consideration any pre-existing connections individual refugees might have to a member state. Only family reunification would be guaranteed under this system.

¹ Joint session of the "Council for External Affairs" and the "Council for Judiciary and Internal Affairs": Ten-point plan for migration, press release April 20, 2015

² Communication from the Commission to the European Parliament and the Council: Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, COM(2016) 197 final.

³ COM(2016) 270 final

Severe impending tightening of the regulation: Abolition of binding statutory periods

The European Commission is planning a severe tightening of the current Dublin system. This will continue to be in force alongside the allocation formula, including the “entry criterion”. The Commission wants to abolish those provisions that allow a humanitarian correction of the current Dublin system: In future, no change of responsibility would result from the expiry of the time periods stipulated in the Dublin regulation.⁴ Until now, member states wanting to push through a Dublin-deportation had to adhere to certain time limits. Member states are currently allowed two (or, in some cases, three) months for the initiation of the Dublin procedure, while for the subsequent deportation usually six months are scheduled. However, when these time periods are not adhered to, responsibility will pass on to the state the refugee is currently staying in.

The result: “Refugees in orbit” become a mass phenomenon

Abolishing this mechanism would have dramatic consequences for refugee protection. The effective access to asylum procedures would be removed, as the time limits and the change of responsibility have the function of speeding up clearances and safeguard effective access to asylum procedures. A removal would result in a situation where asylum seekers who are in Germany and whose Dublin-deportation fails, still would have no access to asylum procedures. They would merely be tolerated and would have to live in the constant fear that they might yet be deported to Bulgaria, Hungary or Italy. Ultimately they would be so-called “refugees in orbit” – refugees in need of protection who have no access to refugee protection: Access to asylum procedures is blocked in the state they are staying in, and they have no humane chances of survival in the state responsible for them under the provisions of the Dublin regulation.

Sovereignty clause – now only in family cases

Another planned tightening also restricts humanitarian flexibilities: The sovereignty clause is to be restricted to apply only in family cases.⁵ Up until now, the application of the sovereignty clause was at the discretion of the respective states. In Germany it has been applied mainly for groups of especially vulnerable people. In cases of a particularly problematic situation in a member state – such as in Bulgaria since 2014 – the Federal Office has been able to apply the sovereignty clause flexibly and at least exempt the especially vulnerable from deportation. In restricting the sovereignty clause to family cases, the European Commission would rule out humanitarian solutions that are based on membership of a group or country.

Third-country regulation annuls responsibility criteria

It is also planned to introduce admissibility procedures that would precede the assessment of jurisdiction.⁶ These would determine if it were perhaps possible to deport an asylum seeker to a “safe third country” or a “first country of asylum”. Such procedures are already possible under the current Dublin regulation, but the new proposals would make the priority to deport to a third country binding. In a departure from the current interpretation of the Dublin law⁷, protection

⁴ art. 26 Dublin IV-Regulation-Proposal, p. 58; art. 30 Dublin IV-Regulation-Proposal, p. 63

⁵ art. 19 Dublin IV-Regulation-Proposal, p. 49.

⁶ Art. 3 par. 3 Dublin IV-Regulation-Proposal, p. 39-40

⁷ See UNHCR on the UN-Turkey deal: <http://www.unhcr.org/56f3ec5a9.pdf>

regulations such as those facilitating family reunification will no longer have priority over deportation to a third country. An asylum seeker who arrives, for example, in Greece and wants to travel on to Germany where his underage children are, currently would be entitled to do so. Under the new proposals this right would be removed and deportation to a third country would be binding. This is not compatible with the basic right for protection of the family, as laid out in the Fundamental Rights Charter.

Deportations of unaccompanied underage refugees

Under the current Dublin regulation, unaccompanied minors who enter an EU country without parents or relatives have the right to remain in the EU country they are currently staying in. Such person must not be deported as a matter of principle. The new draft regulation plans to change this and to give responsibility for unaccompanied minors to the state that received the “first” asylum claim. This means that an underage person who currently resides in Germany, but who had to previously claim asylum, for instance, in Italy, can now be deported there. This constitutes a blatant step backwards in the protection of minors.⁸

Dublin reform: Refugees are denied protection

This planned tightening of the Dublin system would massively increase pressure on refugees and supporting structures. The EU would produce for itself an incredibly high number of irregular migrants wandering around the EU without protection status. Denying protection in this way also inhibits integration in the countries of residence. The people affected only have a chance to settle down, to build a future, to work and to become part of society if they are granted legal status in the country.

The humanitarian mechanisms of Dublin III: some individual cases

In the past it was possible in many cases to prevent the removal of asylum seekers using the humanitarian mechanisms that form part of the Dublin III regulation. In its campaign “*Wir treten ein*” (“*We speak up*”) PRO ASYL portrayed examples of individual cases. The following two cases taken from that campaign illustrate the severe consequences that would ensue if the European Commission’s proposals for the reform of the Dublin regulation were implemented.

Protection under church asylum: No deportation to Italy

After fleeing Somalia, Mustafa Abdi Ali arrived in Italy in 2012. In 2013 the authorities cast him adrift in the streets; months of homelessness and lack of perspective followed. In the winter, he fled to Germany, where he was informed that Italy continues to be responsible for his asylum claim. But Mustafa Abdi Ali was in luck: A church community took him in and offered him church asylum, where he can wait until the time limit for a removal from Germany has elapsed. Had the European Commission’s plans already been implemented and the lapsing of time limits been cancelled, Mustafa would have had no chance to remain in Germany. He would have had to fear deportation into renewed homelessness and the ensuing inhumane treatment.

Source: Pro Asyl, www.wir-treten-ein.de

⁸ The European Court clarified this protection in a ruling from June 6, 2013. Regulation C-648/11

Germany invokes the sovereignty clause: No deportation to Hungary

The European Commission's plans are equally severe for cases such as Reza Ibrahim's. This Afghani man first fled to Greece and from there to Hungary. Along the way, time and again he had to suffer mistreatment by members of the police forces. He could not stay in Hungary. He was denied warm water, was not allowed to access the labour market, and there was not even enough food. The Hungarian authorities denied Reza Ibrahim a humane reception. Reza flees onwards to Germany. There he was threatened with deportation to Hungary, the country supposedly responsible for his claim, according to the Dublin regulation. But together with supporters and lawyers his removal was stopped and Germany took over responsibility for his asylum claim by using the sovereignty clause. This humanitarian mechanism of the Dublin regulation, too, is under threat from the European Commission: the sovereignty clause is set to be removed.

Source: Pro Asyl, www.wir-treten-ein.de

These cases clearly demonstrate that the ongoing dreadful conditions in some EU member states frequently lead to violations of asylum seekers' human rights, and that these can only be prevented by Germany taking on responsibility. Until now, the Dublin regulation contains provisions that can prevent such deportations into suffering. The European Commission's new project "Once responsible – always responsible" goes entirely against the grain of Europe's reality.

Further plans for reform: Severe sanctions for onward travel

In a communication from April 6 2016, the European Commission made clear what other measures it envisages: The planned reforms serve the purpose of blocking asylum seekers and recognised refugees in EU member states and to enforce this agenda. Those who travel onwards – perhaps because they have contacts or friends in another country – will suffer sanctions. Asylum seekers are to be deported immediately to the country responsible for their asylum claim, where their cases are to be processed in summary trials. Crucially, these procedures do not allow for automatic deferral of proceedings in cases where a legal challenge is brought against a negative decision. In addition, deportees who are deemed to be "at risk of going into hiding" are to be subject to restrictions on movement within the responsible member state or even detention, and material reception conditions can be limited to allowances in kind.

Even those whose refugee status has been recognised are to be prevented from travelling onwards to other EU states; the duty for readmission is set to also apply to those eligible for international protection. Under the European Commission's plans, "irregular secondary movement" could lead to a re-examination of the protection status and in some cases to the revoking of the protection status altogether. Furthermore, the guideline on permanent residency is to be altered in such a way that the applicable five-year term starts afresh every time a recognised refugee leaves the responsible state without permission. Only at the end of this term, and in certain circumstances, the affected person is able to settle in another member state.

If the European Commission has its way, protection in Europe will only be granted on a temporary basis – only as long as the risk of persecution or severe harm persists. Currently however, so the European Commission, international protection usually leads to permanent residency. Going forward, regular checks will open the floodgates for revocation proceedings, and a permanent perspective for protection in Europe is set to become the exception.

In addition, the European Commission wants to create the legal basis for a collective list of “safe countries of origin”, in order to refuse and deport asylum seekers from the relevant countries, preferably in fast-track procedures. A definition of “safe third countries” is also planned – also with the aim of producing a collective list. In order to achieve this, the guideline on asylum procedures is to be transformed into a regulation.

At closer inspection, the European Commission’s “reform proposals” turn out to be an undermining of refugees’ rights in Europe. Even though the Dublin system has proved to be fundamentally inoperative, only the symptoms are to be tinkered with – at the expense of those seeking protection. Instead of being a “grand European solution”, the European Commission’s proposals simply turn out to be a collective curtailment of refugees’ rights.