Chapter 2

EU Migration and Asylum in the Aftermath of the 2016 Migration Crisis

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Introduction

The European Union (EU) initiatives aimed at regulating migration have recently enjoyed relatively broad and quick support by EU Member States (EUMS), while the facilitation of migration has been selective and either addressing few targeted countries, or small categories of migrants travelling to the EU – the most qualified ones. Migrants in vulnerable situations with specific protection needs and/or asylum-seekers requesting international protection – seeking access to the EU – are still awaiting legislative and policy reforms addressing their needs. Significant progress was made during the Maltese Presidency towards reaching agreement among EUMS on the Common European Asylum System (CEAS) reform. However, the package of seven instruments and the key issues they seek to address remain *work in much-needed progress*.

Given the 2016 ongoing migration flows to the EU via the Central Mediterranean route, the Maltese Presidency started with a clear determination to reduce arrivals from Libya and save lives, as well as to break the business model of smugglers along the route as stipulated in the European Agenda on Migration. A vivid sense of urgency to increase return rates and uphold the credibility of asylum systems was felt by EUMS and the Commission alike. The new return policy package was released in March 2017, paving the way for a future revision of the Return Directive, with a view to building a *Common European Return System* (CERS). On the external front, making development aid contingent on cooperation on returns and readmission in the Migration Partnership Framework approach has been questioned by the European Parliament (EP) and others, arguing it represents a contradiction with aid effectiveness principles which for this reason risk losing ownership and engagement of partner countries.

Politico gave the Maltese Presidency a high mark for its performance and negotiating ability on Migration and Neighbourhood issues (7 out of 10),[24] highlighting as achievements the European Travel Information and Authorization System (ETIAS), the new EU Agency for Asylum Regulation (EUAA), visa liberalization for Georgia and Ukraine, and the revamping of the EU Return Policy with a particular focus on Libya. Undoubtedly, these results are consistent with the leadership position that Malta acquired during

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[24] Politico (2017).

2015/2016 due to the relevance of the Valletta Summit[25] after the approval of the European Agenda on Migration (EAM). However, the EU asylum *acquis* reform remains very much work in progress; a sensitive file to be dealt with by the next Presidencies.

European Migration Agenda and Common European Asylum System: Work in Much-Needed Progress

Following the priorities set out in the European Agenda on Migration (EAM) (May, 2015) and the subsequent first and second implementation packages – which brought about, among other measures, the Council Decisions on relocation (September, 2015) – the Commission Communication on the reform of the Common European Asylum System (CEAS) was published in April, 2016.

On 4th May 2016 and 13th July 2016, the Commission submitted seven legislative proposals aimed at reforming the CEAS.[26] During its Council Presidency, Malta led the examination of the seven proposals, initiated by the previous two Presidencies – those of The Netherlands and the Slovak Republic. The Maltese Presidency opted for a thematic approach for the revision, given that a number of issues included in many of those proposals were cross-cutting and closely inter-linked: namely, the Qualification Regulation (QR), Asylum Procedures Regulation (APR), Reception Conditions Directive (RCD) and Dublin IV Regulation (Dublin IV). At the same time, from what had started as a 2-package proposal in 2016, the Maltese Presidency inherited the packages somewhat reshuffled according to the progress achieved – with Dublin IV having moved from the first to the second package. This was not due to its reduced importance: quite the contrary, in fact, it was rather because of its importance as the corner stone of the CEAS that the discussions – and also disagreements over it among Member States – had significantly slowed down progress on the negotiation of Dublin IV.

The issue of solidarity and responsibility-sharing among Member States with regard to processing and hosting asylum-seekers remained at the core of the discussions – in other words, nothing has changed in the application of the Dublin regime, whose core principle is that the responsibility for examining an asylum claim lies with the Member State which played the greatest part in the applicant's entry to the EU. In most cases this means it is the Member State of first entry.[27] The Commission proposal to reform the Dublin

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[25] Fernandez, B. (2016).

[26] The recast of the Dublin Regulation (Dublin IV) and of the EURODAC Regulation, a proposal for a Regulation on the establishment of the European Union Agency for Asylum (EUAA), a proposal for a Regulation establishing a common procedure in the EU, a proposal for a Qualification Regulation, the recast of the Reception Conditions Directive and a proposal for a Regulation establishing a Union Resettlement Framework.

[27] European Commission (2017e).

Regulation did not revisit the responsibility criteria of the current Dublin III mechanism. The proposal, however, included a "corrective fairness mechanism" of relocation[28] under which asylum seekers would be subject to a relocation scheme from the country in question only after the potential applicability of the "safe third country" concept has been ruled out in their case.

Even though the proposal was subject to significant changes proposed by the EP during the Maltese Presidency as well as significant efforts towards cluster-agreements around themes – the file of this proposal was handed over to the Estonian Presidency without much overall progress achieved, most notably on the principle of solidarity. To date, the latter remains at the core of persisting differences in Member States' discussions on the entire CEAS reform, impacting progress also on other instruments, especially the forthcoming APR.[29] Reaching agreement on Dublin IV is thus urgently needed not only to unblock the stalemate on the related instruments, but also to allow for the institutionalization of the Emergency Relocation Mechanism.[30]

At the furthermost end of the progress spectrum in terms of potential backing by EU Member States (EUMS) under the Maltese Presidency, was the draft Regulation on the establishment of the EUAA which found principle agreement on all its key tenants. The Commission proposed the transformation of the European Asylum Support Office (EASO) into a full-fledged agency, the European Union Agency for Asylum, with a wider mandate, putting the Agency in charge of operating the corrective fairness mechanism under the proposed Dublin IV, as well as ensuring greater convergence in decision-making and standards between Member States' asylum systems. The text remains to this date, the most advanced among the seven instruments; its adoption will now primarily depend on the agreement reached by EUMS on the other instruments of the CEAS package.

In its final report to the Council on the progress in the CEAS reform in June 2017, the Maltese Presidency noted that "a consensus had emerged among Member States to support a comprehensive approach of which the reform of the CEAS was just one aspect",[31] adding that "policies tackling migratory flows outside the EU, external border management and a strengthened returns framework would need to be enhanced in parallel with the asylum law reform".[32] In the latter priority areas, important efforts were made and achieved under the Maltese Presidency, including, but not limited to, the

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[28] The mechanism needs to be triggered in Member States facing particular pressure.
[29] European Commission (2016b).
[30] Council Decision (EU) 2015/1601.
[31] Presidency of the Council of the European Union (2017a).
[32] *Ibid.*

Action Plan on Measures to Support Italy,[33] the most recent amendment to the Schengen Borders Code,[34] as well as the Entry/Exist System and ETIAS proposals[35] –   which were all adopted or significantly progressed towards regulating migration. On the EU external dimension, this was achieved through successful implementation of the EU-Turkey Statement,[36] and the adoption of the Malta Declaration. On the migration "facilitation" side, notable successes include the progress made on the Blue Card Directive revision (for qualified professionals), and the successful conclusion of the visa liberalization negotiations with Ukraine and Georgia – essentially allowing visa free travel for the nationals of the two countries in exchange for readmission from the EU.

Meanwhile, migrants in vulnerable situations with specific protection needs and/or asylum-seekers requesting international protection – seeking access to the EU – are still awaiting legislative and policy reforms addressing their needs, most notably through the Schengen Visa and Borders Code reform.

Furthermore, the above-mentioned Maltese Presidency June 2017 progress report also noted a general understanding that the reformed CEAS should ensure the right balance between responsibility and solidarity. In other words, "Member States would need to fully implement the acquis, the asylum system should be efficient, avoiding pull factors and discouraging secondary movements, and it should deliver solidarity effectively and efficiently when needed, in particular when a Member State finds itself under disproportionate pressure or adversely affected by unforeseen events".[37] This line was expanded on and reinforced in the Conclusions of the Council meeting held later that same month.[38]

EU Return, Readmission and Development Policies:
Complementary or Contradictory?

During 2016, the efficiency and effectiveness of the EU return system and policy were under serious scrutiny. Even if EU return rates (i.e. enforced return rates as a percentage of the number of removal orders) to third countries increased from 37% (2015) to 46%,[39] it was still not seen as good enough considering the inflows. The European Migration Network (EMN) identified a number of challenges that EUMS encountered in the return of

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[33] European Commission (2017c).
[34] Council of the European Union (2017b).
[35] ETIAS Europe (2017).
[36] For more info see https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/ european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf
[37] Presidency of the Council of the European Union (2017a).
[38] European Council (2017a).
[39] Eurostat.

rejected asylum seekers that are affecting the effective enforcement of return decisions.[40] In brief, the current obstacles are four-fold:

(a) practical (identity determination in the absence of travel documents, individual resistance to return, volatile security situation in some countries of origin.);

(b) legal (procedural safeguards allowing for late-stage appeals and judicial reviews, impossibility for EUMS to establish contact with the authorities of the country of origin before the asylum procedure is closed.);

(c) medical (greater prevalence among asylum seekers than other returnees); and

(d) political (national pressure not to implement removals, and unpopularity of readmission in third countries). Currently, the EUMS are coordinating the implementation of their national return programmes via the AMIF funded European Reintegration Network (ERIN), to reduce costs and to establish common approaches for the provision of reintegration assistance to returnees, whether voluntary or forced. This is in line with what IOM has been advocating for: more harmonization in the field of assisted voluntary return and reintegration (AVRR) as a means of limiting situations where migrants returning to the same country of origin under different programmes would receive different assistance packages.[41] Furthermore, this will reduce the so-called "return shopping", whereby rejected asylum-seekers and irregular migrants seek those EUMS with the most beneficial return package schemes.

After the Malta Summit,[42] the EU Return Policy was reviewed to analyse the application of the legal, operational, financial and practical tools available at EU and national levels, in order to identify how to increase return rates. A month later, the Commission adopted a Recommendation for EU Member States on "making returns more effective when implementing the Directive 2008/115/EC", and a Communication on a Renewed Action Plan on Return (RAPR). According to that Communication of 3rd March 2017,[43] "competent national authorities in the Member States need to apply the standards and procedures set out in the Return Directive in a more effective and direct way when carrying out returns in full respect of fundamental rights and safeguards for a dignified return in line with the Recommendation." The Communication outlines two areas where action is required: making national

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[40] EMN (2016).

[41] IOM has developed an *integrated approach to reintegration assistance* together with Member States and development actors with a view to offer needs-based reintegration assistance to returnees and communities of return, in order to ensure high quality assistance towards dignified return and reintegration. More info at: http://www.iom.int/sites/default/files/our_work/DMM/AVRR/Towards-an-Integrated-Approach-to-Reintegration.pdf

[42] European Council (2017).

[43] European Commission (2017a).

administrative systems and return procedures more effective, and overcoming the challenges of readmission.[44] In order to tackle the former, the Recommendation includes a series of practical measures aimed at improving the return system through a more uniform implementation of the Return Directive by EUMS. The Renewed APR proposed increased financial support to EUMS (EUR 200 million in 2017) for national return efforts (including assisted voluntary return and reintegration programmes) as well as specific European return and reintegration activities. It also proposed improved information exchange to enforce return using the Integrated Return Management Application (IRMA); increased exchange of best practices to ensure reintegration packages are consistent among all EUMS; and the offer of full support to EUMS by the European Border and Coast Guard Agency on pre-return assistance, including the strengthening of its return support unit and setting up commercial flight mechanisms for financing return (by June 2017) as well as training for third country authorities on return (by October 2017). In this context, there is concern that the Return Directive's procedural safeguards will be reduced, while detention will increase. In preparation for the negotiations leading to the Global Compacts on Migration[45] and Refugees, civil society and International Organizations are advocating for alternatives to detention (especially for children[46]), which they believe are linked to higher uptake of assisted voluntary return and reintegration (AVRR),[47] as well as multidisciplinary best interest assessment in return decisions for unaccompanied children. The International Organisation for Migration's (IOM) experience has regularly shown that the use and implementation of AVRR programmes has generally improved the cooperation and dialogue with all countries involved along the return spectrum and thus facilitated administrative aspects such as the provision of travel documents.

The RAPR builds on the 2015 Action Plan on Return, which announced that EU assistance and policies should be used as incentives to stimulate the partner countries' willingness to cooperate and thus increase the EU's leverage on readmission. This translated into the Migration Partnership Framework approach proposed in June 2016, which aims at achieving joint management of migration with countries of origin and transit, with an initial focus on Ethiopia, Senegal, Mali, Nigeria and Niger. Following a series of high level dialogues, cooperation on readmission obligations is now an integral part of the EU's renewed political dialogue with third countries.

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[44] Readmission is the act by a State accepting the re-entry of an individual (own national, third-country national or stateless person), who has been found irregularly entering or being present in another State. Readmission can only happen after a return decision has been made, in accordance with the procedural guarantees set by the Return Directive and the relevant EU asylum rules.
[45] IOM (2017a).
[46] OHCHR (2012).
[47] International Detention Coalition (2017).

While some countries of origin cooperate on the readmission of their nationals (e.g. Georgia), in line with their obligation under international law (and for ACP countries also under Article 13 of the Cotonou Agreement), many others do not cooperate in a way that is satisfactory for the EU.

The Directorate General on Migration and Home Affairs of the Commission (DG Home) and EUMS try to use tailor-made approaches, identifying the interest, incentives and leverages at stake with a third country in order to achieve targets and commitments, and to offer specific support measures – such as effective reintegration of returnees – so as to ensure better management of migration. However, this approach has been widely criticized. Along with the non-governmental organisations (NGOs) active in the migration and development fields, the EP opposes aid conditionality dependent on partner countries cooperating on return and readmission. The Joint Way Forward (JWF)[48] on migration issues between Afghanistan and the EU, an informal readmission arrangement, is a case in point. The EP is concerned that these kinds of arrangements are being used to avoid democratic scrutiny of the negotiation process, the actual operationalization of returns, and the impact on returnees when the country is not safe, while institutional structures to receive and reintegrate returnees are lacking.[49]

Migration Governance in Partnership with Africa

Addressing the current migration challenge without jeopardising development policy achievements and objectives, subordinating it to foreign policy goals on security and migration control was one of the key issues of the revision of the European Consensus on Development (ECD).[50] Specifically, the EP has repeatedly suggested the use of need and efficiency based criteria for the allocation of conditionality-free development assistance linked to migration, while focusing on promoting inclusion and economic opportunities, democracy building and good governance.[51] In June 2017 the new ECD[52] acknowledged

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[48] The Joint Way Forward (JWF) was signed in October 2016 after six months of dialogue between the EU and Afghanistan. It is a non-binding document that does not create obligations since it is a declaration of intent. The Commission believes that "it represents a joint political engagement to manage a complex phenomenon via a structured dialogue, since it has a comprehensive approach (facilitate return, awareness raising campaigns, reintegration assistance, and support to Afghan Government in breaking smuggling business model), and does not cover refugees but those irregular migrants without a valid claim to stay."

[49] With the Lisbon Treaty, the EP has an essential role in the conclusion of readmission agreements since it has the right to veto these. The LIBE (Civil Liberties, Justice and Home Affairs) Committee of the EP regularly calls for a detailed examination of the situation in the countries with which such agreements are negotiated. It demands to be informed and consulted regularly from the beginning of the legislative process to the actual granting of the mandate to the Commission by the Council.

[50] European Parliament (October 2016).

[51] European Parliament (April 2017).

[52] Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting with the Council, the European Parliament, and the European Commission (8th June 2017).

the central role of migrants as drivers of the global economy, but most importantly it reiterated that short- and long-term cross-sectoral interventions, policies and legal frameworks that meet the needs of both migrants and host populations, and ensure their safety, are essential elements of migration management. In this area, significant steps were made at the Valletta Summit (November 2015), with the adoption of an ambitious action plan that would step up efforts to address the root causes of irregular migration and forced displacement. Since then, the EU has made an effort to consolidate migration as a key part of EU foreign policy dialogue, building on the lessons learned in 2016, and focusing on "migration partnerships" in the political governance of international migration.

Malta contributed €250,000 towards the EU Emergency Trust Fund (EUTF), which was divided between two specific windows: the Horn of Africa and North of Africa.[53] The EUTF is funding a joint EU-IOM Initiative for migrant protection and reintegration in Africa along the Central Mediterranean migration routes covering 14 countries, including Libya.[54]

In addition, the Commission launched a new European External Investment Plan (EEIP) in September 2016, and its regulation was developed during 2017. The EEIP will provide a long-term holistic approach to improve investment in Africa and the EU Neighbourhood in order to promote sustainable investment and tackle some of the root causes of migration. Ultimately, it will link financial assistance (EUR 1.5 billion), technical cooperation, and policy dialogue with countries of origin.

Conclusions

This article did not touch upon the creation of much-needed additional safe and legal pathways to the EU for persons entitled to international protection (as well as those seeking other forms of protection), i.e. humanitarian admission and private sponsorship. Clearly, it is paramount that progress is made on all the aspects of the CEAS. This would testify to the integrity of the Union Project when it comes to the protection of those not only in need of it, but entitled to it by the mere application of existing international law.

The Valletta Summit between the EU and Africa was an important first step towards meeting migration challenges in a spirit of mutual responsibility. The five clusters of the Valletta Action Plan taken together presented a blueprint for strengthening cooperation between both continents. A balanced partnership with genuine co-ownership and mutual trust must consider the

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The ECD is in line with the Sustainable Development Agenda, which clearly recognizes the positive contribution of migration and mobility to inclusive growth and sustainable development.
[53] European Migration Network (2016).
[54] European Commission (2017d).

needs and interests of countries of origin, transit and destination, as well as the migrants themselves in order for migration governance to work. Increasing the legal pathways into the EU beyond the Blue Card Directive will be the natural next step for a European Commission and an EEAS that have experienced first-hand the chaotic effects of ad hoc emergency measures.

On a diplomatic level, it will be essential that cooperation moves beyond the current focus on return and readmission and progresses further toward enacting shared commitments on development, mobility and protection issues in support of comprehensive approaches to migration governance both within and outside the European Union. Making aid delivery contingent on returns and readmission could potentially undermine efforts to address underlying drivers of irregular migration and forced displacement such as poverty and state fragility.

As for the EU asylum reform, the CEAS package remains an urgent pending negotiation task. In order to make headway, the EUMS would need to consider the concept of solidarity not only in the context of this notion among EUMS, but also in relation with the global community of those countries hosting refugees and asylum-seekers, invoking International Law on responsibility-sharing[55] as well as recalling the global commitments made under 2016 New York Declaration for Migrants and Refugees. Finally, EUMS would need to balance "solidarity in regulation" with "solidarity in facilitation and protection", since the least contentious place to start is by ensuring a system facilitating access, reception and protection of refugees.

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