

English summary

Sharing responsibility. A proposal for a European Asylum System based on solidarity.

Background and request for advisory report

For some years there has been considerable criticism of the uneven distribution across the member states of the European Union (EU) of asylum applications and the responsibilities related to them. There are substantial differences between member states in the number of asylum applications received, both in absolute and relative terms. Furthermore, the way the member states deal with asylum seekers and asylum applications varies. This is remarkable, considering that the standards governing the treatment of asylum applications are identical in the majority of member states, and are laid down in binding EU directives. The uneven distribution of responsibilities has led to tensions within the EU. For this reason the State Secretary for Security and Justice asked the Advisory Committee on Migration Affairs (ACVZ) for advice on how the Common European Asylum System (CEAS) could be transformed into a system based on solidarity, in which the responsibilities of the member states vis-à-vis asylum seekers and permit holders can be shared fairly among them.

In its report, the ACVZ proposes a permanent mechanism enabling member states to share asylum responsibilities. The Advisory Committee understands the term 'asylum responsibilities' as including not only the responsibility for processing asylum applications and providing reception during the application process, but also for the integration of asylum seekers whose application is accepted and for returning or dealing with those whose application is dismissed.

As a result of the large number of asylum seekers arriving in the EU this year, the debate on the unequal distribution of asylum responsibilities has flared up, leading to the introduction of several measures at EU level. One example is the decision of the European Council to reallocate a total of 160,000 asylum seekers whose asylum application has a good chance of success from Italy and Greece to other member states. However, the implementation of these measures has not been without difficulties and is responsible for even greater tension between member states. It is therefore highly questionable whether this advisory report can count on broad political support in all EU countries. Nonetheless, the ACVZ deems the creation of a permanent responsibility-sharing mechanism to be inevitable. It has therefore attempted to forge a proposal that is both legally viable and practically feasible.

Starting points and legal framework

The goal of European asylum policy

The goal of European asylum policy is laid down in article 78 of the Treaty on the Functioning of the European Union (TFEU). It states that the EU will develop a common policy aiming to offer appropriate status to all third-country nationals in need of international protection and to ensure compliance with the principle of non-refoulement. This means that refugees and persons in need of subsidiary protection are eligible for international protection. The Qualification Directive determines which persons qualify for international protection in the EU, while the Procedures Directive describes how the need for protection is to be established in the asylum procedure. The right to asylum does not oblige a member state to grant a residence permit to all third-country nationals who are present on its territory and in need of protection. The right to asylum permits the transfer of asylum seekers to other member states, or safe third countries, as long as com-

pliance with the principle of non-refoulement is guaranteed in that state and appropriate status is offered to those in need of protection.

How to attain this goal

Article 80 of the TFEU stipulates that the asylum policy of the EU is governed by the principle of solidarity and a fair sharing of responsibility between the member states. However, the content and meaning of the principle of solidarity is not defined. The relevant literature and case law of the Court of Justice of the EU offer some elements of a definition, which the ACVZ has taken as its starting point. These are:

1. solidarity in an international context requires at the very least that countries cooperate;
2. this cooperation is aimed at achieving shared goals that go beyond the interests of the individual sovereign state;
3. this requires a considerable investment by all cooperating states in sharing in the fate of others, which means that every participating state commits to the results of collective decision-making;
4. failing to adhere to the norms resulting from the shared decision-making process undermines the legal order of the EU.

The Advisory Committee applied these elements to the CEAS, so as to interpret the responsibilities arising from them, to a greater extent than before, in the light of the principle of solidarity. As a result, these responsibilities are seen as shared, as well as collective. In other words, all EU member states have a shared duty to fulfil the responsibilities stemming from the CEAS, while no member state may evade these responsibilities, leaving it up to other member states, or institutions of the EU to achieve them. Member states must work together to ensure that the CEAS is properly implemented throughout the EU. In its report the ACVZ describes how this principle relates to the following aspects of the CEAS: 1) border control, 2) registration, 3) responsibility allocation, 4) status determination, 5) return and integration, and 6) monitoring compliance with the CEAS.

Who is responsible for processing an asylum application?

The Dublin Regulation sets out the criteria for identifying the member state responsible for examining an application. It does not contain a mechanism enabling member states to distribute these responsibilities between them. The underlying premise of the Regulation is that the member state that played the largest role in the asylum seeker's entry into, or stay in the EU, taking account of his or her personal situation, is responsible for the asylum application. It is no secret that the Dublin Regulation does not fulfil all its objectives. Criteria are not always applied, or applied incorrectly. In the Advisory Committee's view, complete and correct compliance with the Dublin Regulation would in itself result in a different distribution of asylum responsibilities. This would require a much greater focus on the ties an asylum seeker has with a specific member state, which in turn demands improved and more generous application of the criterion that the presence of family members should be taken into account. To achieve a fair sharing of responsibilities however, additional measures are necessary.

A proposal for a permanent mechanism for responsibility sharing

To achieve a fair sharing of responsibilities, a distribution mechanism should not be the exception – as is the case in the EU's current reallocation plans – but the standard situation. In chapter 4 the ACVZ offers a detailed proposal to this effect. A fair sharing of responsibilities will not be achieved without some form of coercion. To this end, the Advisory Committee proposes amendments to articles 3 and 13 of the Dublin Regulation. Article 13 determines that when no member state can be held responsible for the asylum application under one of the other Dublin criteria, the member state where the

asylum seeker entered ‘Dublin territory’ is responsible for examining the application. When it is impossible to establish where the asylum seeker entered this territory, article 3 of the Dublin Regulation stipulates that the member state where the application is lodged becomes responsible for the application. In the Advisory Committee’s view, these articles should be supplemented with a provision stating that when a member state is confronted with an disproportionately large number of asylum applications, responsibility for future asylum applications in that state can be transferred to another member state which up to that point has received an disproportionately low number of applications. The latter state would be obliged to accept the transfer.

The above provisions should also refer to two new provisions to be added to the Dublin Regulation.

First, the European Council should be given the power to adopt a distribution key to establish a fair sharing of responsibilities. This key can then be used by the European Commission to determine, on an annual basis, the percentage of the total number of asylum applications each member state should be responsible for. Member states should provide the European Commission with the necessary data through Eurostat.

Second, the European Commission must be given the power to determine, every three months and on the basis of the distribution key, the desired distribution of asylum applications across the Member States. This means that the EU agency responsible for the EURODAC database (eu-LISA) in which all persons who apply for asylum are registered, should provide the European Commission with quarterly reports on the total number of asylum seekers registered in the EU and in each member state. The European Commission can then determine which states have received a disproportionate number of applications, and how many asylum seekers may be transferred by these member states to those with disproportionately few applications. Basing distribution on the number of registered asylum seekers creates a built-in incentive for member states to register all asylum seekers.

Conditions

Chapter 5 of the report describes the conditions that have to be fulfilled if the permanent distribution mechanism is to function properly. These are: 1) further harmonization of the CEAS, 2) creation of future prospects for asylum seekers, and 3) continuing work on the external dimension of EU asylum policy.

Further harmonization

The Advisory Committee believes that further harmonization of the CEAS is essential. Asylum applicants have to be confident that their application will receive equal treatment in any of the member states. In other words, the outcome of the application should not depend on which member state processed the application. Without that confidence, the asylum seeker cannot be expected to accept the decision that the asylum application will not be dealt with in the country of his or her choice. This would lead to an increase in secondary migration flows. Further harmonization requires the European Commission to adopt a more active and strategic enforcement approach towards member states who fail to meet their obligations. In addition, it can reward states that take active measures to increase asylum capacity, or offer unused capacity to other member states, with extra funding. However, the member states themselves are primarily responsible for the correct and timely implementation of EU legislation. They should be willing to raise shortcomings in other member states in European Council meetings. As a last resort, it should even be possible to exclude member states from benefitting from the distribution mechanism. Finally, the ACVZ is of the opinion that in the future certain aspects of the CEAS could be implemented at European level. Examples include shared country of origin

reports, cooperation between member states in decision making and the registering of asylum seekers by EU personnel.

Future prospects

The ACVZ proposal does not afford much freedom to the asylum seeker in the choice of member state. This could give rise to secondary flows of asylum seekers who are unhappy about the member state they have to apply to. The Advisory Committee proposes to compensate for this lack of choice by offering the prospect of mobility throughout the EU to permit holders after a two years and subject to certain restrictions.

The external dimension

Distributing asylum responsibilities between the member states will not influence the total number of asylum seekers seeking international protection in the EU. The Advisory Committee therefore also addresses the need to work on the external dimension of EU asylum policy.

Conclusions and recommendations

The conclusions and recommendations of the ACVZ to the State Secretary for Security and Justice are as follows:

Conclusions

- 1) At present, the CEAS is not sufficiently based on the principle of solidarity. Member states should concentrate their efforts on offering international protection to all who qualify for it. This means that, to a greater extent than has been the case, appropriate status determination should be guaranteed in all member states in an equal manner. This requires the provisions of the CEAS to be viewed as collective responsibilities, demanding full compliance.
- 2) Asylum responsibilities are not shared fairly between the member states. This will not be achieved without amending the Dublin Regulation and Dublin system.
- 3) A fair and durable distribution system requires measures to further harmonize the CEAS and to offer the prospect of integration to all permit holders.
- 4) A distribution mechanism is not the answer to migration crises. External solidarity is also needed. A distribution mechanism does have the potential to enlarge the 'protection capacity' of the EU as a whole.

Recommendations

- 1) Advocate incorporating the standards laid down in the Qualification and Procedures Directives in an EU Regulation, emphasising the fact that these standards should be applied equally in all EU member states.
- 2) Emphasise the collective and shared mission of member states to offer international protection. Advocate an interpretation of CEAS responsibilities that is more in line with the principle of solidarity. Urge the European Commission and the member states to take firmer measures against members states that fail to meet their obligations.

- 3) Advocate amending articles 3 and 13 of the Dublin Regulation and supplementing the existing responsibility criteria in such a way that member states with a disproportionately large number of applications will be able to transfer future asylum applications to member states with a disproportionately low number of applications, regardless of whether such applications fall under the responsibility of the latter state under the Dublin criteria. This distribution mechanism could be activated by the European Commission and should operate under its authority. The European Asylum Support Office (EASO) or a new EU distribution agency should coordinate and support the distribution process.
- 4) Advocate the further harmonization of the CEAS. This means that member states and the European Commission will have to call to account member states that fail to meet their obligations and make greater use of political and legal instruments to call these states to heel. In addition, some aspects of the CEAS could in due course be implemented at European level.
- 5) Urge the European Commission and member states to offer asylum seekers and permit holders future prospects. Since asylum seekers will no longer be able to influence in which they will have to submit their application, and following the determination of their status will be obliged to integrate, they should be offered the prospect of mobility throughout the EU, subject to conditions and after a certain time. This will help prevent irregular secondary migration flows, and better regulate intra-EU mobility.
- 6) Promote greater use of resettlement by member states and the European Commission as well as the creation of safe legal avenues for migration to the EU. Such measures will be all the more important if the external borders are closed and agreements are reached with third countries to reduce asylum migration. Efforts should also be made to make more effective use of common measures for the return of failed asylum seekers.