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"TO QUOTA" OR "NOT TO QUOTA"? THE EU FACING EFFECTIVE SOLIDARITY IN ITS ASYLUM POLICY

1. Introduction

The night between the 18th and the 19th of April 2015, more than 800 people perished in the Sicily Channel, in the umpteenth shipwreck in the Mediterranean Sea, in the attempt to reach Italy and Europe for a better life. The majority of them were coming from lands were war, dictatorship and violence are everyday reality.

To face this 'emergency' the EU Institutions decided to launch a new approach, trying to find an immediate solution to the challenges of migration from the African coasts and to develop a new step in the EU migration policy.

The aim of this post is to reflect on the relocation system proposed in the European Agenda on Migration, on which the Member States seem to have reached an agreement in the last Justice and Home Affairs Council, of the 20th of July 2015.

2. The relocation mechanism

In general, addressing irregular migration in Mediterranean concerns also on meeting the need of the people in need of international protection, with a common and shared EU approach.

The aim to have a quick mechanism – based on binding quota for every Member State – to relocate international protection seekers as soon as possible justified the adoption of a temporary procedure (proposal for a Council Decision of 27 may 2015, COM(2015) final) instead of the procedure established in the Regulation 604/2013, which apply from January 1st, 2014. The four pillars characterizing the decision are the support to Italy and Greece; its provisional nature; the need to manage an emergency situation, due to a sudden inflow of third country nationals in the European territory.

Due to the particular characteristics, and above all because of its binding nature, the opposition of some Member States was immediate. The binding nature thereof is a fundamental requirement to give the possibility to the plan to start materializing.

A different option could have been to consider the quota in the annex of the proposal as a minimum to be respected in the case agreement among the concerned Member State cannot be achieved.

With this type of solution two different possibilities exist: negotiations among Member States will be the main way to follow and the decisions' criteria of distribution will apply only in the case of failure of negotiations.

2.1 In search of the right Legal Basis: the 'sudden' question

According to the proposal, art. 78.3 TFEU will justify the adoption of a provisional measure in the case of a «sudden inflow» of migrants. For the first time the Institutions draw upon this legal basis and its interpretation is not clear, in particular regarding the meaning of "sudden": something that is «happening or done quickly and without warning» (Cambridge Dictionary On Line).

Examining the proposal some doubts arose: the data chosen by the Commission to justify its adoption are not supporting the argument of a sudden inflow. In effect, the Commission compared the situation of the year 2014 with the situation of 2013: the increasing was of the 135% in Italy and of the 123% in Greece. However, the adoption could happen – optimistically – in the second half of 2015.

It is really hard to argue that the inflow of migrants in the South of Europe happened "suddenly". What could justify the chosen legal basis could be a comparison between the first period of 2015 with the same in the year before, and a reference to the April 2015 tragedy.

In addition, a postponement of the decision' adoption could influence negatively even more the justification of the use of art.78.3 as legal basis.

In this respect, the situation could be more similar to a moment in which a «massive inflow of migrants» happens: in that hypothesis, only the adoption of a permanent instrument could be justified; the right legal basis would be different (in that case art. 78.2.c) TFEU) and an ordinary legislative procedure instead a special one has to be followed.

The reactions to the proposal where different and significant; amongst them, the Franco-German position that, first, pointed out their willingness to continue to apply Dublin rules; second, they suggested the possibility to stop the implementation of the visa liberalization process with third countries not cooperating with the EU authorities in the fight against irregular migration.

On the first point, the Commission proposed a temporary derogation from the criterion laid down in art.13 of Dublin III Regulation, on the entry and/or stay of the applicants to international protection. It is a logic decision, in full respect of the philosophy of art. 78.3 TFEU, because a temporary measure works only applying a different criterion: the relocation in a EU Member State that will decide on TCN application, instead the final decision by Italian or Greek authorities.

The second question is more systemic, connected to the Schengen *acquis* and in particular to the suspension of the Visa liberalization process, in the case of a sudden inflow of migrants, with countries not cooperating in tackling irregular migration. This was inspired by the visa liberalization process in the Western Balkans, and aims to prevent abuse of the right, which could put the EU asylum system under pressure.

In theory, it could be a positive mean to strengthen the cooperation with third States; in practice, it seems not to be coherent with the decision, whose aim is the relocation of persons in clear need of international position and not the fight against irregular migration.

2.2 Italian and Greek Obligations: only for them?

Italy and Greece will benefit from the temporary measure but this support is counterbalanced by complementary measures to be taken by the two Member States. According to art. 8 of the proposed text, «within one month of entry into force» of the decision, they have to present a roadmap to the Commission which «shall include adequate measure in the area of asylum, first reception and return, enhancing the capacity, quality and efficiency of their systems in these areas as well as measure to ensure appropriate implementation of this decision». In the case the roadmaps are not satisfying the Commission, the decision' effect may be put in suspension. Moreover, at the same time, there are no obligations imposed on the Member States of relocation in the case of unjustified refusal and this could affect the implementation of the decision: it is very difficult to consider as effective an obligation without a remedy in case of its violation.

Due to the fact that is not realistic an infringement procedure for the violation of EU Law because of the length of the procedure, the prevision of a sanction, also in an economic perspective, could have more effect on these States attitude. The hypothesis of an obligatory financial support to Italy or Greece for managing assistance to persons which relocation is refused, could act as a push factor to cooperate in the relocation system. However, it seems more like a hypothetical scenario, rather than a plausible and realistic solution.

Even though the idea is included in the Agenda on Migration, the proposal is not considering the "hotspot" approach –supported by the Franco-German position- following the idea to push the two States to create specialized detention centres to "host" migrants before their identification and the clarification of their status. In the proposal there is only reference to the need of identification, specifying that migrants unidentified and not "fingerprinted" «may not be relocated» (art. 5.5).

The EU States clearly to not trust the Italian and Greek capacities, mixing up the lack of cooperation and solidarity as an effect, instead of the cause of the actual situation. The idea that relocation and hotspots are the solution exemplifies the limits of its rationale. In reality, relocation would have been more effective, if it was sharing the weight of screening of all irregular migrants' profiles and needs, and not only focusing on those in clear need of international protection.

A problem for the coherence of the system will arise – after the identification – in the case persons waiting for the relocation are kept in detention centres: their conditions could be worse than those of irregular migrants put in detention because of, among others, serious risk of absconding (C-146/14PPU, Mahdi).

The system provided for the proposal is lack in simplicity and it could not be able to relocate in a short time people arriving from third countries; in any case, it does not mitigate the situation of first arrival. A system according to which the relocation is not linked to the nationality and the need of international

protection but on the number of arrivals could be better and with a more benefit impact.

2.3 The Relocation Criteria

Irregular migrants in a clear need of international protection have to be identified by the authorities of the countries of arrival, i.e. Greece and Italy, and the relocation will happen in the case their competence on the application exists. In that case, if belonging «to nationalities for which» «the average rate at EU level of decision granting international protection in the procedures of first instance is of 75% or above of the total number at the EU level of decisions on applications for international protection taken at first instance», they could be relocated in another Member State that will examine the case.

After this first – double – filter, the procedure will start, finding the State following four criteria proposed by the Commission to guarantee an equal relocation: first of all, the size of population – 2014 figures – that will weight 40%, because it reflects «the capacity of a Member State to absorb a certain number of refugees»; the second is the national GDP, with the same weight but with 2013 figures. In that case, the Commission points out that the absolute weight of a country «is indicative for the capacity of an economy to absorb and integrate refugees».

The third criterion is on the efforts made by the Member States in the field of assistance and hospitality in the recent past: following the proposal, the average number of spontaneous asylum application and the number of resettled refugees per one million inhabitants over the period 2010-2014 will weight 10%. Finally, the unemployment rates in 2014 that will weight 10% and that – in theory – reflects the capacity to integrate refugees.

The Commission efforts are a positive attempt to include all the States in burden sharing. However, it has to be pointed out that migrants' integration justifies the adoption of two criteria, GDP and the unemployment rates. The GDP (2013) is weighting four times more than the unemployment rate in a more recent period (2014) for a relocation that will happen in half 2015.

Furthermore, the four criteria do not take under consideration the national efforts on management of the external borders, that diverge from resettlement and hospitality efforts: Member States not benefiting from this decision but under pressure in managing an important part of EU external border – like Bulgaria or Hungary – could probably have better received the proposal, only if all their efforts were acknowledged as well.

2.4 The procedure

The provisional procedure would take place for 24 months from its entry into force. In theory, it shall take no longer than one month from the time of identification. In case of non-respect of this timeline because of the responsibility of the Italian or Greek authorities, the procedure could be stopped. At the same time, no solutions are provided in case of liability of the State of relocation.

The decision will apply, *ratione personae*, to third country nationals in clear need of international protection, once they will be identified and fingerprinted by the Greek and the Italian authorities, after

the date of publication of the decision and once the competence of the two member States' is ascertained. What is more, the decision will apply to a number of Syrian and Eritrean citizens, since, according to the project of art. 3.2, «relocation […] shall only be applied in respect of applicants who belong to nationalities for which […] the average rate at EU level of decisions granting international protection in the procedures at first instance […] is […] of 75% or above of the total number at EU level of decisions on applications for international protection taken at first instance». Considering an average rate at the EU level is a positive element, although this high rate means that the relocation will be for people with clear status.

Once identified, the third-country nationals have to be relocated in different Member States. The implementing decision calculates how many persons every State have to host in the concerned 24 months; in the respect of a maximum of 40000, Italy (24000 max.) or Greece (16000 max.) and the EASO – not the Member States of relocation – will share the decision on the final destination. However, according to the outcome of the Council meeting that took place the 20th of July, the governments decided on the relocation of 32256 persons, committing to agree on the relocation of remaining 7744 persons by December 2015.

In particular, after the identification, Italian and Greek authorities – at regular intervals – shall identify the applicants to be relocated, and they shall keep the Member States and EASO informed about the number of relocated. After the communication, the concerned Member State shall indicate the number of immediate relocation in their territory and any other relevant information. On that basis, acting as soon as possible, Italy and Greece shall take the final decision on every single case. The concerned persons have to be informed about the evolution of the procedure and, according to the application of art. 28 of reg. 604/2013, they have the right to act against the decision of relocation, but not in relation to selecting or refusing the country of final destination.

The proposal provides for a compulsory mechanism for the Member States, that do not have the right to refuse relocated persons, except in the case of national security or public order concerns, after an individual evaluation of the risk. However, as it was mentioned before, there are no sanctions in the case of violation of this obligation by the Member States.

Criteria of selection could be subject of negotiation between national authorities, EASO and liaison officers in Italy and Greece: the approach could be different from the two south European States, although the part of the "whereas" of the decision suggests to consider «specific qualifications», like language or professional skills that could facilitate their integration into the State of relocation (whereas 24 of the proposal). In that case, risks of distinction between poor and well-educated people still exist.

In any case, people in vulnerable positions have to be considered as a priority (art. 5); furthermore, the State must consider the best interests of the child and family unity in the place of relocation.

3. Final Remarks

The Commission' Proposal represents an important step in the implementation of the principle of

solidarity, as well as comprehending the need for cooperation, burden and responsibilities sharing in the EU action. More solidarity and more cooperation mean more European Union and less individual role for the Member States, with actions of questionable success.

Notwithstanding the critical remarks, and the limited practical impact, the proposal has to be considered positively, as a further step in building a genuine and integrated EU asylum policy.

However, some aspects require clarification or a better solution before the definitive submission for the Council' approval.

Firstly, the fact that there is an unbalanced situation between Greece and Italy, from one side, and other Member States, from the other side. If the southern countries have to respect the obligations set with the risk of having the mechanism suspended, there should clear practical consequences for the Member States that refuse a relocation plan without justified reason. The risk of a very difficult implementation of the mechanism really exists.

What is more, it is important that the decision clarifies the suspensive effect of an action against the relocation' decision, otherwise the respect of the "one month" duration of the procedure could be impossible.

The number of relocated persons has to be in connection with periodical arrivals and not a fixed quantity, which overlooks the reality in the concerned Member States. Moreover, the mere fact of establishing a set number diverges from the idea to support in the case of a sudden inflow but it seems more relevant for a massive situation.

Furthermore, the criteria chosen to share relocated third-country nationals among the member States contribute to have a system as neutral as possible; but there is the need to consider more the pressure to which Member States other than whose who benefit of the decision are subject to and their efforts to guarantee the management of the EU external borders.

Finally, the selection of appropriate legal basis calls for further reflection. Justifying the adoption of a decision, in late 2015, with reference to data collected in 2014 and compared with 2013 is the weak part of the reasoning: is this the demonstration that there was not a sudden situation but "only" a massive inflow of migrants?

In this case, art. 78.2.c) TFEU could be the right legal basis, instead of art. 78.3 TFEU. A reference to the 2014 and 2015 situations could have been a better and more appropriate solution to use and to implement art. 78.3 TFEU. It will help the adoption of a measure the importance of which goes beyond the migration policy: a failed agreement will impact the Schengen philosophy and, consequently, the free movement of person, one of the four pillars of the European Union system.

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