A mechanism for early warning, preparedness and crisis management in the Dublin area –

Commission Services' Non-Paper

The present non-paper aims at providing guidance on the implementation of the early warning, preparedness and crisis management mechanism. It takes into account the reasons and objectives in Article 33, and seeks to provide some clarity regarding the issues left unaddressed or not expressly addressed or detailed in the legal provision itself. It attempts to strike the right balance between the need to put in place a mechanism which builds trust and adds value within the CEAS, and one which builds as much as possible on existing structures and instruments in order to avoid creating unnecessary administrative hurdles. It is without prejudice to the powers conferred by the Treaty on the Commission to oversee the implementation of EU law.

Purpose and scope of the mechanism

The mechanism is geared towards three main policy objectives:

- **Identifying concerns** that the smooth functioning of the Dublin system is jeopardized (or is likely to be) as a result of:
  1. particular pressure on, and/or
  2. deficiencies in the asylum systems of one or more Member States.
- **Ensuring that the Member State concerned addresses the deficiencies** giving rise to these concerns early on, thus enhancing responsibility within the Dublin system;
- **Steering solidarity** and support in order to assist Member States' national systems under strain, and the asylum applicants. The Commission and EASO will work hand in hand and ensure coordinated provision of assistance to the Member State concerned as appropriate. The Council and Parliament will equally offer guidance in this respect.

The mechanism instituted under Article 33 can thus be best described as a mechanism of course-correction, meant to ensure the smooth running of the Common European Asylum System.

Division of roles

Article 33 provides, implicitly or explicitly, for four types of roles:

- **Data collection and analysis** – EASO will play a central role in this respect, though the sources of information to be taken into account when deciding whether or not to trigger the mechanism will almost invariably be various and extend beyond EASO's remit (as explained above).

  In this respect the paper *Reflection on the implementation of Art. 33 of the recast Dublin Regulation and the role of EASO in the field of data collection and trend analysis* discussed and approved at the EASO's 9th Management Board of November 2012 details EASO's role and functions under Article 33.

- **Decision making** – Article 33 provides an explicit legal basis for the Commission to take the decisions as regards the triggering of the mechanism, after consulting EASO, as appropriate, in particular as regards situations of particular pressure.

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1 "A mechanism for early warning, preparedness and crisis management", former Art. 31 "Temporary suspension of transfers" in the Commission proposal for a recast Dublin Regulation.
• Political supervision – the Council has an important role in the mechanism in conformity with its role under the Treaties, in particular as regards the provision of political guidance. The European Parliament will be equally involved in the mechanism, in particular as regards political discussions over situations of crisis and solidarity decisions. Both the Parliament and the Council will be regularly informed on the developments of the process and will provide guidance on measures of solidarity.

• Implementation – the task of actually drafting, implementing and reporting on the action plans in any phase of the mechanism rests with the concerned Member State, who will be supported in this by the Commission and EASO, especially through the recommendations made.

Structure of the mechanism

The provisions of Article 33 indicate that the mechanism should, in principle, unfold according to two phases, each corresponding to a specific level of severity and urgency of the challenge to the functioning of CEAS. These two phases are foreseen as the "preventive" and the "crisis management" phases, respectively.

Although not explicitly foreseen in Article 33, it is clear that in order to establish the existence of risks to the functioning of the Dublin system, a phase of gathering and analysing data must exist prior to a Commission decision requesting an action plan, so as to provide the early warning that the mechanism refers to. The data collection and analysis is thus a necessary backdrop to the Article 33 mechanism, ensuring that the process can effectively provide early warning on possible concerns.

   a) Early Warning phase - data collection and analysis

When: The data collection precedes the actual application of the mechanism.

Why: The preparedness of the Union for asylum crises needs to be enhanced. The purpose of the exercise is to structure already existing data and intelligence into a permanent and reliable flow that would allow the early warning systems mentioned before to fulfil their task in a consistent way and would constitute a solid basis for any Commission decision to address recommendations to Member States in which problems are identified.

What: The "early warning phase" of Article 33 will thus draw on existing and developing systems of data collection and analysis, bringing together expertise from across Member States, EU Agencies, UNHCR and civil society, in which EASO will play a key role.

The information the Commission relies upon and bases itself in deciding whether or not to trigger the mechanism would, if deemed necessary, also have to take into account all other relevant sources of information and intelligence, e.g. the regular reporting by Member States on the implementation of the EU legislation in the field of asylum and the data gathered and analysed by EASO in the framework of Articles 9 and 11 of its founding Regulation, the reports on the practical implementation of the asylum law and on the functioning of the Member States' reception and asylum systems by UNHCR, international intergovernmental organisations (e.g. Council of Europe) and international NGO's, jurisprudence of European courts, or information from regular or emergency visits on the ground.
b) **Preparedness phase - preventing asylum crisis**

i. **Informal dialogue phase**

*When:* In order to increase the predictability of any measures taken under this Article, the Commission envisages putting in place an informal dialogue phase to be used before resorting to the application of Article 33.

*Why:* This dialogue avoids unnecessarily resorting to the formal obligations resulting from Article 33. It ensures, in a first phase, a more flexible approach to communicate with the Member State concerned for situations where the identified risks in the national systems are not critical enough to justify an immediate request for an action plan under Art. 33. It would signal to the concerned Member State(s) that the Commission is following up on certain concerns, which, if unaddressed, might end up in a formal Article 33 procedure.

*What:* An exchange will be initiated, based on informal contacts, between the Commission and the concerned administration, addressing the issues identified, trying to clarify these issues, their severity, scope, and urgency and suggesting possible remedial actions.

ii. **Formal phase**

*When:* This phase could be triggered both in situations where the informal phase has led to unsatisfactory results in terms of remedying the identified problems, or where there are persisting problems, unlikely to be adequately addressed in the absence of a preventive action plan (PAP).

*Why:* Where, based on information provided by the early warning mechanisms or processes mentioned above, the Commission establishes that the running of the Dublin system may be jeopardized, it will make recommendations to the Member State concerned to take corrective measures, and invite it to detail such measures, together with a timetable for their implementation, in the form of a PAP.

*What:* The structure and content of the PAP will be discussed and agreed between the Commission, the Member State concerned and EASO (as appropriate). Each PAP will be uniquely designed to address and monitor through ad-hoc indicators the specific problems identified in respect of that particular Member State, at a certain moment in time and to steer support as appropriate. Unless otherwise deemed necessary, there will be no pre-established PAP-template.

A regular monitoring of the implementation of the measures agreed will need to be set in place, allowing the Commission to fulfil its reporting obligations to the Parliament and the Council, as provided for in the Regulation.

The preventive phase of the mechanism does not require compulsory action from the Member State concerned. However, where the invitation is accepted, the Member State concerned will be required to submit the PAP within a period of time following receipt of the invitation which would be appropriate to the urgency, nature and extent of the concerns identified.

The preventive phase of the mechanism could co-exist with EASO assistance which, in accordance with its Regulation, can be provided without necessary reference to the application of Article 33. In order to ensure consistent approaches at the EU level, Member States which have requested assistance to EASO to address shortcomings in their asylum or reception systems should, if invited by the Commission to draft a PAP regarding the same concerns, adequately
respond to the recommendations made by the Commission and ensure – in cooperation with EASO and the Commission – coordination of the different actions.

c) Crisis management phase

**When:** A crisis management phase would be triggered by the Commission, either when:
- it considers (on the basis of EASO analysis) that the preventive measures already implemented have failed to correct the problem; or when
- it deems that there is an imminent crisis unfolding which could not be properly addressed via a preventive action plan.

The emphasis of the crisis management will be to ensure that the Dublin system continues to run smoothly even in such circumstances, and that all applicants for international protection are treated in accordance with the rules and standards of the Common European Asylum System.

**Why:** The Commission's decision whether and when to call for a crisis management action plan (CRIS-MAP) will rely, as in the previous phase, on the information provided by the systems of warning developed by EASO, as well as other relevant sources, including UNHCR and NGO's reports, or Member States' own information (either as a result of reporting when implementing the PAP or as new information) or missions organised to Member States. A request from the Commission to a Member State to prepare a CRIS-MAP would include a set of concrete recommendations regarding the steps that would need to be taken in order to address the concerns.

**What:** Unlike the PAP, the CRIS-MAP is compulsory upon the Member State, and will have to be drawn up within a maximum period of three months from the request. Subsequently, reports on its implementation will have to be submitted at least every three months, or more often if the Commission deems it necessary for the rapid implementation of the measures envisaged to address the situation.

As in the case of the PAP, the structure and content of the CRIS-MAP will be discussed and agreed between the Commission, the Member State concerned and EASO (as appropriate) and will be uniquely designed to address and monitor through ad-hoc indicators the specific problems identified in respect of that particular Member State and to steer support as appropriate. Therefore, there will be no pre-established CRIS-MAP-template.

**In view of its significance, the CRIS-MAP will require appropriate political attention,** to be achieved by bringing the matter to the attention of the JHA Council for debate at all stages (preventive, crisis management). As foreseen in Article 33, the Commission will report/inform the Council regularly on the implementation of the action plans, based on the Member State's reports.

Eventual pre-existing assistance which is offered by EASO in accordance with the agency’s founding regulation will be fully coordinated with the CRIS-MAP in order to ensure consistency of efforts at the European level.
Threshold for triggering the mechanism and its phases - suitability test

Article 33 does not provide any explicit guidance on the threshold to be applied in order to identify which level of dysfunction or particular pressure qualifies as a trigger for the mechanism. It is for the Commission to "establish that the application of this Regulation may be jeopardized" (paragraph 1) or that "the implementation of the preventive action plan has not remedied the deficiencies identified" (paragraph 3).

It should be established in each individual case whether the Article 33 mechanism is the most suitable tool to address the identified problem. Though the complexity of situations that may arise in practice, as well as the need to allow the Commission flexibility in running the mechanism, make a precise definition of a threshold undesirable, some criteria can be identified in order to place the process on a transparent and predictable path.

The Commission intends to use these criteria for a suitability test to establish the threshold for triggering the mechanism or any of its phases:

1) The relevance of the problem identified as a risk to the application of the Dublin Regulation. Problems related to the quality of assessment decisions, reception capacity and conditions, and access to and length of the asylum procedure, due process guarantees, arbitrary detention or sub-standard detention conditions, as well as any other combination of factors that might amount to a possible violation of Art. 4 of the Charter are considered relevant for an action plan.\(^2\)

2) The severity of the problem identified. This notion implies consideration of whether the problem is serious and persistent, as well as whether it has systemic consequences. Problems likely to affect or already affecting a large number of applicants will be the main target of the mechanism.

3) The urgency of the risk. This will involve consideration of whether informal means would suffice to address the concerns, or whether a PAP or CRIS-MAP would be better suited for the purpose.

4) The vulnerability of the affected national system(s). The resilience of the system to the risks involved by deficiencies or particular pressure need to be pondered upon - in some cases the risk could be small, but so is the resilience of the system, whereas in others, despite high risks, the national system could be highly resilient.

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\(^2\) The CJEU judgment in the NS vs. UK case, though not exclusively confining all situations of suspension of Dublin transfers to breaches of Art. 4, seems to indicate it as the most obvious reason for doing so: *systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Art. 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision*; Judgment of the Court of Justice of the European Union in Joined Cases C-411/10 and C-493/10, 21 December 2011, p.86