Council of the European Union

Brussels, 26 October 2016
(OR. en)

13703/16

Interinstitutional Files:
2016/0133 (COD)
2016/0132 (COD)
2016/0131 (COD)

ASILE 59
EURODAC 15
ENFOPOL 373
CODEC 1528

COVER NOTE

From:	European Economic and Social Committee
date of receipt:	24 October 2016
To:	General Secretariat of the Council
Subject:	Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person] , for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast) Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 - Opinion of the European Economic and Social Committee

Delegations will find attached the opinion of the Economic and Social Committee regarding the above mentioned subject. Please note that other language versions should be available at :

https://dm.eesc.europa.eu/EESCDocumentSearch/Pages/opinionsresults.aspx?k=SOC%2F543

ANNEX

European Economic and Social Committee

SOC/543

CEAS reform I

OPINION

European Economic and Social Committee

Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
[COM(2016) 270 final - 2016/0133(COD)]

Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010
[COM(2016) 271 final - 2016/0131(COD)]

Proposal for a regulation of the European Parliament and of the Council on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast)
[COM(2016) 272 final - 2016/0132(COD)]

Rapporteur: **José Antonio MORENO DÍAZ**

Consultation	Council of the European Union, 15/06/2016
Legal basis	Article 304 of the Treaty on the Functioning of the European Union
Section responsible	Section for Employment, Social Affairs and Citizenship
Adopted in section	27/09/2016
Adopted at plenary	19/10/2016
Plenary session No	520
Outcome of vote (for/against/abstentions)	215/1/4

1. Conclusions

1.1. The EESC considers it essential to carry out an efficient and effective reform of the Common European Asylum System (CEAS) and improve the legal means of accessing the European Union based on the principle of respecting persecuted people's human rights.

1.2. To that end, a genuine common and obligatory system for all Member States should be proposed in order to harmonise national legislation or − failing this − to introduce at the very least a common system for the mutual recognition of resolutions on asylum between all the EU Member States. This would make a genuine Common European Asylum System possible.

1.3. In any case, the EESC approves of the proposed objective to improve and speed up the determination procedures in the interest of better efficiency, but believes that protective provisions should be clarified and included on procedural issues, individual treatment of applications, maintenance of discretionary clauses, maintenance of the deadline for the cessation of obligation for a Member State to assume responsibility, the rights of applicants and the limitation of the corrective allocation mechanism.

1.4. Care must be taken to ensure that the provisions proposed in the regulation are consistent with existing provisions in this area and related measures that the EC intends to roll out as part of the fundamental transformation of the CEAS, and that they are consistent with other EU policies.

1.5. All Member States should be responsible for providing applicants with detailed and up-to-date information regarding the procedures under the Dublin system, in line with the requirements set out in Article 4.

1.6. The principle of proportionality should be assured so that the system is sustainable in practice, with regard to applicants' quick access to the asylum procedure and the capacity of Member States' administrations to apply the system.

2. Background

2.1. On 6 April 2016, the Commission published a communication which outlined the shortcomings in the formulation and application of the Common European Asylum System, in particular the "Dublin" provisions, and proposed five priority areas for improving the situation.

2.2. With a view to establishing a system which is fairer and more efficient and sustainable, the Commission proposes to reform the Common European Asylum System by revising the current Regulation No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection.

2.3. The Commission notes that the Dublin system was not set up to guarantee that responsibilities with regard to applicants for international protection across the whole of the EU were distributed sustainably, fairly and efficiently. The so-called "Dublin System" has not worked properly or uniformly: the last few years have demonstrated that in cases of massive migratory flows, a small number of Member States have to examine the majority of applications for international protection, which on occasion has led to growing breaches of EU asylum standards.

2.4. To mitigate these shortcomings, the Commission proposes that the regulation be modified to include the following objectives:

- bolstering the efficacy of the system by making a single Member State responsible for assessing each individual application for international protection;
- discouraging abuse of the asylum system and preventing secondary movements of applicants within the EU;
- establishing a fairer distribution system through a corrective mechanism which will automatically identify whether a Member State is faced with a disproportionate number of applications for asylum;
- providing a clarification of the obligations of applicants for asylum in the European Union and of the consequences of failing to comply with those obligations;
- modifying the Eurodac Regulation to bring it into line with the changes to the Dublin system and to ensure that it is applied correctly;
- strengthening the mandate of the European Asylum Support Office (EASO) by establishing the European Union Agency for Asylum.

3. Analysis

3.1. The Dublin criteria put forward to determine the responsibility of the Member State

Under the current Regulation No 604/2013, the general criterion most commonly used to determine transfers is documentation and place of entry, leading to a significant assumption of responsibility on the part of Member States with external borders. The information contained in Eurodac and the Visa Information System (VIS) is accepted as proof by the majority of the Member States; however on some occasions it is not considered enough evidence.

In the proposal, the criterion for determining the Member State will be applied only once and Article 9 stipulates that an applicant must apply in the Member State in which they first arrived regardless of whether their entry was regular or irregular. The hierarchy criteria outlined in Articles 10 to 17 support similar provisions:

3.1.1. **Minors**: The proposed reform preserves the established considerations but only for unaccompanied minors who have applied for international protection.

3.1.2. **Family members**: The proposal broadens the definition of members in two respects: it extends to siblings and takes into consideration families formed before arrival in the Member State, but not necessarily in the country of origin as defined in Dublin Regulation III (DR III). Both considerations are of utmost important, in particular with regard to those hardship cases that occur when siblings are not considered to be "family members", which in many cases affects unaccompanied minors whose only family connections in a Member State are their siblings.

3.1.3. **Residence or visa documents**: The proposal maintains the Member State's responsibility to assess applications for international protection when issuing such documents, although it also introduces considerations in an effort to clarify the responsibility criteria.

3.1.4. **Irregular entry through a Member State**: The proposal removes the provisions on the cessation of responsibility 12 months after the date of the unauthorised border crossing.

3.1.5. **Discretionary clauses**: The proposal limits the Member States' room for manoeuvre and makes it possible for them to assume responsibility for an application for international protection for which they are not responsible only on the basis of family relations which are not taken into account in the definition of members of the family unit.

3.1.6. Regarding dependent persons, no modifications have been put forward in the proposal. Therefore, if an applicant is dependent on assistance from children, siblings or parents who reside legally in one of the Member States owing to pregnancy, recent child-birth, serious illness, serious disability or old age, or in cases where the above-mentioned persons are dependent on assistance from the applicant, the Member States will always bring them together or group them with the applicant if there were ties in the country of origin and the persons in question can provide the above-mentioned assistance and declare so in writing.

3.2. Process of determining which Member State is responsible for examining an application for international protection

3.2.1. The aim of the proposed reform of the Dublin Regulation is to establish a fairer and more sustainable system by simplifying the procedure and increasing its effectiveness, although the modifications introduced are not always geared towards achieving these objectives.

Article 3 of the proposed reform introduces analysis of the admissibility criteria for an application for international protection before the Member State responsible has been determined, without assessing the existence of family in another Member State or the needs of minors.

The admissibility criteria which can be assessed in advance are: safe third country, first country of asylum, safe country of origin, and the indeterminate legal concept of *danger to security*.

The proposal introduces changes to deadlines which will reduce them significantly, and speeds up readmission procedures.

3.2.2. The reform removes the circumstances in which responsibility ceases that are laid down in the current Article 19 (if the applicant voluntarily leaves the EU for more than three months or has been expelled). This implies that the same Member State will be responsible for any application submitted at any time, even if the applicant has returned to their country of origin for an extended period of time, their personal and familial circumstances have changed in the interim or the conditions in the Member State in question have altered substantially.

3.3. Procedural guarantees and guarantees of fundamental rights in the process of determining the Member State responsible

3.3.1. **The right to information**: Article 6(1) reinforces the right to information on the part of applicants for international protection who are subject to the process determining which Member State is responsible, and sets out the information that must be provided.

3.3.2. **Right to an effective remedy**: Article 27 of the reform stipulates that the applicant must be notified in writing of the decision to transfer them to the Member State responsible without delay. This notification also informs them that the decision can be appealed. Article 28 guarantees the suspensive effect of appeals against decisions to transfer applicants for international protection, and establishes deadlines for the review procedure, although these are too short (only seven days are given to lodge an appeal).

3.3.3. **Right to freedom of movement and detention of applicants subject to the process of determining the Member State responsible for examining an application**: Article 29 of the proposal halves the period for procedures in cases where the person applying is being detained. It also reduces from six to four weeks the time in which the transfer must be made, or in the opposite case, the time in which the person must be released.

3.4. Obligations and sanctions

3.4.1. The proposal expressly introduces the obligations of applicants for international protection, who must:

- apply for international protection in the first country that they entered irregularly or in the country in which they are authorised to stay legally;
- present all the information and all the proof required as soon as possible and at the very latest during the interview to determine which Member State is responsible, and cooperate with the authorities of the Member State tasked with determining the Member State responsible;
- be present and available to the authorities of the Member State that is determining which Member State is responsible;
- comply with the transfer to the Member State responsible.

3.4.2. In cases of non-compliance, Article 5 lays down disproportionate procedural and reception consequences which are not in line with the standards in the current directives on asylum procedures (Directive 2013/32) and on reception (Directive 2013/33), and with the Charter of Fundamental Rights of the EU:

- In cases where the application is not carried out in the Member State in which the applicant is authorised to stay or in the Member State which he or she entered irregularly, the assessment of the application will take place through the accelerated procedure outlined in Article 31.8 of Directive 2013/32/EU. However, the Article in question does not provide for such cases specifically, meaning that a procedure is applied to a wider range of cases. In practice this leads to shorter deadlines within which to assess the basis for the application, a reduction in guarantees and greater difficulty in identifying vulnerable individuals owing to the shorter deadlines. This is of particular importance with regard to the obligation laid down in Article 24(3) of Directive 2013/32/EU not to apply accelerated procedures in cases where applicants are particularly vulnerable.
- Only information and documentation submitted before the interview to determine which state is responsible for examining their application is taken into account. However, in order for family ties to be certified, proof of a child-parent relationship is needed in many cases, and that can take time.
- The reception conditions laid down in Articles 14-19 of Directive 2013/33/EU are excluded in any other Member State: among the reception conditions which would be excluded is the schooling of minors (Article 14 of Directive 2013/33) which is a clear breach of the right to education of minors (Articles 14 and 24 of the Charter of Fundamental Rights of the European Union), health care not limited to emergencies (Article 19 of Directive 2013/33) and an adequate standard of living which guarantees their livelihood and protects their physical and mental health (Article 17 of Directive 2013/33).
- The possibility for appeal against a rejected application for international protection is excluded for applicants who have been rejected and then transferred to another Member State (Article 20(5) of the proposal). This provision may infringe Article 46 of Directive 2013/32 and Article 47 of the Charter of Fundamental Rights.

3.5. Corrective allocation mechanism

A corrective mechanism is established to counter the potentially disproportionate number of applicants that each Member State must process according to the previous criteria. To assess the situation in question, a reference value is calculated – on the basis of GDP and population – of the number of applications and resettlements that each Member State has the capacity to take on. If this figure exceeds 150%, the corrective mechanism is activated automatically, relocating the applicants for international protection in the (benefitting) Member State in question to other Member States (of allocation) which have fewer applicants.

3.6. Consolidating the Eurodac system

The Commission proposal includes a plan to adapt the Eurodac system with the aim of improving the system set up in 2000 for the organisation and use of European databases in which the fingerprints of applicants for international protection and various categories of illegal immigrants are recorded. The purpose of the system is to facilitate the application of the Dublin Regulation by making it possible to determine which Member State was the first point of entry into the EU by an applicant for international protection. It provides for the possibility to increase the scope of action and to include and store data about individuals coming from third countries who have not applied for international protection and are residing in the EU irregularly.

3.7. New mandate for the EU asylum agency

The Commission proposes that the EASO mandate be modified in order to facilitate the functioning of the Common European Asylum System and the Dublin Regulation.

The Commission suggests that the mandate of the European Asylum Support Office is extended to increase its functions and monitor the effective implementation of the Common European Asylum System.

4. Specific recommendations

4.1. Unaccompanied minors

The provisions go against "the best interests of the minor" given that, in many cases, unaccompanied minors do not have access to the international protection procedure owing to a variety of circumstances. Neither do they ensure an assessment of their individual needs.

4.2. Irregular entry via a Member State

Removing the cessation of responsibility of 12 months after the date of the unauthorised border crossing appears to be at odds with one of the main objectives of the reform, namely to guarantee that responsibilities are distributed in a sustainable manner and that the system is fairer. Eliminating the cessation would not guarantee the above-mentioned fairness to Member States with external borders.

4.3. Discretionary clauses

4.3.1. The EESC does not agree with limiting this clause only to cases of family connections that differ from the definition of family members, as it is essential to take into account the fact that problems can arise in a Member State which are not only quantitative – owing to the number of applicants for international protection – but also qualitative. These problems affect issues related to the effective application of Directive 2013/32/EU on common procedures for granting and withdrawing international protection with regard to access to the asylum procedure for applicants for international protection, information and advice, procedural guarantees and special procedures for people who require them. In addition, the recast Directive 2013/33/EU on reception conditions contains common standards to guarantee comparable living conditions in all the Member States to applicants for international protection and guarantee that their fundamental rights are upheld.

4.3.2. Circumstances can arise in which a Member State is not in a position to guarantee the provisions contained in the directives in question. The wording of DR III must consequently be preserved with regard to the decision of any Member State to assess an application for international protection which is presented to it even when the assessment is not that state's responsibility.

4.3.3. Furthermore, it should be taken into account that many applicants for international protection are seriously ill and/or disabled, and do not have family ties in any Member State: however, due to their particular circumstances, these applicants cannot, for medical reasons, be transferred to the Member State responsible for examining their application, which establishes the relationship of dependency with the Member State in which they applied for international protection. Such cases must be included in the new proposed draft of the discretionary clauses.

4.3.4. The assumption of responsibility on humanitarian or cultural grounds must be preserved in order to guarantee assistance to people applying for international protection who are in particularly vulnerable situations, in accordance with Directive 2013/32/EU, and to guarantee differentiated treatment in accordance with the assessment of specific circumstances.

4.4. Process of determining which Member State is responsible for examining an application for international protection

4.4.1. Assessing admissibility without prior analysis of the existence of family members in another Member State or the needs of minors, when this results in an application for international protection being rejected, may be at odds with the right to family life recognised under Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention on Human Rights.

4.4.2. Automatically applying the concepts of safe third country, first country of asylum, safe country of origin and the legal concept of endangering security may lead to situations of discrimination on the basis of nationality or migratory routes. In addition, in the case of safe country of origin and security risk, Article 3(3) stipulates that an accelerated procedure should apply. This accelerated procedure may not under any circumstances cause the procedural guarantees to be undermined due to the speed of deadlines. Nor can it result in a non-individual assessment of the application for international protection, as this is prohibited under Article 10(3)(a) of Directive 2013/32.

4.4.3. Article 33 of the proposal does not introduce any improvement with regard to exchanges of information between Member States on vulnerable cases, medical situations and other individual cases for the applicants who are to be transferred, in spite of the fact this is one of the biggest shortcomings observed in the practical application of the Dublin system.

4.4.4. The provision regarding the cessation of responsibility in cases where the applicant voluntarily leaves the EU for more than three months, or has been expelled, may lead to situations in which family ties formed in the country of origin after the original application for international protection in the EU are not taken into account, or in which the reception and procedural conditions which were fulfilled during the first application are not guaranteed in the Member State responsible during the second application.

4.5. Procedural guarantees

4.5.1. Regarding the right to information, the provision on the transmission of information via an information brochure does not take into account the fact that in the majority of Member States this brochure only contains general information, in terms which are barely comprehensible to applicants. This information must always be provided in the interview.

4.5.2. With regard to the right to an effective remedy, we feel that this remedy should not be limited to the three cases specified, given that access to a fair trial would be restricted in the following situations:

- the risk of inhumane or degrading treatment in the Member State responsible for flaws in the asylum policy;
- transfer decisions on the basis of the criterion on minors (Article 10), on the family criterion (Articles 11, 12 and 13) and on the criterion on dependent persons (Article 18);
- decisions to assume responsibility for the assessment (non-transfer), when the family criteria have not been applied.

4.5.3. Regarding the right to freedom of movement and the possible detention of applicants subject to the process of determining the Member State responsible, the limitation upon time in detention (two weeks) does not introduce new provisions on exceptional cases in which detention is to be ordered. Given the divergence in state practices that the Commission itself has observed, clear and specific criteria should be established on the exceptional circumstance of detention and the assessment of the necessity and proportionality of the measure.

4.6. Corrective allocation mechanism

4.6.1. Using such a high figure, 150% of the capacity of the Member State in question, could compromise the reception and procedural conditions of applicants for international protection who are already in the Member State until the figure is reached. If, according to the criteria, reception capacity has been established, it seems logical to activate the mechanism when that capacity is exceeded rather than wait until it reaches 150%. Furthermore, to make this mechanism effective, allocation should apply to every person who has the right to seek asylum, regardless of country of origin.

4.6.2. The mechanism is applied prior to determining which Member State is responsible, which is carried out subsequently by the Member State to which the applicants have been allocated. This implies that, after being transferred from the benefitting Member State to the Member State of allocation, the applicant for international protection may be transferred again to a third Member State where he or she has family members, which would result in a lack of efficiency in the system and a greater delay in accessing the procedure to determine the status of international protection.

4.6.3. In addition, because it is automatic, the mechanism does not take into account the individual circumstances of applicants for international protection or special needs, for example vulnerability, which may make transfer to the Member State of allocation inadvisable.

4.6.4. The corrective mechanism takes no account of applicants who arrived before the reform entered into force, and applicants who were rejected before the application of the criteria for determining the Member State responsible, under Article 3, are excluded from allocation, as are applicants who arrived in a Member State before 150% of reception capacity was reached. The above points may be obstacles to the ultimate aim of the mechanism and have a very limited effect on the distribution of responsibility to assess applications and on reception.

4.6.5. The fact that Member States may choose not to take part in the corrective mechanism by paying a certain amount for each applicant for international protection who is not allocated to their territory may lead to instances of discrimination by allowing Member States to choose which applicants to accept or reject on the basis of religion, ethnicity or nationality.

4.7. The Eurodac System

Any consideration with regard to adapting the regulation should justify the necessity and proportionality of the measures adopted given the sensitivity of the data involved, particularly with regard to applicants for international protection and the confidentiality of the procedure.

4.8. Mandate for the EU asylum agency

The EESC supports the proposals given that, since EASO was set up, the goals set have not been fulfilled. We believe that the role of the existing Consultative Forum for organisations, whose capacity has been severely weakened in practice, should be strengthened and developed in the new proposal. The future EASO should take into account the information from the organisations in question and the work they carry out in each of the Member States in order to monitor the correct application and implementation of the Common European Asylum System.

Brussels, 19 October 2016

Georges DASSIS
The president of the European Economic and Social Committee