

Q&A: Trending Issues on Migration

The EU Refugee Policy in the New Legislative Term: What to Expect?

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- The political controversies in the European Council and the transition to a new legislative term mean that for more than a year the EU's refugee and migration policies have remained essentially at a deadlock. The newly elected decision-makers at the EU level face enormous challenges when it comes to migration and refugee policies. The number of refugees worldwide continues to rise.
- The political decisions of the coming months and years are critical, not only in terms of the asylum and refugee policies of the European Union, but also for the long-term stability and urgently needed development of the global refugee and migration regimes. The credibility of the EU as a defender of human rights and a representative of global solidarity is also at stake.
- There remains scope for an agreement on reform to the Common European Asylum System (CEAS), even as regards the question of how – in a spirit of voluntary solidarity – to divide responsibility. However, when the external dimension of the migration and refugee issue is examined it seems likely that the policy of strict isolation will be maintained. This approach views the decline in the number of arrivals in Europe as the sole yardstick of success, and ignores the many risks which are associated with a policy of externalisation. If these continue to be ignored, we may well witness the erosion of the global refugee regime.
- A course correction is urgently required. Future decision-makers should return to an honest, evidence-based debate which fully respects European law and international obligations. Responsibility should be redistributed more equitably, and decisions should be reached within the appropriate EU institutions.

1. What are the challenges facing the new decision-makers at the EU level?

The rightward drift in several EU Member States, and therefore also in the European Council, led in the preceding legislative period (2014-2019) to a lengthy and paralysing conflict over how to deal with refugees and migrants. This conflict brought EU institutions to the brink of complete standstill. The disputes themselves often revolved around ideological ideas quite distinct from actual events and challenges. Right-wing and populist groups were able to frame the narrative around refugees and migration as primarily one of threat, which translated into widespread press coverage and electoral success. Progressive political groups were often too timid in their approach, which had serious implications for refugee and migration policies on a European and global level.

Attempts at urgently needed reforms to the Common European Asylum System (CEAS) have not succeeded. In spite of a common legal framework (see box) the chances of someone being recognised as meeting the criteria for asylum differ still widely from country to country. The same applies to reception facilities and access to language courses and integration measures. Furthermore, the distribution of asylum seekers and refugees among EU Member States is extremely unequal.

As there is no effective mechanism for correcting this imbalance, it leads to repeated conflict, and to policies which aim to make a particular state as unattractive as possible, so as to shift the responsibility to other Member States. This conflict has existed for many years, but reached unprecedented intensity in the previous legislative term. Though the Ad Hoc Relocation Programme was passed, theoretically providing for the relocation of as many as 160,000 asylum seekers on a short-term basis, ultimately only around 35,000 asylum seekers were ever relocated. The conflict escalated as several Central European states, in contravention of a legally binding Council decision – which was passed for the first time by the majority principle – refused to take in asylum seekers from Italy and Greece. This conflict still has not been resolved.

At the same time the EU Commission began in the spring of 2016 a new attempt at comprehensive reform of the Dublin Regulation and the entire CEAS. Despite intensive debate and numerous model proposals, no agreement on reform to the Dublin Regulation could be reached. The Juncker Commission gave up all attempts at finding a compromise in the autumn of 2018, handing over the problem to the new Commission. As a result, all other elements of the CEAS reform package were likewise blocked, though broad agreement

Common European Asylum System (CEAS) – Existing Provisions

The legal framework currently consists of the following regulations and directives:

- Dublin Regulation
- Eurodac Regulation
- Asylum Procedures Directive
- Reception Directive
- Qualification Directive
- Temporary Protection Directive (never applied)

Consequences for asylum seekers include i.a. further legal regulations:

- Return Policy
- Family Reunification Directive
- Schengen Borders Code

Two institutions and a financing instrument also belong to the CEAS:

- The European Asylum Support Office (EASO)
- The European Border and Coast Guard Agency (Frontex)
- The Asylum, Migration and Integration Fund (AMIF)

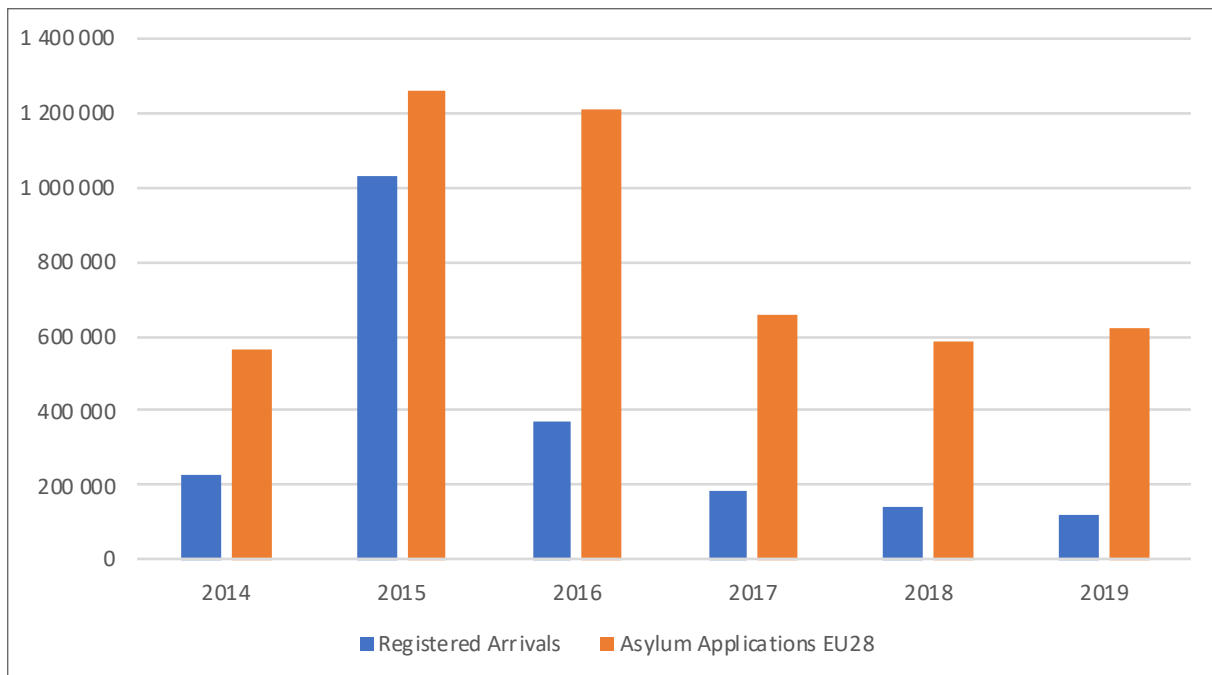
had been reached on numerous pieces of legislation. A number of Southern and Eastern European states were willing to vote for new legislation only as part of a complete package.

The internal paralysis of the EU results in great challenges with regard to external migration and refugee policy. The number of people in need of protection continues to increase worldwide: By the end of 2018 the United Nations Refugee Agency, the UNHCR, had registered more than 70 million forcibly displaced persons, of whom 26 million were refugees. The number of particularly vulnerable refugees with urgent need of resettlement also continues to increase (2020: 1.44 million). Millions of refugees are enduring ever longer periods of displacement. The primary host countries – i.a. Turkey, Pakistan and Uganda – face enormous challenges which they are unable to meet alone. Repeated commitments to undertake a more equal distribution of responsibility, most recently within the framework of the Global Compact on Refugees, have thus far been insufficiently met by European nations and other industrial nations of the global north. The situation is aggravated by the step-by-step withdrawal of the USA under President Donald Trump from the global refugee regime. One country which merits particular attention in the European context is Turkey, which currently hosts around four million refugees, and threatens to reduce its support.

The EU and its Member States provide substantial and growing support for humanitarian aid, the protection of refugees and economic development. These sums, however, are far from sufficient to cover the actual costs. The UNHCR's budget, for instance, has in recent years only been half covered. While it is true that the number of resettlement places provided by the EU has slightly risen, these still provide for only a very small proportion of those in need.

In contrast, there is political agreement on the EU level that further measures should be taken to keep asylum seekers and other undesirable migrants off European territory. The already existing instruments have been significantly expanded, and the financial resources at their disposal have been increased. One example of this policy is the cooperation with authoritarian states on the frontiers of the EU or along transit routes, such as Turkey, Libya, Morocco, Niger and Sudan, with the aim of ensuring that third-country nationals should be prevented from travelling on to European territory, regardless of any potential right to asylum. The construction of further border protection infrastructure, the removal of state-supported maritime rescue, the criminalisation of civilian maritime rescue operations and the illegal pushbacks conducted by several EU states also have the aim of permanently reducing migration and refugee movements towards Europe.

Arrivals and Asylum Applications in the EU



Source: Eurostat/UNHCR 2019, author's own compilation. Included are recorded arrivals at the coastal borders of Italy, Greece, Spain, Cyprus and Malta, as well as at the land borders of Spain and Greece. The values for 2019 are an estimate by the author based on data available up to October 22nd 2019.

The measures taken by the EU have contributed to a fall in the number of people seeking asylum in Europe. This reduction is particularly apparent when considering the number of recorded arrivals on Mediterranean routes, where a clear decrease can be observed (see chart above). The usefulness of this data is limited, however, as it shows only a small part of overall migration taking place. It takes no account of persons who enter unobserved or with forged identity papers, nor of so-called visa overstayers. The number of asylum applications has roughly halved since the exceptional years of 2015/2016. With around 600,000 new applications per year, it seems likely to remain at a high level for the foreseeable future.

To date, the policies of the EU have therefore been only partially successful – if judged by their own criteria of effectiveness – and at significant resource cost. They neither prevent irregular migration nor channel it into regular pathways, nor do they fulfil EU obligations in terms of global refugee protection. A more comprehensive assessment of European migration and refugee policies

should also include a calculation of risks and political costs, which goes beyond a simple tally of the number of persons coming to Europe.

2. What political “solutions” are emerging?

Since the European Parliament elections in May, the balance of power in EU institutions has shifted further. Right-wing parties have increased their influence in the European Parliament. In addition, the political majority has become more unstable. Against this background it is unclear whether the Parliament can continue to fulfil its traditional role as a human-rights-focused counterweight to the Council, which tends to concentrate more heavily on questions of control and security. Right-wing and conservative governments continue to predominate in the Council. The Greek conservative Margaritis Schinas has been appointed vice-president of the European Commission portfolio for “Promoting our European Way of Life” which includes responsibility for, among other areas, migration and security.

Responsibility will be shared with Ylva Johansson, a Swedish Social Democrat and future EU Interior Commissioner. The European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) will continue to play an important role. Several important judgements are pending, in particular concerning cooperation with Morocco and Libya to curtail migration (for instance in the case of *N.D. and N.T. vs. Spain*, and the legal action against the pullbacks performed by the Libyan Coastguard on November 6th 2017). In the past, courts have frequently interpreted the law as giving extensive rights to migrants. Some observers anticipate the emergence of a rather more restricted judicial line, at least in the ECJ, as a result of a change of personnel – the judges are appointees of national governments. Against this overall institutional setting, it is to be expected that the current restrictive asylum and refugee policy course will continue.

In a few weeks the Commission is expected to publish a new five-year programme for the field of migration and asylum policies. In this follow-up to the Agenda for Migration the key guidelines for this policy area will be determined for the coming legislative period. On the basis of existing documents and statements, certain preliminary conclusions may be drawn. These come in particular from the ‘New Strategic Agenda 2019-2024’ which was passed by the Council in June, the statements of the Commission President-Designate Ursula von der Leyen – who has announced a new compact for migration and asylum – as well as the incoming commissioners, documents from the Finnish President of the Council, and the expectations and demands of NGOs and other observers.

Progress in CEAS Reform

Progress can be expected in CEAS reform, though the battle lines from previous years’ conflicts still exist. Because of high expectations, helped by the reduced number of arrivals, a modest lowering of the intensity of debate in many countries and the momentum of a new legislature, the passage of at least part of the CEAS package in the coming months again seems more probable.

There is, in any case, broad political agreement on many aspects of the package. It seems possible that the CEAS package will be separated into individual proposals, some of which will be withdrawn while others are passed or amended. It also seems likely that certain temporary measures will be adopted – concerning, for instance, resettlement and the Dublin Regulation – to allow time for finding more lasting solutions.

Relief for Greece in particular could soon be added to the agenda. The sticking point remains reform of the Dublin Regulation. A binding mechanism for more balanced distribution of asylum seekers across all EU Member States is not very probable, even if certain governments – most recently France and Italy – continue to press for it, and the possibility of a new and lasting escalation cannot be ruled out. More flexible, non-binding means of dividing responsibility – somewhat in the style of a ‘coalition of the willing’ – seem more likely. The agreement which has already been reached on refugees and migrants rescued in the Central Mediterranean Sea could potentially function as a test case for other groups of asylum seekers. However, it is rather improbable that any fundamental, long-term solution will be found. Furthermore, there seems to be no recognition that the preferences of those seeking asylum should be taken into account when deciding on their placement if a human-rights-compliant, resource-efficient and integration-friendly system is to be implemented. A system which does not take such preferences into account, but acts only through coercive measures and sanctions, is not sustainable. It seems likely that the European Asylum Support Office (EASO) will be further strengthened. Agreement on the CEAS package may lead, in the best-case scenario, to a further reduction in the discrepancies between refugees’ chances of being recognised as deserving of asylum, and their reception conditions.

Continued Externalisation

With regard to the external dimension of refugee and migration policies, continuity is to be expected. It seems very likely that the policy of heavily policed external borders and cooperation

with authoritarian states along transit routes, with the aim of keeping refugees and migrants away from Europe, will continue. This, at least, is what the available resolutions and statements indicate. It remains to be seen whether the systematic review of the competence of neighbouring non-EU states to take responsibility for asylum seekers – provided for in the new Asylum Procedures Regulation – will actually be adopted. Even the frequently criticised approach of instrumentalising development aid to increase states' willingness to cooperate in migration control policies is prominently featured again here.

Continued externalisation is also likely because, despite some possible progress in CEAS reform, no fundamental, substantial division of responsibility within the EU is expected. As in the past, political agreement will thus be focused more on expanding border protection and on transferring responsibility to non-EU states. Border control policies in particular have a strongly symbolic dimension: Much is done to signal control and the ability to react. It is also anticipated that the concept of extraterritorial asylum centres will return to the agenda. The precise form cooperation takes will thus continue to depend more heavily on the negotiating position of the country in question than on particular refugees' needs, or on the obligations of international refugee law. Cooperation with Turkey is particularly critical for the EU. Despite a slight increase in arrivals in Greece, and rhetorical threats from Ankara, both sides agreed in October to continue cooperation.

3. Risks and Alternatives: What are the Prospects for the Future?

Political decision makers – as well as certain sections of the press – often declare the measures adopted in migration control as a great success. Almost the sole yardstick used to measure this is the considerable reduction in the number of irregular refugee and migrant arrivals at the external borders. Other objectives of European (migration) policy, such as upholding human rights, stabilising the refugee regime, initialising development

processes and strengthening democracy, are all relegated to the background. The repercussions of such an approach are harder to quantify than the number of refugee arrivals, and their effects are, at least in the short term, almost impossible to determine. That does not, however, make them any less real. Significant risks, as well as mid and long-term consequences, are often obscured. The following list of – interlinked – risks which attend a policy aimed solely at limiting migration should be given greater consideration in the further formulation and implementation of Europe's external migration and refugee policy.

Firstly, the current border control policies, in conjunction with the cessation of state-run maritime rescue operations and the criminalisation of civilian maritime rescue efforts, as well as the extremely limited availability of safe migration options, have greatly increased the chances of refugees dying or falling victim to severe human rights abuses. Furthermore, hundreds continue to die in the Mediterranean, and probably thousands on the trails across the Sahara. Millions live a precarious, long-term existence as displaced persons, without any prospect of a decent, meaningful life. Alongside smugglers and the security forces of non-EU countries, European decision-makers are also partly responsible. However, this policy is not only extremely problematic in normative terms.

For secondly, the EU has also suffered serious losses, both in terms of credibility and reputation. It will therefore be considerably more difficult to persuade other states to respect the rights of refugees and migrants, and indeed their own populations. It may even lead to a further weakening of the international refugee regime. When major actors such as the EU and the USA – in spite of a global increase in the number of refugees – reduce their engagement and implement policies designed to shift responsibility on to others, this has a powerful signalling effect. The already weak normative power of the refugee regime will be hollowed out still further, and the commitments made in the context of the Global Compact on Refugees – to a more equal sharing of responsibility – will be called into question. It would hence

be in the self-interest of the EU to unambiguously emphasise its commitment to human rights and the refugee regime. The alternative threatens to entail further influxes of refugees and continued instability on Europe's periphery.

Thirdly, the EU's development and democratisation goals are put at risk through one-sided cooperation with authoritarian regimes with regard to controlling migratory flows. These now possess leverage over the EU, in that they can threaten further migration into Europe – something the Turkish government does on a regular basis. Through this dependence, the EU loses its ability to influence these states in matters such as security, stability or democratisation. The governments in these countries receive both legitimation and resources through this cooperation, and are able to solidify their power base. Processes of democratisation are therefore blocked. Another knock-on effect is that with regional mobility and migration hindered, it curtails the processes of economic development in countries such as Niger.

Against the background of these risks, it is clear that a rethink of external migration and refugee policies is urgently required. Moderate and progressive political groups must recover from their political shock and begin to formulate proposals for new external migration and refugee policies. In the following section four principles are formulated, which future decision makers should use as orientation guidelines.

1. First, it is necessary to return to an honest, evidence-based debate, which takes sufficient account of the complex, long-term effects on countries of origin and transit, as well as on migrants and refugees themselves. Political discussions, decisions and documents are often based only in part upon verified evidence, together with short-term calculations, and follow strong political narratives. Prominent examples include the assumed linear relationship between development aid and migration, the effectiveness of the EU-Turkey deal, and the so-called pull factor of maritime rescue operations. It is primarily the responsibility of the EU Commission to scrutinise

these claims with care, but the scientific and academic communities should also take a more active role. It is striking that statements and documents from the Commission and the Council systematically conceal, downplay or deny human rights violations and violence committed by security forces along the EU's external borders. One notable exception came in July 2019, when the President of Croatia made a statement justifying the use of 'a bit of violence' to protect the border. In order to return to a more balanced politics, it is necessary to openly discuss, frequently and intensively, which (coercive) measures are compatible with European laws and values, and which are not.

2. As a second principle, European and international law should be respected in its entirety. Indeed, representatives of EU institutions regularly emphasise how important this is. However, pushbacks of an illegal or at least very legally questionable nature frequently take place along the EU's external borders, and have been widely documented. Other circumstances which hardly seem to accord with European law include the Hungarian Transit Zone, cooperation with Libya and the conditions in Greek hotspots. Criticisms of UN organisations, courts and human-rights organisations should be taken seriously. As guarantor of all EU commitments, the Commission should be more active in penalising infractions. If it becomes clear that grave and frequent human-rights violations are taking place in partner nations such as Libya and Turkey, these should not be ignored or minimised simply because it is politically opportune. Cooperation can only be considered if the human-rights conditions in that country meet a sufficient standard. An independent body comprising civil-society representatives, academics and the United Nations should be convened to develop objective, transparent criteria and monitor compliance.
3. Thirdly, a fair, serious-minded division of responsibility, both among EU states and with non-EU partner states, is necessary. Despite

all promises and declarations, we seem to remain as far from this goal as ever. Measures to tackle this have long existed, and have been discussed at great length. On the one hand, this is a question of financial responsibility: The EU as a whole must provide greater and more flexible support to the UNHCR, host countries as well as NGOs. On the other hand, active admission policies for refugees should be developed, alongside safe and legal migration routes for those migrating for reasons of work or education. A significant, concrete increase in resources is both a signal of dependability in terms of dividing responsibility, and also a vital contribution to ensuring that migration is diverted into safe, well-ordered routes – a goal repeatedly emphasised by the EU. As for a guideline figure which would correspond to the economic and political weight of the EU in the world, we might consider the figure put forward in the EU Parliament in 2017: 20% of

the worldwide resettlement quota. This would amount to just 300,000 refugees per year.

4. Fourthly, it is of the utmost importance for the legitimacy of Europe's migration and refugee policies that these are debated and decided within the EU's political institutions. In recent years, important decisions have been decided merely within the council, or entirely outside the institutions of the EU, such as the EU Turkey Agreement. The European Parliament and Court of Justice were thus circumvented. Such practices must remain the exception. In addition, more qualified majority votes in the Council – which are in any event quite customary, and also possible in matters of asylum law – are fundamentally desirable. Decisions on sensitive topics, such as the distribution of asylum seekers, could still be based upon the principle of unanimity.

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- Monitoring national discourses on flight, migration and integration and contributing to a mutual understanding among the European countries.
- Exchanging experiences concerning integration and sharing best practices in the field of integration policies.
- Developing ideas and recommendations for a Common European Migration and Asylum Policy, as well as contributing to a rapprochement of the divergent approaches towards migration policy within Europe.

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