

Refugee Support Aegean (RSA) Position Paper to the Dutch Senate on European proposals regarding Migration and Asylum

On 23 September 2020, the European Commission presented the New Pact on Migration and Asylum as a “fresh start on migration” based on “building confidence and striking a new balance between responsibility and solidarity”,¹ accompanied by a package of legislative proposals. Refugee Support Aegean (RSA) has published detailed observations on the above package of legislative initiatives and their impact on Greece.² The proposals loudly dispel the Commission’s declarations of a “fresh start on migration” and of “building confidence and striking a new balance between responsibility and solidarity” of Member States. They also raise serious concerns on critical legal and political issues, namely:

1. The promise of a “fresh start” is sealed by the old, problematic and failed Dublin system, which stays largely intact in the Asylum and Migration Management Regulation proposal, despite its inherent flaws and inequalities, violations of fundamental rights and consistently documented deficiencies since its entry into force in Europe in 1997. The only innovation is the absence of “Dublin” from the “Asylum and Migration Management Regulation” which nevertheless enshrines the Dublin system as its main framework and core mechanism.
2. No real change or improvement is codified with regard to solidarity Member States. The spirit and structure of the proposal reveals a lack of will on the part of the Commission to incorporate responsibility-sharing and solidarity as core parts of the EU mechanism on responsibility for examining asylum claims and corollary granting of international protection. Solidarity measures between Member States depend on complex and unduly bureaucratic procedures, and are restricted to situations of search and rescue and “migratory pressure”,³ while the provisions lack clarity and binding effect, and unavoidably risk becoming ‘dead letter’.
3. The uniform border procedure, as the cornerstone of the proposals,⁴ is problematic and entails dramatic restrictions on the fundamental rights and safeguards of newly arrived applicants, to deliver “rapid and efficient examination” but mainly to prepare their return. Moreover, the introduction of an additional procedural stage at the external borders for the “referral” of newly arrived people to the asylum procedure demonstrates an attempt to entrench their restriction and/or exclusion from protection. The proposals put forward yet another regime of exception from safeguards and rights, in direct contravention of international and EU law.⁵

¹ RSA, ‘New Pact on Migration and Asylum’, available at: <https://bit.ly/38GdkDQ>.

² Αρθρα 8-11 Reception Conditions Directive, applicable from the moment the intention to seek international protection is expressed: Court of Justice of the European Union (CJEU), Case C-36/20 VL v *Ministerio Fiscal*, 25 June 2020, paras 104-113.

³ Articles 45 et seq. Asylum and Migration Management Regulation proposal.

⁴ Recitals 40-40a Asylum Procedures Regulation proposal. See also European Commission, *New Pact on Migration and Asylum*, COM(2020) 609, 23 September 2020, 4.

⁵ Αρθρα 8-11 Reception Conditions Directive, applicable from the moment the intention to seek international protection is expressed: Court of Justice of the European Union (CJEU), Case C-36/20 VL v *Ministerio Fiscal*, 25 June 2020, paras 104-113.

4. The strengthening of the border procedure as a mandatory, systematic and lengthier stage of European asylum systems, per the legislative proposals, shrinks guarantees and rights, and codifies and further entrenches the failed EU operational approach tested in recent years, which has caused prolonged mass confinement of people in inhuman conditions at points of entry such as the Greek islands, and a gradual dismantling of procedural safeguards and of the quality of the asylum procedure, to the detriment of refugee rights and the functioning of the Greek administration.⁶ The establishment of a so-called “pre-entry procedure” by the Screening Regulation proposal and amended Asylum Procedures Regulation proposal creates an additional ambiguous and dangerous regime of derogation from basic safeguards and entitlements for new arrivals at borders. Based on the – already problematic – fiction of “non-entry”, the proposals foresee unacceptable interference with asylum seekers’ fundamental rights⁷ such as immediate access to an asylum procedure, to reception conditions, to an effective remedy,⁸ to liberty and to remain on the territory of the country pending the examination of their claim, i.e. protection from *refoulement*. The suggested measures are liable to exacerbate the flagrant violations of fundamental rights brought about by the implementation of hotspots as an EU approach to management of refugee and migration flows in Greece, notably through the establishment of disproportionately short time limits and excessive barriers and prohibitions on the exercise of remedies.⁹
5. The provision of a monitoring mechanism for fundamental rights compliance at borders is insufficient and ineffective. The mechanism lacks a binding framework of safeguards and depends on Member State discretion. In no way does the introduction of such a “flexible” provision comply with the harmonisation objectives required for the use of directly applicable Regulations in as sensitive and liable to abuse an area.
6. The dangerous, unacceptable and unjustified enactment of open-ended derogations from provisions of the EU *acquis* further chips away at guarantees and rights available to newly arrived asylum seekers, under the Crisis Regulation proposal. Beyond the considerable ambiguity surrounding the overlapping derogation regimes in the proposed provisions, the proposal runs a high risk of arbitrary interpretation by Member States to promote policies consisting of violations of fundamental rights and the asylum *acquis*. In addition, its implementation will further intensify mass confinement of people at the EU external borders. The granting of “immediate protection” under the proposal is the only necessary provision which may offer satisfactory and lawful solutions in potential urgent circumstances, in conjunction with activation of solidarity and responsibility-sharing through relocation.
7. Beyond the measures regarding the border procedure, the provisions introduced by the Asylum Procedures Regulation proposal amount to a legislative downgrading of the existing EU *acquis* as regards basic safeguards like procedural guarantees in the asylum process, protection from *refoulement* and the right to an effective remedy. The proposed asylum procedure subject to restrictions on fundamental rights – through wider grounds for the use of the accelerated procedure, “presumption of unfoundedness” of applications, exceptions to the right to appeal and its suspensive effect – raises serious issues of compatibility with international and EU law and contravenes constitutional rights such as legal protection by courts.¹⁰

⁶ RSA & Stiftung PRO ASYL, *Submission in the M.S.S. [Group] and Rahimi cases*, July 2020, available at: <https://bit.ly/3llZefv>.

⁷ Recital 16 Screening Regulation proposal.

⁸ Screening Regulation proposal, Explanatory Memorandum, 5, stating that registration of the application and the Reception Conditions Directive provisions shall apply after the completion of screening.

⁹ RSA, *Comments on the Commission proposal for a Regulation on screening at the external borders*, October 2020.

¹⁰ Article 20(1) Greek Constitution.