The Common European Asylum System

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TAMPERE CONCLUSIONS

3. This freedom (to move) should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others worldwide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles, which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union.

4. The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity.

13. The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement.

14. This System should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. To that end, the Council is urged to adopt, on the basis of Commission proposals, the necessary decisions according to the timetable set in the Treaty of Amsterdam and the Vienna Action Plan. The European Council stresses the importance of consulting UNHCR and other international organisations.

15. In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union. The Commission is asked to prepare within one year a communication on this matter.

16. The European Council urges the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States. The European Council believes that consideration should be given to making some form of financial reserve available in situations of mass influx of refugees for temporary protection. The Commission is invited to explore the possibilities for this.

17. The European Council urges the Council to finalise promptly its work on the system for the identification of asylum seekers (Eurodac).

PART 1: ASSESSMENT OF THE CURRENT SITUATION

Two decades later, the outcomes of the Tampere conclusions combined the legislative and institutional reforms of the EU asylum policy, as well as ad hoc policy initiatives. The asylum legislation experienced two generations of development – specifically between 2004 and 2005, and 2011 and 2013 – to harmonise the member states' legislation and practices on qualification and procedures and reception in the form of directives, whereby the states are allowed to apply more favourable standards. It centralised the conditions for launching temporary protection. The Dublin system for the distribution of responsibility for asylum seekers among the member states, established in 1990 under an international framework, was replaced in 2003 and updated in 2013 by EU regulations. The principle of mutual trust upon which the Dublin system is based has been challenged by the European courts – both the European Court of Human Rights (ECHR) and the Court of Justice of the EU (CJEU) – and Dublin operation towards certain member states was suspended (Greece in particular) due to serious deficiencies in their asylum or reception systems. This demonstrates the failure of the objectives of the Common European Asylum System (CEAS) instruments, and the reception conditions in particular.

While the Tampere conclusions called for "open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity",[2] the EU paid insufficient attention to the human dignity of asylum seekers and refugees. In particular, the living conditions in the hotspots established on the Greek islands were in contradiction to the absolute prohibition of inhuman or degrading treatment as cited in the EU Charter of Fundamental Rights (hereafter the Charter). The CEAS has proved its limitations to protect asylum seekers in the context of rising numbers of arrivals to the EU, especially during the peak in 2015-16. It is important to stress, however, that the issue is not the number of arrivals, but rather the lack of solidarity between the member states, of appropriate institutional framework to provide asylum in the EU, and of values and fundamental rights approach in guiding the implementation of the asylum policy.

Among the ad hoc measures undertaken as part of the EU response to the crisis were immediate and long-term initiatives which aimed to stabilise the situation. Externally, cooperation with countries of origin and transit was strengthened, albeit some measures did attract criticism and were not without controversy (e.g. the EU-Turkey statement, arrangements for cooperation with Libya). Internally, the Temporary Protection Directive 2001/55/EC – which is meant for such situations – has not been activated. Instead, the EU implemented operational solutions (e.g. the hotspot approach) and a temporary yet mandatory relocation scheme, which resulted in the transfer of 34,712 persons from Italy and Greece to other member states. Relocation measures which mitigate the outcomes of the crisis have not gained support from all of the member states, as most have not accepted their allocated share of persons and some even oppose the idea frontally so that ultimately it was not effective enough. These measures were later complemented with a more successful voluntary scheme on EU resettlement from third countries, thus representing a mark of progress for the EU and strengthening its position as one of the main players in the area of resettlement.

At the institutional level, the European Asylum Support Office (EASO) was set up in 2011 to enhance practical cooperation on asylum-related matters among the member states and assisting their implementation of CEAS obligations. The Office has been providing unprecedented support to the member states affected disproportionately by participating in the asylum procedure in Greece and Italy.

Notwithstanding these important achievements, a number of vital challenges remain unresolved while attempts at making the CEAS more efficient, harmonised and stable in the face of future migratory pressures have not been successful. The European Commission issued the European Agenda on Migration[3] in May 2015 which set out further steps towards a reform of the CEAS, and tabled proposals for said reform in 2016.[4] The latter suggested replacing the current directives on qualification and asylum procedures with regulations, recasting the Dublin III Regulation No.604/2013 and the Reception Conditions Directive 2013/33/EU (RCD), extending the scope of the Eurodac Regulation No.603/2013 and establishing a permanent Union resettlement framework.

CEAS limitations lie not in the number of arrivals, but rather the lack of solidarity between the member states, of appropriate institutional framework to provide asylum in the EU, and of values and fundamental rights approach in guiding the implementation of the asylum policy.

Despite significant efforts and important progress at the technical level on the new legislative proposals – provisional agreement on the main elements was reached in 2018 –, it has not yet been possible to reach a balanced political compromise on the overall CEAS reform, in particular regarding the Dublin Regulation. This CEAS 'crisis' could possibly jeopardise the entire European construct. The problems the CEAS encounters and the solutions proposed in response demonstrate a deep gridlock of the system, as some of these solutions lack compliance with the EU's fundamental values.

The CEAS suffers from a lack of common implementation in practice rather than a deficit of new harmonised rules.

Among the main trends in the legislative initiatives of 2016 as having the intention of improving the CEAS, the following four can be identified:

► Firstly, an attempt to increase harmonisation by leaving less discretion to the member states: replacing directives with regulations, turning some optional clauses into mandatory ones by making a number of concepts obligatory (e.g. on safe third countries), replacing optional rules for more prescriptive ones (e.g. in the case of the refusal of protection).

► Secondly, a focus on the secondary movement of asylum seekers and beneficiaries of international protection. However, the root causes of such movements are not addressed enough.

► Thirdly, the absence of a mechanism of responsibility sharing that would accommodate both the preferences of

member states and applicants has not been elaborated, although sharing funds and resources are not only practically easier but also much more cost-efficient than trying to 'share' people.

► Fourthly, the proliferation of various national or transnational policy responses which involve just a few member states (e.g. the 2018 joint paper of Denmark and Austria to severely limit the right to apply for asylum in Europe; Germany's bilateral administrative agreements with Spain, Greece and Portugal on quick transfers which bypass the rules of the Dublin system[5]).

PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

Elements of the vital challenges to make the CEAS more efficient, harmonised and resilient to future migratory pressures, and which are yet to be resolved, include the following:

► **Firstly, the CEAS suffers from a lack of common implementation in practice rather than a deficit of new harmonised rules.** The divergences in the qualification for international protection are considerably visible,[6] the levels of harmonisation of reception conditions and protection offered are limited, which have often led to secondary movements. Implementing a true CEAS requires looking beyond the legislative level to consider how to make common implementation work in practice, as opposed to continuing member state-specific ways of implementation. The legal acts' mere change from directives to regulations will unlikely lead to more practical convergence among the member states. Focusing on the enforcement of the existing rules could bring more progress to the implementation of the CEAS: practical and operational measures, and the enhancement of the EASO's role, whereby member state authorities should take into account EASO analysis and guidelines; better monitoring of the implementation of current harmonised rules; harmonising the competencies of EU asylum and migration officials and judges. This would bring a more realistic change towards convergence in decision-making. The implementation of CEAS would also benefit from more active involvement of national judges, who would bring the preliminary questions on the existing instruments to Luxembourg.

► **Secondly**, the problems encountered by the CEAS and solutions proposed by the European Commission demonstrate **a deeper gridlock of the system, which is the result of its lack of compliance with the EU's fundamental values**. This issue of compliance is caused by restrictions' approach, evident from the 2016 reform of the CEAS. A number of amendments introduced in the new package of legislation, although aiming to improve the CEAS, in effect balance on the verge of compatibility with the Charter and the international refugee protection regime (e.g. expansion of the use of accelerated procedures despite possible substantive risk of inhuman and degrading treatment in the member state of first entry; possibility to reduce the requirements for protection in the context of mandatory application of the 'safe countries' concepts, which relies on an undefined notion of 'sufficient protection', detention for non-compliance with obligations, etc.).

► **Thirdly, there is a need to achieve a fair balance between the incentives and restrictions for asylum seekers in relation to the secondary movements.** The present system is constructed on the basis of a punitive approach, which was reinforced in the 2016 legislative package. In addition, there is a general lack of positive incentives for not only asylum seekers but also member states, at all stages of the procedure and beyond. This punitive approach is not likely to bring the desired changes as long as it does not address the root causes of secondary movements. On the contrary, it will exacerbate the situation by creating more serious problems. It should be noted that most of the causes behind secondary movements are objectively compelling, and result from the (in)action of member states themselves. These causes also include those that have been the object of litigation (e.g. systemic deficiencies in the reception and asylum systems, inadequate living conditions to the extent of extreme material poverty). Punishing asylum seekers or the beneficiaries of protection for moving due to a member state's failures could contravene the Union's principle of good administration.

Implementing a true CEAS requires looking beyond the legislative level to consider how to make common implementation work in practice. The legal acts' mere change from directives to regulations will unlikely lead to more practical convergence among the member states. Focusing on the enforcement of the existing rules could bring more progress to the implementation of the CEAS.

► **Fourthly, the present challenges and the future of the CEAS cannot be disassociated from the issue of solidarity** – at least, from the perspectives of in- and outside of the EU. Inside the Union, there are still no uniform concepts of solidarity or sharing responsibility fairly. The challenge lies in the continued 'sharing' of people, while it might be more effective to share the funding and move people only when it is reasonable and justified. As there is currently no system in the Union to address massive flows of asylum seekers, both internal operational capacity and workable solidarity mechanisms are necessary. If any new legislation is to be written up, it should be on responsibility-sharing of mass arrivals and of persons rescued at sea. At the operational level, the codification of the EASO's experiences in Greece and Italy on processing and viably structuring support to member states during crises is worth exploring. Concerning external solidarity, one can no longer think of solidarity as a regional public good (as envisaged in the TFEU), but rather as something requiring an international collective responsibility. In this context, expanding notions of 'safe country' is unlikely to work without embracing external solidarity.

The problems encountered by the CEAS and solutions proposed by the Commission demonstrate a deeper gridlock of the system, which is the result of its lack of compliance with the EU's fundamental values.

A. The value basis of the overall asylum policy reform

The trends and challenges mentioned above demonstrate that the 2016 reform of the CEAS is largely guided by punitive and restrictive considerations that question the basis upon which the CEAS was initially founded, including the 1951 Refugee Convention and the Charter's right to asylum. What is most needed at this stage is not 'better' legislative proposals, but a discussion and agreement on the fundamental policy principles that would guide and drive the policy reform and better monitoring of the member states' implementation of the current harmonised rules.

These observations raise the following questions:

- Which fundamental values are guiding the CEAS policy reform?
- How can these values be reconciled with the attainment of an efficient and effective asylum policy?
- Should the CEAS allow transnational responses among some member states?

INITIAL SUGGESTIONS AND IDEAS:

1. Defining the fundamental principles/values test for any asylum policy reform proposal and transnational cooperation between member states.

2. Establishing a closer link between the EU's asylum policy and the UN Global Compact on Refugees.

There is a need to achieve a fair balance between the incentives and restrictions for asylum seekers in relation to the secondary movements.

This punitive approach is not likely to bring the desired changes as long as it does not address the root causes of secondary movements.

B. EU resettlement framework and complementary pathways

Safe and legal pathways to protection in the EU should be complementary and not substitute the CEAS outright. Less than 5% of refugees considered by the UNHCR to be in need of resettlement were provided with new homes in 2018. More progress is therefore needed. The alternative pathways are not

able to meet today's demands, frequently lack protection standards and coordinating structures, and are not easily accessible for refugees. The proposal for an EU Resettlement Framework Regulation envisages a mandatory resettlement scheme, but links resettlement to foreign policy objectives of the member states and third countries' cooperation on related matters.[7] This does not necessarily ensure a focus on countries that face the most pressing needs of the most vulnerable and in need of international protection. Regarding complementary pathways (e.g. community or private sponsorship schemes), they should be designed and implemented in such a way as to include protection safeguards.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- Should resettlement be tied to the cooperation of third countries on migration issues?
- How should resettlement efforts be prioritised and the main obstacles to substantive progress eliminated?

INITIAL SUGGESTIONS AND IDEAS:

3. Linking EU resettlement policy with third countries that host the most people in need of protection.

4. Linking EU resettlement policy with the UNHCR's Three-Year Strategy (2019-2021) on Resettlement and Complementary Pathways.[8]

5. Including community or private sponsorship programmes into the EU legal framework.

C. Defining protection-related exceptions to the Dublin system's principle of mutual trust

Recent CJEU and ECtHR case-law have created protection-oriented exceptions to the principle of mutual trust upon which the Dublin system is based, which prevents member states from transferring applicants to other states. These exceptions include systemic deficiencies in the asylum systems of the host member states[9] and risk of extreme material poverty despite the stage of the asylum procedure.[10] It revealed the necessity to assess not only the general situation of asylum seekers in the member state deemed responsible but also any risk of inhuman and degrading treatment that would prevent the transfer.[11] Current EU law provides little guidance regarding the meaning of 'systematic deficiencies' or 'extreme material poverty'. Moreover, the proposal for a Dublin IV Regulation reduces the member states' margin of discretion[12] while the value of discretionary clauses is precisely so that it allows member states to guarantee when need be that human rights of asylum seekers are respected.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- If the Dublin Regulation is sustained, how should protection-oriented exceptions function in the Dublin procedures?
- What are the risks related to the reduction of member states' discretion concerning Dublin transfers?
- How can notions of 'systematic deficiencies' and 'extreme material poverty'

be linked to reception and asylum procedure rules?

INITIAL SUGGESTIONS AND IDEAS:

6. Linking the Dublin exceptions to the concepts of "adequate standard of living", to be defined in reception and qualification directives; and of "adequacy of asylum procedures" in the Asylum Procedures Directive 2013/32/EU (APD).

7. Furthering EASO guidance to ascertain when transfers should not be carried out.

8. Organising the possibility in EU law for the transferring member state to seek assurances in practice from the receiving member state that conditions are adequate for the transfer to be carried out in individual situations; as well as foresee a monitoring mechanism by EASO in case of such transfers.

D. Positively addressing the secondary movements of asylum seekers

In June 2018, the European Council considered that the "secondary movements of asylum seekers between member states risk jeopardising the integrity of the Common European Asylum System and the Schengen acquis",[13] thus underlining the importance of this issue in regard to member states' trust in each other. Secondary movements should be distinguished when it concerns asylum seekers or protected persons. The proposals for the new CEAS legislation extensively incorporate aspects related to secondary movements, mostly based on a punitive approach. For instance, according to the proposal for Asylum Procedures Regulation 2013/32/EU (APR), the accelerated procedure will become mandatory in the case of non-compliance with the obligation to apply in the member state of first entry, or a subsequent application.[14]

However, the use of accelerated procedures as a mean of punishment for secondary movement might not be compatible with the standards embodied by the Charter. Secondary movements are justifiable if there is a substantive risk of inhuman and degrading treatment in the country of first entry.[15] Furthermore, this punitive approach does not take into account the obstacles to integration after granting protection. The Dublin IV Regulation proposal suggests reducing material reception benefits in the case of non-compliance, with the obligation for asylum seekers to apply in the member state of first entry and remain there. The proposal for the Qualification Regulation also introduces stricter rules for sanctioning secondary movements.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- To what extent is the issue of secondary movements of asylum seekers between member states relevant, and what are the risks if the EU policies are to focus on it?
- Should secondary movements be differentiated between 'justified' and 'unjustified'?
- What positive incentives could be introduced to reduce secondary movements?

INITIAL SUGGESTIONS AND IDEAS:

9. Introducing the notion of 'justified secondary movements' in situations of family, cultural and linguistic considerations, dependency not covered by other criteria, particular grounds of vulnerability (i.e. children, elderly), or other circumstances related to the protection of human rights. This definition could be incorporated into exceptions to the Dublin criteria, reception conditions, the long-term residents directive 2003/109/EC, determinations of asylum procedures and the context of detention. Also, defining the 'adequate standards of living' concept.

10. Launching a study on the benefits of secondary movement of both asylum seekers and beneficiaries of protection, and including lessons learned in the relevant asylum proposals.

11. Analysing what motivates asylum seekers and beneficiaries to stay in less attractive member states and developing positive incentives at the EU and national levels to reduce the 'need' for unjustified secondary movements.

E. Aligning divergent interpretations of international protection criteria (subsidiary protection)

Despite the harmonisation of the main provisions of the recast Qualification Directive 2011/95/EU and the developing jurisprudence of the CJEU on granting international protection, differences in the interpretation of the grounds for international protection remain among the member states, in particular as concerns the application of Article 15(c) of the Qualification Directive as a ground for subsidiary protection.[16] There are differences in their assessment of the magnitude of violence required for a claimant to be considered at risk by solely being on the territory, as well as their semantic understanding relating to terminology (e.g. definition of 'serious harm to a person'[17]). The first CJEU judgment in 2009, asylum case *Elgafaji*,[18] did not bring the solution, as the practice of applying CJEU's principles diverges (e.g. the Netherlands grant subsidiary protection as long as a high level of violence is present in the country, while some member states apply the 'sliding scale' approach).

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- How could the application of the grounds for subsidiary protection be more harmonised at the practical level across member states?

- Could a more exhaustive set of rules on qualification ensure the convergence of member states' practices?

INITIAL SUGGESTIONS AND IDEAS:

12. Incorporating the 'sliding scale' assessment in the proposal for the Qualification Regulation by embedding two situations stemming from the *Elgafaji* judgment: situations of intense violence where the mere presence of the applicant would place him/her in danger, and situations of less intense violence where individual circumstances lead to the conclusion that the applicant cannot stay in the territory of the conflict.

13. Further harmonising the conditions for subsidiary protection, as provided by Article 15(c) as concerns the assessment criteria of general risk, nature of the harm, and the factors qualifying the individual risk.

F. Introducing the 'European refugee' concept

Member states currently recognise negative asylum decisions through the Dublin system, but not the positive ones. Meanwhile, a number of beneficiaries of protection move to other member states for objective reasons: family, community, language proximity, etc. The mutual recognition of positive decisions among the member states and the separation of the refugee's place of residence from the place of recognition would provide better integration opportunities for refugees. A uniform refugee status valid throughout the EU is moreover required by Article 78 (2a) TFEU, and this could translate into the 'European Refugee' concept. The current proposal to amend the long-term residents directive foresees that in the case of a beneficiary being found in a member state that did not grant protection status, without a right to stay there, the period of legal stay preceding this situation shall not be taken into account when calculating the five years necessary to qualify for long-term residence. This punitive approach will not contribute to integration but rather create more serious problems, alienating refugees from the host societies they are expected to integrate into.

The present challenges and the future of the CEAS cannot be disassociated from the issue of solidarity – at least, from the perspectives of in- and outside of the EU.

Expanding notions of 'safe country' is unlikely to work without embracing external solidarity.

What is most needed at this stage is not 'better' legislative proposals, but a discussion and agreement on the fundamental policy principles that would guide and drive the policy reform and better monitoring of the member states' implementation of the current harmonised rules.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- How could the mutual recognition of positive judgments be achieved among the member states with a view of achieving a uniform refugee status valid throughout the EU?

- What would be the positive and/or negative implications of such a recognition?

INITIAL SUGGESTIONS AND IDEAS:

14. Launching a study on the possible positive and/or negative impacts of the mutual recognition of positive decisions and introducing the 'European Refugee' concept.

15. Organising – as requested by the EU treaties' clauses on

the freedom of movement – beneficiaries of international protection's entitlement to a long-term residence status earlier to facilitate self-reliance (e.g. through job opportunities).

16. Creating special EU funding allocations for member states that host a disproportionate number of refugees who are recognised in another member state.

G. Ensuring the safety standards of asylum seekers in third states in line with the principle of non-refoulement

Even if one can understand the use of the concept 'safe country of origin' in relation to countries, which abolished the visa requirement, thus leading to an increase of unfounded asylum applications, there is a risk that this concept would also be used to send back persons into life-threatening conditions. The use of this concept, with a focus on the travel route rather than the individual reasons behind applying for protection, may endanger the compliance with the principle of non-refoulement. This risk will increase if the use of the concepts 'first country of asylum', 'safe third country' and 'safe country of origin' becomes mandatory with the new CEAS legislation.[19] The mandatory application of the 'safe country' concepts would also result in a systematic shift of responsibility for people in need to the neighbouring countries of war regions and conflict zones.

Furthermore, the introduction of the 'sufficient protection' concept without a clear definition might result in asylum seekers being sent back to situations that are incompatible with the obligations under non-refoulement.[20] It therefore remains unclear what kind of protection status is necessary in order for a third country to be considered safe. Moreover, the fact that member states can individually determine whether an asylum seeker enjoyed sufficient protection in a third country through which he or she transited – even if this protection is not in line with the 1951 Refugee Convention – might lead to concerns.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- Will the mandatory use of concepts of protection outside the EU not undermine the harmonisation of the asylum procedures?

- Can the concept of 'sufficient protection' in third countries guarantee the respect the principle of non-refoulement and, if so, under what circumstances?

INITIAL SUGGESTIONS AND IDEAS:

17. If the mandatory application of the 'safe countries' concept is introduced, mandatory guidelines to determine such countries and monitoring framework by the EASO (which will eventually become the European Union Agency for Asylum) should be applied.

18. Defining the concept of 'sufficient protection' in the context of the proposed asylum instruments.

H. Enhancing the rights of vulnerable applicants

The rights of vulnerable applicants are not fully guaranteed by the current CEAS, especially unaccompanied minors' freedom from detention. Meanwhile, international practice on this specific issue leans towards the absolute prohibition of their detention. Secondly, there is certain confusion surrounding the notions of 'vulnerable persons' and 'persons with special needs', and the different lists of vulnerability within the context of reception and asylum procedures – these should be clarified. This inconsistency results in ambiguity in the member states that have not taken a consistent approach to the procedural and reception guarantees required for vulnerable applicants under EU law. The upcoming new CEAS legislation should clarify these notions and ensure that the treatment of vulnerable persons is in line with the relevant standards. The current proposals do not bring sufficient clarity by replacing notions of vulnerability with additional categories like 'specific reception needs' and providing the exhaustive list of categories in reception but referring to individual circumstances in asylum procedures. Also, the proposal for a new RCD no longer excludes vulnerable persons (including unaccompanied minors) from detention.[21]

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- How can the rights of vulnerable applicants be better mainstreamed into the new CEAS legislation and practices of member states?
- Should the determination of vulnerability and/or special needs be based on a list of categories or individual circumstances?

INITIAL SUGGESTIONS AND IDEAS:

19. Ensuring the full exemption of vulnerable applicants (minors in particular) from the accelerated and border procedures, as well as detention.

20. Clarifying the relationship between determining vulnerability for procedures and for reception conditions.

7

I. Replacing detention measures with alternative means of control over asylum seekers

Based on international and EU legal standards, the detention of asylum seekers can only be applied when it is necessary, justified, proportionate and a last resort. International and EU jurisprudence confirms that alternatives to detention (ATDs) must be part of the examination process to ensure that detention is used as the last resort. Moreover, ATDs prove to be more effective, cost-efficient and compatible with human rights standards than detention. The grounds for detention in the RCD include vague and legally undefined concepts such as "risk of absconding",[22] yet plays a substantial role in deciding whether to detain an asylum seeker or not. It is important to clarify this concept by incorporating the recent CJEU jurisprudence.[23] The proposal for a new

RCD introduces definitions for the "(risk of) absconding",[24] an action by which in order to avoid asylum procedures, an applicant does not remain available to the competent authorities. This definition remains too abstract and subject to broad interpretation, however.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- How can ATDs be made to work in the EU?
- How could the risk of absconding be defined within the context of asylum detention?

INITIAL SUGGESTIONS AND IDEAS:

21. Including an explicit examination of ATDs as a mandatory step before any decision on detention.

22. Defining 'risk of absconding' so that it covers situations where: (a) the applicant intentionally evades the reach of the national authorities, and (b) the applicant evades the reach of the national authorities despite being informed of the obligation not to abscond and it is not possible to establish his/her intent.

J. The normative gap for persons fleeing due to environmental or climate change reasons

While climate change dominates the global political agenda, it also has relevance for refugee protection regimes. In the absence of an international agreement on the protection of persons fleeing environmental disasters/climate change consequences, several states, including in the EU (e.g. Finland, Sweden) provide certain forms of protection under their respective national laws. However, there is clearly a protection gap generally in the EU.

These observations raise the following questions:

- Should the proposed CEAS instruments envisage possible implications of the climate change on the protection of refugees in the EU and, if so, how?

INITIAL SUGGESTIONS AND IDEAS:

23. Launching a new study on the consequences and options of protecting environmental and climate refugees in the EU.

K. Harmonising both statuses of protection

Disparities in benefits granted according to the protection status between member states are one of the factors impacting the secondary movements of protected persons.[25] Furthermore, the proposal for the Qualification Regulation increases the divergence of the two statuses with the determination of the validity of residence

permits, obligatory status review and possibility to limit social assistance to core benefits for subsidiary protection beneficiaries.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

► Should protection statuses (i.e. refugee and subsidiary protection) be fully unified with regards to the rights and duration of residence permits?

INITIAL SUGGESTIONS AND IDEAS:

24. Setting standards of treatment as of EU citizens for those rights that are not within the exclusive competence of the member states.

25. Given the integration objectives, providing for the same duration of residence permits under both protection statuses: a minimum of three years for refugee status as is currently, but three years with a possibility of review in the case of subsidiary protection.

L. Further reflections

► Should a mechanism for sharing asylum seekers rescued at sea be linked to the APR?

► To strengthen the link between EU funding and integration: include integration as a priority in the upcoming Multiannual Financial Framework and earmark a specific percentage of spending for integration within the European Social Fund.

► To analyse the potential implications when postponing of the conclusion of examining an asylum seeker's uncertain situation in their country of origin, which is expected to be a temporary period of up to 15 months.[26] Such an open clause could leave a margin of interpretation for member states that is too wide, create legal uncertainty for asylum seekers and impact integration negatively.

► To clarify the application of Article 14 (4) and (5) of the Qualification Directive in line with the recent CJEU judgment in *M and Others*.[27] Also, to move these provisions to the Status Rights' section of the Directive, which would ensure that member states apply this Article strictly as a termination of "residence status" (i.e. "asylum" in the meaning of the Charter), rather than termination of refugee status or subsidiary protection.

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2. European Council (1999), Tampere European Council 15 and 16 October 1999: Presidency conclusions, para.4.

3. European Commission (2015), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM(2015) 240 final, Brussels.

[4] European Commission (2016a), Communication from the Commission to the European Parliament and the Council: Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, COM(2016) 197 final, Brussels.

[5] See European Council on Refugees and Exiles (2018), "Bilateral agreements: Implementing or bypassing the Dublin Regulation? ECRE's assessment of recent administrative arrangements on transfer of asylum-seekers and their impact on the CEAS", Brussels.

[6] E.g. The trend of different recognition rates continued in 2018, with the largest variations observed for Afghanistan (between 6% and 98%) and Iraq (between 8% and 98%). See *European Asylum Support Office*, "Latest asylum trends – 2018 overview" (accessed 06 June 2019).

[7] European Commission (2016b), Proposal for a Directive of the European Parliament of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final, Brussels.

[8] See United Nations High Commissioner for Refugees (2019), "The Three-Year (2019-2021) Strategy on Resettlement and Complementary Pathways".

[9] *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (2011), Judgment of the Court of Justice of the European Union, C-411/10 and C-493/10.

[10] *Case of M.S.S. v. Greece and Belgium* (2011), Judgment of the European Court of Human Rights, Application no. 30696/09; *Abubacarr Jawo v Bundesrepublik Deutschland* (2019), Judgment of the Court of Justice of the European Union, C-163/17; *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov* (2019), Judgment of the Court of Justice of the European Union, C-297/17.

[11] See *Tarakhel v. Switzerland* (2014), Judgment of the European Court of Human Rights, no. 29217/12.

[12] See e.g. the elimination of cultural considerations in the humanitarian clause. European Commission (2016c), Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final, Brussels, Art. 19.

[13] European Council (2018), European Council meeting (28 June 2018) – Conclusions, EUCO 9/18, Brussels, para. 11, p. 4.

[14] European Commission (2016d), Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final, Brussels, Art. 40, pp. 64-65.

[15] See *Abubacarr Jawo v Bundesrepublik Deutschland, op.cit.*; *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov, op.cit.* The Court considered it immaterial for the purposes of applying Article 4 of the Charter of Fundamental Rights of the European Union, whether such a risk arises during or after the asylum procedure in the member state. As such, it is not only asylum seekers who face risks in the first host country, but also the beneficiaries of protection.

[16] European Parliament and the Council of the European Union (2011), Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Art.15(c), p.18.

[17] This concept has been narrowly interpreted in Germany to mean the danger to life and limb, whereas the UK Courts have adopted a broader interpretation, encompassing mental trauma as well.

[18] *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* (2009), Judgment of the Court of Justice of the European Union, C-465/07.

[19] European Commission (2016a), *op.cit.*, Art. 44(1), p. 67.

[20] See *ibid.*, Art. 44 and 45 (1), pp. 67-68.

[21] European Commission (2016e), Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final, Brussels, Art. 11, p. 44-45.

[22] European Parliament and the Council of the European Union (2013), Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Art. 8 (3), p.101.

[23] See *Abubacarr Jawo v Bundesrepublik Deutschland, op.cit.*

[24] European Commission (2016e), *op.cit.*, Art. 2 (10), p. 34.

[25] See *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov, op.cit.*

[26] European Commission (2016a), *op. cit.*, p.11.

[27] *M and Others v Comissaire général aux réfugiés et aux apatrides* (2019), Judgment of the Court of Justice of the European Union, C-77/17 and C-78/17.