



## Comments on the proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX (Asylum and Migration Fund)

Solidarity is one of the founding principles of the European Union. Anchored in the tradition of humanism as well as the teachings of different faiths, solidarity is a key concern of churches and Christian organisations, based on the conviction that: ‘All human beings (...) are sisters and brothers, connected by love, and by our equal dignity that does not have to be earned. Therefore, as a family linked by the one Creator, and created in God’s image, we have responsibility for each other’.<sup>1</sup>

The practical implementation of the principle of solidarity and the fair sharing of responsibility are the key issues to address in order to overcome the deadlock among Member States on EU asylum and migration policy. With the New Pact on Migration and Asylum, the European Commission tried to offer a way out based on the principle that Member States must be able to “rely on the solidarity of our whole European Union” while a “human and humane approach”<sup>2</sup> will be taken.

The lengthy and complex proposal for a Regulation on Asylum and Migration Management (hereinafter RAMM) supposedly puts an end to the current system for the determination of the responsible Member State to examine an asylum application by replacing the current Dublin Regulation. At the same time, it introduces a ‘new solidarity mechanism’ linked to ‘robust and fair management of the external borders’ and guided by a new ‘governance framework’. The proposed regulation aims at embedding solidarity and responsibility sharing into an overall vast approach for migration management and returns.

Unfortunately, an in-depth analysis of the text reveals only a few positive changes in relation to the current Dublin system. Moreover, the suggested solidarity mechanism raises a range of moral and legal concerns as well as numerous questions on its practical feasibility and added value relating to the aim of reducing pressure for the Member States at the EU external borders.

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### ❖ Dublin system: Old wine in new bottles

The RAMM is presented as an answer to the many calls to reform the Dublin system, that is judged as dysfunctional by all actors involved as well as by numerous studies, and represents a source of conflict between EU Member States.<sup>3</sup> The proposed rules aim to take better account of newly arrived people's legitimate interests and any meaningful links they have

<sup>1</sup> Pontifical Council for Interreligious Dialogue & World Council of Churches: Serving a Wounded World in Interreligious Solidarity, p. 11, Geneva/Vatican City 2020

<sup>2</sup> President von der Leyen, State of the Union Address 2020.

<sup>3</sup> E.g. European Parliamentary Research Service (2020), Dublin Regulation on international protection applications – European Implementation Assessment.

with a Member State in order to determine the State responsible for examining their claim. However, despite such declarations, Part III of the Migration Management Proposal preserves the main provisions in relation to the determination of responsibility for examining an application for international protection. The first entry criterion shall not be abolished but remains intact and the responsibility shall last three years instead of one year. Consequently, this implies a structural imbalance between the Member States, and Member States at the borders continue to bear the main burden.

We welcome some positive changes that are introduced, such as the enlargement of the family definition to include siblings as well as families formed in transit countries. Moreover, the possession of diplomas achieved in a Member State in the hierarchy of criteria is considered a meaningful link to assign responsibility for the examination of an application. It is also positive that the Commission wants to include 'severe trauma' as a ground for dependency.

Nevertheless, the definition of family members applicable to 'dependent persons' shall become more limited by excluding sibling relationships. Furthermore, as already proposed in the draft Dublin IV regulation, a punitive approach to secondary movement is put forward, as asylum seekers must stay in the country responsible for examining their application and moving to another Member State will entail their losing the benefits of the Reception Conditions Directive. These provisions ignore the reality that recognition rates in the Member States still differ greatly and in some Member States reception conditions are inadequate and inhumane. We are also concerned that unaccompanied minors could be transferred to the Member State where they first applied if no family criterion is applicable. This would not reflect the presumption found in the MA & Others judgment of the CJEU (C-648/11) that transfers to another country are not in a child's best interests.

Moreover, the scope of appeals against transfers shall be limited to examining whether the transfer would entail a real risk of ill-treatment and whether the family criteria has been applied correctly. This would contravene the right to an effective remedy for the violation of any Convention right (Art. 13 ECHR). Finally, the Proposal also reduces time frames within the framework of implementing transfers. This could be a positive development, however, the proposed timelines seem unrealistic in view of the realities on the ground, especially in relation to the realisation of rights to family reunification and an adequate judicial review of a transfer decision. In essence, the Proposal is reluctant to deepen reform and fails to address the flaws of the system that have been a key cause of the current imbalance in responsibility.

❖ **Solidarity mechanism: complex, bureaucratic, unpredictable and hardly solidarity at all**

Part IV of the RAMM introduces a flexible solidarity mechanism in which all states *must* participate. By means of a Migration Management Report, the European Commission assumes a vital position in assessing migratory pressure and the management of Member States' responses. The mechanism applies to four types of situation (normal influx, persons

disembarked after rescue at sea (SAR), ongoing migratory pressure and migratory crisis<sup>4</sup>). In the case of SAR disembarkations, it would replace the current ad-hoc solidarity initiatives and become, together with the case of migratory pressure, a corrective mandatory solidarity mechanism building on the basic rules on determination of responsibility (Part III RAMM). The process includes an annual EU-wide pledging system based on projections of the anticipated size of spontaneous migration arrivals and a redistribution plan proposed by the Commission based on Member States' size and economy. Member States would be able to fill their 'quota' either through relocation, return sponsorships or 'capacity building' measures. If pledges are not sufficient, the Commission convenes the 'Solidarity Forum' and invites the Member States to review their contributions. Afterwards, the Commission establishes revised targets and the Member States are obliged to meet at least 50% of the quota set either with relocation or return sponsorship offers.

With this proposal, the European Commission clearly tries to push Member States as far as possible to participate in relocation, knowing that proposing compulsory quota would find no political consensus. Even if we acknowledge the difficulty of such a task, we strongly disagree with the idea that achieving a compromise by offering Member States the option to choose between receiving asylum seekers or returning migrants to their country of origin reflects a consensus on solidarity. Nor would it ultimately lead to an equitable division of responsibilities. On the contrary, what the proposal really does is re-confirm and codify the disagreement around solidarity and responsibility sharing between Member States within a legal framework. If taken forward, this approach would considerably weaken the intention for the EU to have a common approach to asylum and migration and allows the Member States with an explicit anti-migration agenda to legitimise their abandoning of responsibilities within the CEAS and international law.

Apart from the problematic ideological premises, it is very doubtful whether such a mechanism would be feasible in practice. The whole system is complex and bureaucratic, with a long series of steps, reports (Migration Management Report, report on migratory pressure, Solidarity Response Plans, Solidarity Forum, implementing acts), deadlines and formulas to calculate or discount contribution shares. Finally, it all comes down to a lengthy bargaining process in which ultimately Member States can only be obliged to meet 50% of the quota eventually allocated to them. As a result, the system remains highly unpredictable. This low threshold commitment will make the implementation of relocation, which has already proven to be challenging in the past, even more unpredictable and uncertain. Moreover, in the current climate of distrust and lack of political will, offering other options to Member States in place of relocation might result in an additional watering down of the commitments of even those Member States that have supported relocation in the past.

<sup>4</sup> See the Regulation addressing situations of crisis and *force majeure*, which will also include specific rules for relocation and return sponsorships to structurally deal with situations of crisis, for which reason the 2015 proposal for a crisis relocation mechanism and the Temporary Protection Directive will be revoked.

Finally, it is striking and unacceptable that in a proposal addressing the issue of solidarity, so little attention is given to the human rights and dignity of those people affected. In the best case scenario, the proposed administrative procedures would take up to three and a half months before the relocation of the first people could even start. Regarding the current reality of procedural practices, it could prolong the stay of most of the asylum seekers in the Member States of arrival in overcrowded reception centres under often degrading circumstances. Moreover, the mechanism foresees no requirement to consider the perspective and personal circumstances of asylum seekers, who are in danger of becoming bargaining chips in a 'responsibility sharing-game' played by unwilling countries. Although it is true that the Commission proposes to prioritise the relocation of unaccompanied children and to take into account vulnerabilities in the selection of those people to be relocated, the current reality shows that such vulnerabilities often remain unidentified and it is hard to see how the proposals of the Pact, taken as a whole, would bring a meaningful change in this respect.

❖ **Solidarity contributions: insufficient relocation, unacceptable return sponsorship and vague 'capacity building' measures**

The proposed forms in which Member States might contribute to solidarity raise a number of concerns. With regard to relocation, the proposal states that 'only persons who are more likely to have a right to stay in the Union should be relocated'<sup>5</sup> and consequently establishes that asylum seekers subjected to asylum border procedures - that is, according to the proposed amended Asylum Procedures Regulation, all applicants with nationalities for which the average European recognition rate is equal or lower to 20% - are not included within the application of the solidarity mechanism. Member States remain free to offer to relocate applicants subjected to the asylum border procedures at any time, however, it is unlikely that many will be willing to do so, as this would be contrary to the whole Pact's rationale of filtering people at the borders and swiftly returning those not in need of protection. In practice, therefore, the number of people eligible for relocation are likely to be very limited, questioning the whole approach of using relocation to ease the pressure on the Member States receiving higher numbers of arrivals at the external borders. This is another reason for our rejecting the use of the 20% criterion to 'filter' people at the external borders and accompanies the legal and moral concerns described in our comments on the proposed Screening Regulation and amended Asylum Procedures Regulation.

The second, and new, possible solidarity contribution introduced by the RAMM is return sponsorship.<sup>6</sup> This is the possibility for a Member State that does not want to relocate asylum seekers to assist another Member State under migratory pressure in the return and readmission of an 'illegally staying third-country national' instead. If after eight months - or 4 months in the case of crisis and force majeure - the return attempts are unsuccessful, the third-country national shall be transferred to the 'sponsoring' Member State. For us, this

<sup>5</sup> RAMM, Recital (26).

<sup>6</sup> See also Comments on Return Policies, Readmissions and Cooperation with Third Countries within the framework of the New Pact on Migration and Asylum.

concept is unacceptable for several reasons. Firstly, as conveyed earlier, we do not agree with a system that equates the concept of solidarity with support to deport people. Secondly, it is highly questionable whether Member States will succeed in arranging returns (e.g. identification procedures, exchange between national authorities and logistics) on the territory of another Member State. Finally, it is completely unclear what fate awaits those who cannot be returned after 8 months, once they are transferred to the ‘sponsoring’ Member State. The proposal is silent both on the legal status and the conditions in which people will have to be received after such a transfer. In reality, return sponsorship might very well result in a permanent irregular stay and the exposure of migrants to legal uncertainty, destitution and violations of fundamental rights.

The third way for Member States to contribute within the solidarity mechanism is through ‘capacity-building measures in the field of asylum, reception and return’, e.g. with expertise or operational support, such as the secondment of staff or the management of reception centres. In principle, we agree with the need to support Member States experiencing particular pressure on their asylum and reception systems. Maintaining a well-functioning asylum procedure and good quality reception facilities requires considerable investment and it is fair that such investment is supported by a common effort of all Member States. However, the proposed RAMM remains vague on the possible nature of such contributions except for the fact that they should be in accordance with the objectives set within the Asylum Migration Fund. Based on existing experience in countries like Greece, there is a real risk that Member States might use this third option as a way to avoid welcoming refugees by offering expertise that is not truly qualified to support the needs on the ground. This option could also be used to support activities, such as the construction and maintenance of detention centres, which will ultimately lead to violation of migrants’ fundamental rights.

#### ❖ **Our vision: Need for genuine and predictable solidarity**

The proposed RAMM, as well as the whole Pact in its current form, are far from a “fresh start” and fail to strike a satisfying balance between responsibility and solidarity, particularly when conditions in a Member State make it evident that it is struggling to comply with its moral and legal responsibilities. Without underestimating the positive elements included in the Commission’s proposal, experience on the ground illustrates that more needs to be done to ensure that the unequal distribution of responsibilities between Member States does not result in suffering for asylum seekers and in the violation of their fundamental rights.

As articulated in our comments on the proposed Screening Regulation and amended Asylum Procedure Regulation, our vision for a new common EU migration and asylum system is not one where people are concentrated at the EU external border to be hastily filtered and returned. We believe rather in a system where the screening, identification and any further processing of people’s migration procedures occur in dignified reception conditions, with careful examination of potential vulnerabilities, following the submission of information and in a climate of trust. The responsibility for such work cannot rest entirely on the countries at the external borders, but must be the result of a common effort by all Member States. In this vision, European solidarity and responsibility sharing implies, therefore, the systematic use of

relocation, consideration of people's preferences and aspirations, and serious investment in reception conditions and early integration measures.

A radical shift in approach on the Pact would be needed to achieve such a vision. However, as the EU-legislators will negotiate the current proposals, we believe that there is need to move the current RAMM in a direction that represents not only the interests of the Member States themselves, but also of the women, men and children who are seeking protection. We strongly **recommend** the EU-legislators carefully assess the impact that the proposed mechanism will have on the rights of asylum seekers in Europe as they approach the current proposed RAMM and in particular:

- Ensure that the RAMM introduces binding solidarity instruments, which will include practical and financial support and expand relocation as the preferred mechanism for solidarity and responsibility sharing for beneficiaries of international protection.
- Set out clear and predictable commitments for relocation and avoid political manoeuvring within the framework of the Solidarity Forum. This could be done by fixing indicative annual 'solidarity quota', supplemented with a correction mechanism to adapt – by lowering or increasing the quota – to the real needs.
- Expand relocation, promote and fund decentralised and community relocation schemes of international protection, building on municipal, civil society and grassroots initiatives to support relocation efforts.
- Delete return sponsorship from the options of solidarity contributions.
- Provide possibility for the Commission to implement effective counter measures in the case that Member States do not comply with the solidarity pledges.
- Establish a clearly defined framework for the European Commission's assessment on migratory pressure and an adequate information sharing system with the European Parliament.
- Ensure the right to an effective remedy for all people subjected to the application of the system of determination of the responsible Member State. In this respect, reasonable timeframes must be guaranteed for judicial reviews as well as the full examination of all subjective rights of the persons concerned.
- Expand the approach to extend deadlines for submitting and replying to a take charge request in cases for unaccompanied minors to all family cases in order to promote family unification more consistently.

- Clearly establish, in line with jurisprudence, that the Member State responsible for an application of an unaccompanied child should be the one in which the child is present unless this is not found to be in the best interests of the child.
- Ensure that family and other meaningful links to a Member State are proactively taken into account and enforced with priority and consistency by the national authorities in the process of determining the Member State responsible. The country of first arrival criterion should not overshadow the implementation of the hierarchy of criteria.

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- Caritas Europa, [www.caritas.eu](http://www.caritas.eu)
  - CCME – Churches’ Commission for Migrants in Europe, [www.ccme.eu](http://www.ccme.eu)
  - COMECE – Commission of the Bishops’ Conferences of the European Union (Secretariat), [www.comece.eu](http://www.comece.eu)
  - Don Bosco International, [www.donboscointernational.eu](http://www.donboscointernational.eu)
  - Eurodiaconia, [www.eurodiaconia.org](http://www.eurodiaconia.org)
  - Sant’Egidio BXL Europe, [www.santegidio.org](http://www.santegidio.org)
  - ICMC – International Catholic Migration Commission, <https://www.icmc.net/europe/>
  - JRS Europe – Jesuit Refugee Service Europe, [www.jrseurope.org](http://www.jrseurope.org)
  - Protestant Church in Germany – EKD, [www.ekd.de/Bevollmaechtigter-EKD-Dienststelle-Bruessel-25117.htm](http://www.ekd.de/Bevollmaechtigter-EKD-Dienststelle-Bruessel-25117.htm)