

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **C**  
**CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**



Constitutional Affairs

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# Setting up a Common European Asylum System

EXECUTIVE SUMMARY



DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

# Setting up a Common European Asylum System - Report on the application of existing instruments and proposals for the new system

## EXECUTIVE SUMMARY

### **Abstract**

The study assesses firstly the evaluation process of the first generation of asylum instruments while underlining the possibilities to improve it. It analyses secondly the asylum "acquis" regarding distribution of refugees between Member States, the eligibility for protection, the status of protected persons regarding detention and vulnerability, asylum procedures and the external dimension by formulating short-term recommendations of each area. Its last part is devoted to the long term evolution of the Common European Asylum System regarding the legal context including the accession of the EU to the Geneva Convention, the institutional perspectives including the new European Support Office, the jurisdictional perspective, the substantive perspective, the distributive perspective and the external perspective.



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## LIST OF ABBREVIATIONS

<b>AJIL:</b>	American Journal of International Law
<b>APD:</b>	Asylum Procedures Directive
<b>AQSEM:</b>	Asylum Systems Quality Assurance and Evaluation Mechanism
<b>AsyIGH:</b>	Asylgerichtshof (Austrian asylum tribunal)
<b>ATV:</b>	Airport Transit Visa
<b>BVerfG:</b>	Bundesverfassungsgericht (German Constitutional Court)
<b>BVG:</b>	Bundesverwaltungsgericht (Swiss Federal Administrative Tribunal)
<b>CCC:</b>	Common Core Curriculum
<b>CCI:</b>	Common Consular Instructions
<b>CCV:</b>	Community Code on Visas
<b>CAT:</b>	Convention Against Torture
<b>CE Be:</b>	Conseil d'Etat (Belgian Council of State)
<b>CE Fr:</b>	Conseil d'Etat (French Council of State)
<b>CEAS:</b>	Common European Asylum System
<b>CFR:</b>	Charter of fundamental rights of the EU
<b>CISA:</b>	Convention Implementing the Schengen Agreement
<b>CMLRev:</b>	Common Market Law Review
<b>CRD:</b>	UN Convention on the Rights of the Child
<b>CS:</b>	Consiglio di Stato (Italian Council of State)
<b>DG:</b>	Directorate General
<b>EAC:</b>	European Asylum Curriculum;
<b>EASO:</b>	European Asylum Support Office
<b>EC:</b>	European Community or European Community Treaty
<b>ECHR:</b>	European Convention on Human Rights
<b>ECJ:</b>	European Court of Justice
<b>EComHR:</b>	European Commission of Human Rights

<b>ECR:</b>	European Court Reports
<b>ECRE:</b>	European Council on Refugees and Exiles
<b>ECtHR:</b>	European Court of Human Rights
<b>EDPS:</b>	European Data Protection Supervisor
<b>EEA:</b>	European Economic Area
<b>EHRLR:</b>	European Human Rights Law Review
<b>EJML:</b>	European Journal of Migration and Law
<b>ERF:</b>	European Refugee Fund
<b>(E)STC:</b>	European Safe Third Country
<b>ETS:</b>	European Treaty Series
<b>EUCFR:</b>	European Union Charter of Fundamental Rights
<b>EWCA:</b>	England and Wales Court of Appeal
<b>EXCOM:</b>	Executive Committee
<b>FCA:</b>	First Country of Asylum
<b>FCAFC:</b>	Federal Court of Australia Full Court
<b>FSJ:</b>	Freedom, Security and Justice
<b>GC:</b>	Geneva Convention
<b>HRC:</b>	Human Rights Committee
<b>IA:</b>	Impact assessment
<b>ICCPR:</b>	International Covenant on Civil and Political Rights
<b>ICJ:</b>	International Court of Justice
<b>ICLQ</b>	International and Comparative Law Quarterly
<b>IJRL:</b>	International Journal of Refugee Law
<b>ILC:</b>	International Law Commission
<b>ILO :</b>	Immigration Liaison Officer
<b>IMO :</b>	International Maritime Organisation
<b>Inter-Am.</b>	
<b>C.H.R.:</b>	Inter-American Commission of Human Rights

<b>IOM:</b>	International Organisation for Migration
<b>JHA:</b>	Justice and Home Affairs
<b>JLS:</b>	Justice, Liberty and Security
<b>LTV:</b>	Limited Territorial Validity
<b>MSC:</b>	Maritime Security Committee
<b>NEFR:</b>	The EU network of independent Experts on Fundamental Rights
<b>NGOs:</b>	Non-Governmental Organisations
<b>NIS:</b>	Newly Independent States
<b>Nyr:</b>	Not yet reported
<b>OJ:</b>	Official Journal
<b>PEP:</b>	Protected-Entry Procedure
<b>QB:</b>	Queen's Bench
<b>QI:</b>	Quality initiatives
<b>RABIT:</b>	Rapid Border Intervention Team
<b>RPP:</b>	Regional Protection Programme
<b>RSQ:</b>	Refugee Survey Quarterly
<b>SAR:</b>	Search and Rescue or Search and Rescue Convention
<b>SBC:</b>	Schengen Borders Code
<b>SCIFA:</b>	Strategic Committee on Immigration, Frontiers and Asylum
<b>SCO:</b>	Safe Country of Origin
<b>SIS:</b>	Schengen Information System
<b>SOLAS:</b>	Safety of Life at Sea Convention
<b>TAR:</b>	Tribunale amministrativo regionale (Italian Administrative Tribunal)
<b>TEU:</b>	Treaty on European Union
<b>TFEU:</b>	Treaty on the Functioning of the European Union
<b>UDHR:</b>	Universal Declaration of Human Rights
<b>UK CA:</b>	UK Court of Appeal
<b>UK HL:</b>	UK House of Lords

**UN:** United Nations

**UNHCR:** United Nations High Commissioner for Refugees

**VG:** Verwaltungsgericht (German Administrative Tribunal)

**VwGH:** Verwaltungsgerichtshof (Austrian Supreme Administrative Court)



## EXECUTIVE SUMMARY AND RECOMMENDATIONS

### PART 1: ASSESSMENT OF THE EVALUATIONS OF THE ASYLUM POLICY

The issue is a key one since The Hague Programme requested in 2004 the Common European Asylum to be built upon a thorough and complete evaluation of the legal instruments that have been adopted in the first phase. This evaluation should be systematic, efficient, impartial and objective and have not only a legal purpose by dealing with the implementation of the asylum instruments, but also a political one by covering the effectiveness and impact of the asylum policy.

The Commission adopted to follow up this request a Communication on the evaluation of EU policies on Freedom, Security and Justice on 28 June 2006. The mechanism conceived in three steps (information gathering, reporting and evaluating strategically) was based on factsheets containing indicators to be completed by Member States and would have been implemented twice every five years. The Council adopted on 19 June 2007 conclusions restraining the proposal of the Commission. Due to the lack of support of Member States considering it too burdensome, this mechanism has never been implemented. In practice, the evaluation of the asylum policy consequently took place on the basis of the existing methodology and means. They are based on the "Scoreboard +" (see below) and the standard reporting provisions included in the final provisions of the legal instruments adopted by the EU that are insufficient.

The evaluations conducted suffer from several weaknesses - firstly, not on a political, but rather from a more or less purely legal perspective. This has been the case for the evaluation of the directives on reception conditions for asylum seekers and on the definition and status of protected persons and in particular for the Dublin Regulation and the Frontex Agency, with nevertheless some improvement for the directive on asylum procedures. Secondly, no horizontal approach evaluating the instruments in the broader context of the asylum policy and including cross-cutting issues, but a merely vertical approach focusing on each of the instruments separately. The fact that impact assessments that are normally ex-ante evaluating tools about the possible impact of an instrument in the future, have been used to replace (in the case of the qualification and asylum procedures directives) or complete ex-post evaluations reveals the difficulties of the Commission to conduct proper evaluations. The results show that the evaluations have not been systematic, neither efficient but fairly objective, even if the report about the Dublin regulation is not impartial as it has been driven in function to the single minded preference for the status quo.

Several reasons explain this situation. Aside from the fact that evaluations are sometimes requested too early due to the political agenda before there is enough insight concerning the implementation of instruments by Member States, the main reason is a lack of appropriate evaluating tools and data.

The Scoreboard qualified "plus" because it covers not only the European but also national level, is a purely quantitative tool measuring the progress of the policy regarding the adoption of the expected instruments towards the agenda contained in the five years policy programmes and action plans. The standard provision<sup>1</sup> contained in the final provisions of

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1 Reading like following: "Not later than/ by (date) the Commission shall report to the European Parliament and the Council on the application of this Directive/ Regulation/ Decision in the Member

legal instruments adopted by the EU and included in the asylum directives or regulations, has no political purpose. It limits the scope of the evaluation to the application and not the impact or effectiveness of the instruments without specifying the information to be provided by the Member States to the Commission. Despite the fact this is not limited to Asylum, it is still a general problem after fifty years of European Law and it is striking that even the legal information that the Member States are requested to transmit to the Commission does not include at least a table of concordance between the provisions of European directives and national provisions of transposition<sup>2</sup>. Only the decisions related to the European Refugee Fund contain more adequate provisions on evaluation due to the fact that they concern a financial instrument whose efficiency is more scrutinised. There is also a problem due the lack of statistical data in the field of asylum.

The absence of a mechanism for monitoring Human Rights is particularly problematic due to the fact that asylum has been included under article 18 in the EU Charter that is legally binding since the entry into force of the Lisbon Treaty. If the Commission checks the conformity of its legislative proposals with the Charter, the Fundamental Rights Agency does not have a mandate to control the respect of human rights by the EU and its Member States, but only to provide them with assistance and expertise. Finally, the costs of gathering the information necessary to adequately evaluate the effectiveness of European and national instruments might be considered to high by Member States as it was the case during the discussions of the Council conclusions of 19 June 2007 on the Evaluation of EU policies on Freedom, Security and Justice.

There are fortunately several elements that should or could lead to an improvement of the evaluation in the field of asylum.

Firstly, the regulation 862/2007 of 11 July 2007 on community statistics on migration and international protection is applicable in practice since 2008 and will provide lacking data in the field of asylum, even if it does not cover adequately all the fields of asylum where some gaps not filled by specific provisions of the concerned instruments will remain. Secondly, the Quality Initiatives promoted by the UNHCR in the United Kingdom since 2003, in eight Central and Easter countries since 2008 and envisaged for five more Southern Member States contribute to the evaluation of the quality of the concrete functioning of the national asylum systems and incite the participating States to set up internal quality review mechanisms. Thirdly, the European Asylum Support Office created by Regulation 439/2010 of 19 may 2010, will contribute notably to improve the availability of data and information about the implementation of European and national rules regarding asylum and their comparability. This new office will also have a reporting mission on the situation of asylum in the Union that could nevertheless be limited to its own activities due to the fact the legislator has not tasked it with a function of evaluation that could nevertheless be added to its missions in the future.

Finally, the Treaty of Lisbon paves the way for an improvement of the evaluation of the asylum policy in the European Union. Article 70 TFEU provides a special legal basis for the creation of a new evaluating mechanism. The fact that it is based on peer review of States by States will have the advantage to encourage them to provide the necessary information while the collaboration with the Commission will guarantee the required objectivity and impartiality of the process. On the contrary, the exclusion of the European Parliament of a

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*States and shall propose any amendments that are necessary. The Member States shall send the Commission all the information that is appropriate for drawing up this report."*

<sup>2</sup> This leads often the Commission to externalise lengthy studies to legal experts obliged to loose time by looking for information that Member States have or should have.

mechanism aiming at evaluating European policies where the Assembly has a co-decision power is incomprehensible. The Stockholm programme devotes a lot of attention to evaluation and even quotes asylum procedures as a priority field to this end. There seems to be the necessary political will to improve evaluation in the field of asylum. The future will tell us if this will translate into reality.

## **PART 2: ASSESSMENT OF THE ASYLUM ACQUIS AND RECOMMENDATIONS FOR IMPROVEMENT IN THE SHORT TERM**

### **CHAPTER 1: DISTRIBUTION OF APPLICANTS FOR INTERNATIONAL PROTECTION AND PROTECTED PERSONS**

#### **1. GENERAL CONSIDERATIONS**

This Chapter addresses CEAS instruments on the distribution of applicants for protection and of protected persons. The key instrument in this area, indeed the sole significant “distributive” instrument adopted to date, is the Dublin system. Current proposals for the second phase of the CEAS do not prefigure a profound restructuring of its “distributional” components but essentially focus on the Commission proposal to recast the Dublin Regulation. The Proposal does not purport to alter the general scheme of the Dublin system. Instead, the Commission has taken the approach of “confirm[ing] the principles underlying [the Dublin Regulation], while making the necessary improvements”. The first and welcome such improvement consists in fully extending the scope of the Dublin system to all applicants for international protection and not only to asylum seekers. The other suggestions for improvement put forward by the Commission aim to tackle a number of deficiencies observed in the operation of the Dublin system, in pursuance of two overarching goals: to increase the system’s efficiency and to ensure higher standards of protection for persons falling under the Dublin procedure.

This Chapter examines these proposals in detail, against the background of current Dublin practice, and in light of protection principles relevant to the operation of the Dublin system. The analysis is organised in five thematic sections, each discussing key problem areas in relation to the Dublin system: guarantees against refoulement; protection of family unity and integration-related concerns; protection of vulnerable persons, including children; distributive fairness and the burden-concentrating effects of the system on “border” States; and finally, concerns relating to the effectiveness of the Dublin system and to the adverse impacts it has on the CEAS as a whole. In each area, possible solutions are considered in the context and within the constraints of the current recasting procedure. The Recast Proposal includes a number of welcome suggestions to correct the shortcomings of the Dublin system, but leaves a number of problems standing. Some of these will need to be tackled in the long term, through a reconsideration of the Dublin system as a whole.

#### **2. MAIN PROBLEM AREAS IDENTIFIED IN RELATION TO THE DUBLIN SYSTEM**

Our first finding is that the Dublin Regulation falls short of ensuring compliance with the principle of non-refoulement, generating instead risks of refoulement. This is the result of two concomitant problems. The first such problem is that sufficient guarantees against

refoulement and ill-treatment are not available always in the responsible State. On the one hand, and specifically, the interplay of the Dublin system with procedural rules (e.g. interruption in case of withdrawal) has demonstrably prevented asylum seekers from accessing a meaningful asylum procedure in the responsible State. On the other hand, in the context of widely diverging protection and reception standards, there are persistent concerns that the practices of some Member States fall short of ensuring fair asylum procedures (due to e.g. insufficient procedural guarantees, the application of unduly restrictive qualification criteria or reliance on flawed risk assessments) and dignified standards of living. The “sending” Member States could of course obviate to this, and prevent any risk of refoulement, through a principled application of the sovereignty clause. However – and this is the second problem – this second line of protection is also performing well below the standard of a full and inclusive application of the non-refoulement principle. Thus, first instance Dublin procedures fall short of basic standards of fairness and effective remedies against transfers are not always available in the “sending” State. Furthermore, in several member States, national administrations and courts are not in the position, or not willing, to meaningfully scrutinise the risks incurred by the asylum seeker in the responsible State, leading to an over-reliance on safety presumptions and an underestimation of the risks incurred by the asylum seeker.

The second problem area is that of protection of family-unity and integration-related concerns. The Dublin criteria on family unity are shown to be restrictively framed and applied, falling well short of ensuring respect for the fundamental right to family life. The sovereignty and humanitarian clauses, which could in principle correct this shortcoming, are not consistently applied to this end. Moreover, the Dublin regulation disregards “close links”, other than family ties, between asylum seekers and a particular Member State, which has a negative impact on the integration and well-being of asylum seekers, as well as on the efficiency of the Dublin system.

In a third section, the Chapter discusses problems concerning the protection of vulnerable persons -including children- in the Dublin system. While the Dublin Regulation explicitly refers to international obligations and humanitarian standards as an integral part of the Dublin scheme, it does not make provision for specific safeguards in regard to applicants with special needs, a lacuna which has given rise to unsatisfactory practice. More specifically, reception conditions of vulnerable persons in the State carrying out the Dublin procedure are of concern, both due to gaps in the legal framework (e.g. absence of firm obligations to institute a “screening procedure” to identify special needs), and to its misapplication (e.g., instances where the Reception Conditions Directive is not applied to persons subject to the Dublin procedure). Furthermore, the Dublin Regulation does not make provision for “fit for transfer” screening, nor does it include sufficient guarantees ensuring the continuity of treatment of vulnerable persons in the “receiving” State, after the transfer. Such shortcomings have not been made good by Member State practice, and have resulted in serious -on occasion even fatal- harm.

In regard to unaccompanied minors, the Dublin Regulation does not adequately reflect the principle that in all actions relating to children, the child’s best interest must be a primary consideration. Insufficient consideration for other child-specific guarantees, such as adequate representation, is also highlighted, and it is shown that these lacunae in the legal framework have paved the way for unsatisfactory practice in the Member States. More particularly, Member State practice shows that Dublin transfers are carried out even when in conflict with the best interest of the child, and that Member States rely excessively on uncertain age-assessment techniques or even treat age-disputed applicants as adults.

The fourth problem area taken up is that of distributive fairness and the burden-concentrating effects of the system on “border” States. It is shown that the Dublin system in some cases aggravates the imbalances in the distribution of asylum seekers, with detrimental effects in terms of effectiveness and protection. Though not meant to realise a “fair sharing of responsibilities”, the Dublin system is however intended to contribute to a fair sharing, but due to its distributive concept, linking together responsibility and irregular entry into the EU, the system does entail additional burdens on some Member States that are under particular migratory pressure because of their geographical location, and that have limited reception and absorption capacity.

Lastly, this Chapter mentions the problem of the inefficiency of the Dublin system as a whole. Available information indicates that the number of effected transfers is much lower than the number of accepted transfers, and that the overwhelming majority of asylum applications are examined where they are first lodged. These structural problems indicate, first, that many of the resources invested in the operation of the system are ultimately wasted and, second, that the Dublin criteria have a minimal impact in practice – or more pointedly, are unworkable in practice. We also note that the Dublin system considerably delays access to asylum procedures. While these deficits may in part be due to technical problems, such as inappropriate deadlines or un-clarity of rules, it is argued that they are more likely due to key structural features of the system – and more particularly, to the fact that the system insufficiently takes into consideration the interests of asylum seekers, inciting them to evade its application, e.g. by absconding or by disposing of travel documents. The impacts of such uncooperative behaviour go beyond the mere inefficiency of the Dublin system. By inducing asylum seekers to engage in uncooperative behaviour, the Dublin system adversely affects the ability of Member States to carry out efficient asylum and return procedures, and it undermines efforts for an orderly management of migration. Furthermore, to the extent that it induces bona fide refugees to abscond or to engage in behaviour otherwise undermining their protection chances, the system arguably contradicts the Treaty goal of “offering appropriate status to any third-country national requiring international protection” (art. 78 TFEU).

### **3. RECOMMENDATIONS**

With regard to insufficient guarantees against refoulement and ill-treatment in the responsible State, and more specifically the issue of impaired access to the asylum procedure, it is suggested that Dublin returnees be given a clear right to have their case re-opened, or to lodge an appeal, on return to the responsible State. Art. 18(2) of the Recast Proposal lays down an explicit guarantee that the responsible State must examine the application including by re-opening the case, if the examination of the claim has been discontinued due to “withdrawal”. This proposal would partially solve the problem. However, in view of providing for more complete protection, it is recommended to take the Presidency Compromise text as a basis and to further amend it in order to eliminate its current ambiguities. In regard to the problem of failing protection and reception standards in the responsible State, the study emphasises that there are no solutions to be expected from a reform of the Dublin system. Indeed, the goal of ensuring that adequate and equivalent standards of reception and protection are applied throughout the Dublin area is a long-term goal, which can only be achieved through decisive advances in harmonisation and, arguably, strengthened supervision, capacity building, and burden-sharing.

Concerning the problem of insufficient procedural guarantees against refoulement in the sending State, the Commission proposes the introduction of strengthened guarantees in the Dublin procedure: a comprehensive right to information, the right to a hearing and,

importantly, a truly effective remedy against Dublin transfer. These proposals are fully supported in their original form, subject to a helpful amendment introduced by the Parliament, regarding a minimum 10 days deadline to file an appeal against Dublin transfers. With regard to the problem of over-reliance on safety presumptions, the Recast Proposal includes an innovative mechanism for the general suspension of transfers to Member States where “systemic” risks of refoulement or ill-treatment exist. This collective suspension mechanism should be maintained, although the substantive and procedural rules relating to its functioning should be improved in order to ensure that it is indeed applied in a protection-minded perspective. Another important measure would be to clarify Member States’ responsibilities in preventing refoulement through suitable amendments (fully set out in the Chapter) to the preamble of the Dublin Regulation. This would prevent the establishment of the collective suspension mechanism from sending wrong and dangerous signals to national administrations, e.g. that the Commission is solely responsible to avoid refoulement in Dublin context.

As regards the problem of the overly restrictive criteria on family-unity and the ensuing human rights concerns, the proposed reforms of the family definition and family criteria go some way towards solving the issues arising under the right to family life. There is nonetheless scope for improvement. Thus, art. 11 of the Recast Proposal should refer to “a family member or relative” and not only “a relative”; the enumeration of dependency situations should be made non-exhaustive and a new procedure should be introduced ensuring the identification of a responsible State in every case. It is also advised that the European Parliament reopen a discussion with the Commission and Council on whether, and how far, some stark “status” limitations, which are left untouched by the Recast Proposal, are indeed justified by public interest considerations. Concerning special provisions on minors, the Recast Proposal includes a number of welcome proposals, such as making it clear that the “best interest” principle applies throughout the procedures; clearly requiring Member States to trace the family of unaccompanied minors; and extending the definition of “family members”. In this last respect, a reformulation of art. 2(i)(v) of the Recast Proposal is suggested so as to ensure that adult siblings of a minor applicant are included in the definition. A possible rewording for the “time rule” in art. 7(3) of the Recast Proposal is also put forward, in recognition of the fact that although the original provision suggested by the Commission is flawed, its underlying concept is worth maintaining.

In this context, we would recommend that the European Parliament reconsider some of the amendments it has adopted at first reading – particularly, that it revert to the original Commission proposals to consider married minors as family members of their parents and siblings, provided that it is in line with the “best interest” principle, and to ensure family reunification for unaccompanied minors to the extent possible in the framework of art. 8 of the Recast Proposal. It is important to stress that even if all our recommendations were followed, gaps in the protection of family unity would remain, and the discretionary clauses would retain their importance. The Proposal introduces welcome amendments to the clauses themselves and to the Preamble of the Regulation. It is further recommended, as a short-term measure, to broaden the scope of the humanitarian clause in order to encompass “close ties” beyond family ties. This would be a small step towards addressing the broader issue of integration, though real solutions to this problem would require rethinking the whole distributive concept underpinning the Dublin Regulation.

With regard to problems relating to the protection of vulnerable persons, and their reception during Dublin procedures more specifically, recital 9 of the Recast Proposal seeks to ensure the full application of the Reception Conditions Directive. This initiative is welcome, as well as the suggestion to set up an identification procedure (art. 21 of the

Reception Conditions Recast Proposal). The strengthened information rights and procedural guarantees, provided in articles 4-5 and 26 of the Recast Proposal, are also supported in the perspective of improving the protection of vulnerable persons. Taken together, these proposals would help ensuring appropriate identification and treatment of vulnerable applicants at all stages of the asylum process. Concerning fitness to travel and continuity of care, the Recast Proposal assists in ensuring that the Dublin system is applied with due regard to the physical and mental integrity of vulnerable applicants, laying down the principle that applicants may be transferred only if “fit for transfer”, and that relevant information must be exchanged between the Member States concerned. It is recommended that these useful proposals be strengthened by the inclusion of a mandatory “fit to travel” screening in the Regulation.

Regarding unaccompanied minors, it is suggested that the “horizontal” guarantees for minors (a clear affirmation of the “best interest” principle, the obligation to ensure adequate representation in all Dublin procedures and a requirement of age-sensitive communication) be strengthened in all Dublin procedures, along the lines of the Recast Proposal. In addition, the requirements of independence and qualification for the minor’s representative should be better clarified. A properly conducted “best interest” determination, along the lines of art. 6 of the Proposal, would have the potential of solving the problem of transfers that are carried out even when in conflict with the “best interest” principle. However, practice suggests that Member States have not been unaware of relevant principles in the past, but have rather sidelined them in favour of the effective implementation of transfers. Owing to the special vulnerability of unaccompanied minors, the Commission’s proposal to introduce a “hard and fast” rule exempting them in part from “take back” transfers merits further consideration. Finally, the Commission Proposal does not address the issue of age assessment. The European Parliament has adopted welcome amendments in this regard, although they would be usefully complemented by a principle whereby applicants must be given the benefit of the doubt in case of uncertainty.

Concerning the lacking distributive fairness of the Dublin system, the Recast Proposal foresees the establishment of a mechanism for the suspension of transfers to overburdened States. This proposal is considered positive, though it is recommended it be further improved by enlarging the conditions for triggering the mechanism. The solution is not considered as complete however, and the distributive imbalances currently observed in the CEAS are seen to require more decisive steps forward in the establishment of permanent burden-sharing mechanisms, as also demanded by the European Parliament at first reading.

Regarding the final problem area, the inefficiency of the Dublin system, it is highlighted that the Recast Proposal includes a number of technical amendments designed to ensure a smoother operation of the Dublin system, such as new or revised deadlines, clarifications on contested points and the generalisation of conciliation procedures. Though it is acknowledged that these amendments may in part mitigate the observed problems, it is argued that they fail to tackle the key factor behind the considerable efficiency deficit of the Dublin system: the fundamental unfairness of the Dublin system to asylum seekers. In the view of the authors, true solutions to this problem can only come from a reconsideration of the Dublin system as such, i.e. from its replacement with a more integration-friendly system, capable of attracting widespread compliance from asylum seekers.

## CHAPTER 2: THE QUALIFICATION DIRECTIVE

### 1. GENERAL CONSIDERATIONS

This part of the Assessment analyses problematic aspects of the current text of the Qualification Directive (qualification part of this instrument, while status part is only referred to on several connected aspects) and proposes short-term solutions. The problems were identified taking into account first of all the objectives of the Directive, namely:

- To ensure a minimum level of protection in all MSs for those in need of protection;
- To reduce disparities between MS legislation and practice;
- To limit secondary movements.

The need to align Member State obligations with the Geneva Convention and international human rights law was taken into account, as required by Art. 78(1) TEU. Proposals were developed with solution orientation in mind and considering the effectiveness, efficiency and coherence, as well as social impacts and impacts on fundamental rights as suggested in the 2009 Commission Impact Assessment. Since the Commission presented its' Recast Proposal for Qualification Directive on 21 October 2009, some of the problems identified and proposals to deal with them are already included in Commission's suggestions. Also, due to recast legislative technique possibility of amendments to the Directive is limited to what the Commission suggests. However the authors have kept also suggestions that go beyond the Recast Proposal. It is believed that the Commission unnecessarily overlooked some of the key issues, which will not be addressed right now, but will remain relevant in view of implementing the Stockholm Programme. The analysis of problems and proposed solutions is presented in the order of sequence of articles in the directive.

### 2. MAIN PROBLEMS

Several issues have been identified in the problem analysis part and they relate to the following provisions of the Directive: refugee status inclusion provisions (sur place claims, non-state actors of protection, internal relocation alternative, prosecution for conscientious objection, possible nexus between lack of protection and persecution grounds, cumulative test of social group and gender related aspects), grounds of subsidiary protection and exclusion and cessation provisions for refugee status and subsidiary protection.

In terms of international protection inclusion provisions, the following provisions are of concern:

1. Refusal of protection when a person creates the circumstances leading to protection needs: art. 5(2) comes close to requiring the "continuation of convictions" as a condition for a well-founded fear or real risk, while it is not necessary under the Refugee Convention. Art. 5(3) provision may raise concern with regard to compliance with the Refugee Convention, as the latter does not provide for any limitations of protection in cases when a person himself/herself creates the circumstances leading to protection needs.
2. Non-state protection and the notion of protection without the mandatory requirement of effectiveness: while the Refugee Convention requires state protection, Art. 7(1)(b) of the Directive allows the possibility of non-state



protection. According to Art. 7(2), it is enough that state or non-state actors take "reasonable steps to prevent the persecution", regardless of whether those steps lead to the effective protection of individuals or not.

3. Internal protection alternative test in Art. 8 („the applicant can reasonably be expected to stay there“) is considered to be too general and not ensuring that alternative is accessible: it gives a complete discretion to the MSs and results in divergent interpretations of the concept across national jurisdictions. Article 8(3) allowing refuse protection despite technical obstacles to return might be evaluated as contrary to the Refugee Convention.
4. Prosecution for conscientious objection is not covered by persecution as a basis for refugee status (Art. 9(2)(e)): as the recognition of conscientious objection is not specifically mentioned in the directive, the practice of MSs regarding persecution by prosecution of draft evaders varies a lot. Mentioning only excludable acts, the directive does not seem to cover other situations (i.e. conscientious objection in the absence of alternative to a military service).
5. Possible nexus between lack of protection and persecution grounds is not included (Art. 9(3)): the rules of the Directive on the nexus with the Refugee Convention grounds are overly restrictive, because Art. 9(3) excludes possible link between the Convention grounds and the lack of protection. It often results in state practice that is not in conformity with existing case law on the Refugee Convention.
6. Cumulative test of social group and weak reference to gender related aspects: art.10(1)(d) raises the issues related to cumulative application of "social perception" and "protected characteristics" requirements in social group test and to non-presumption of social group from gender related aspects alone. These provisions are weak, they give a broad discretion to the MSs and involve the risk that persecution on the basis of social group (in particular on the basis of gender) will not be sufficiently considered.

One of the major concerns is that current scope of subsidiary protection in the directive is limited as does not cover all protection needs (Art. 15). As a result, a number of persons in need of international protection remain outside the scope of harmonisation among the MSs under the notion of subsidiary protection. This goes against the objective of the directive, which is to ensure minimum level of protection to all those in need. Secondly, there are significant disparities in MS practices while applying subsidiary protection, thus undermining the harmonisation objective and encouraging onward movements within the Union. Among the persons not currently covered by subsidiary protection in the Directive, but in need of protection are:

- Persons who cannot be expelled because of the absolute obligation of MSs under non-refoulement (e.g. art. 3 ECHR). This may include persons who were denied status under the directive but cannot be returned; as well as persons who should be exceptionally protected as there is no adequate treatment in their home country.
- Persons whose family life cannot be guaranteed in the home country based on Art. 8 ECHR or when interests of the child cannot be guaranteed in the country of origin.

- Victims of generalised violence and human rights violations to whom most MSs grant protection. On EU level, protection to these persons is provided under the Temporary Protection Directive, but only when they arrive in a mass influx situation, albeit not individually. This causes horizontal inconsistency between asylum instruments and disparities in MS practice as concerns the issuance of residence permits.
- Persons left out because MSs interpret various notions in Art. 15(c) differently: for instance "internal armed conflict" is understood unevenly, as a result some MSs do grant protection and some not to individuals coming from the same countries of origin.

The need to expand the scope of subsidiary protection should be clearly distinguished from purely compassionate situations (e.g. old age, integration in a host society or technical obstacles to return) which should continue to be part of MSs discretionary decisions (in the absence of internationally or regionally defined standards how to deal with these individuals).

With regard to denial of protection (exclusion, cessation and revocation clauses), they are beyond permitted limits of MS's obligations (Art. 14 (4-5), 17 (1), 19). Confusion of exclusion/cessation clauses with exceptions to non-refoulement, as well as obligatory exclusion from subsidiary protection disregarding the absolute prohibition of refoulement, poses a risk to compliance of MS practices with the Convention and the TEU, thereby undermining the objective of the Union to provide protection to those in need. There is an apparent confusion in the Directive itself, even more in MS practice, as concerns the correct application of mentioned notions. Two concrete practical and legal problems are identified:

1. Art. 14(4) and 14(5) dealing with exceptions to non-refoulement include what constitutes de facto provisions on exclusion, going beyond what is permissible under the Refugee Convention. National security reasons and convictions for a "particularly serious crime" maintained as quasi-exclusion grounds under the revocation provisions may be potentially in breach of MS obligations under the Refugee Convention. Some MS merge provisions on exclusion with provisions that stem from exceptions to the principle of non-refoulement. However, there is a difference between denial (exclusion) and termination of refugee status. Hence, if using Art. 14(4-5), refugee status is withdrawn, the person will no longer be considered as refugee and thus will not be able to enjoy the benefits mentioned in art. 14(6).
2. Mandatory exclusion from subsidiary protection may run counter with prevailing international obligations of MS and "minimum standards" required by the TEU. In a number of MS exclusion is not required in all cases covered by Art. 17(1), since the MS refer to absolute obligations under non-refoulement (e.g. Art. 2 and 3 ECHR). In practice also, many MS grant to persons excluded from international protection other statuses, and this renders the obligatory exclusion rather symbolical. If the obligations under international human rights law are considered minimum standards as required, then requirement of the directive to mandatory exclude persons from subsidiary protection is below these standards. In MS practice, it has been noted that provisions on revocation, ending of or refusal to renew refugee status (Art. 14) or subsidiary protection status (Art. 19) have led to cases of deterioration due to this obligation to terminate the status.

With regard to cessation provisions for refugee status and subsidiary protection (Art. 11, 14(2), 16 and 19(4)), the practice shows that there is insufficient harmonisation of

requirements for application of cessation of protection across the MS. As a result, some Member States tend to examine the existence of current risk of persecution/harm rather than assessing the durability of eliminated risk along with availability of effective protection. This results in incorrect practical application of cessation thereby prematurely denying protection to persons who continue to be in need of it. Evidence collected by UNHCR, Odysseus network and ECRE suggests that:

- a. in some MS domestic law states additional grounds or overly wide grounds for cessation or exclusion or these grounds were interpreted in a liberal way resulting in revocation of status of many refugees;
- b. many MS have failed the rule on the burden of proof, which requires the authorities to “demonstrate on an individual basis” that the person has ceased to be a refugee or a person eligible for subsidiary protection. Refugee status cessation provisions became an issue before the Court of Justice which delivered a decision on 2 March 2010 concluding that a person loses the status when, following a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which had justified the person’s fear of persecution no longer exist and he has no other reason to fear being persecuted. This Court decision clarified the application of cessation to a certain extent, however it would still be beneficial to clarify the provisions of the Directive in order to ensure better harmonisation of practices. If these issues are not addressed, the impact of the directive on secondary movements within the EU will continue to be insignificant and legal limbo situations for persons to whom protection was legally ended but who cannot de facto as yet enjoy national protection might become more frequent.

### **3. RECOMMENDATIONS**

Solutions for problems identified suggest revision of QD provisions, where it is considered that the issue cannot be sufficiently resolved by the practice, Court jurisprudence or in other ways. With regard to international protection inclusion provisions of the Directive, the authors suggest to:

- Delete the second part of Art. 5(2) (starting from the words “in particular”) and Art. 5(3); Art. 7(1)(b) or limit it only to de facto state authority; the words “generally” and “inter alia” in Art. 7(2); Art. 8(3);
- Specify internal protection criteria in Art. 8(1) by making a reference to Art. 7 criteria and the criteria of Salah Sheekh vs. Netherlands judgment of ECtHR, adding the word “access” and deleting the word “stay”;
- Amend Art. 9(2)(e) to include refusal to perform military service (and not only in a conflict) due to conscientious objection as a possible case of persecution;
- Amend Art. 9(3) by adding a link between lack of protection and persecution grounds as a possible nexus in the refugee definition;
- Amend Art. 10(1)(d) by stating that the requirements of “social perception” and “protected characteristics” are alternative and that gender related aspects are in particular relevant for both social group tests.

Expansion of subsidiary protection to include all those really in need of protection would align the practice with the objective of the directive and ensure consistency with other asylum instruments. Explicit coverage of certain individuals will limit the disparities that exist in MS legislation and practice and reduce the onward movements within the Union. From a practical and financial point of view, expansion of subsidiary protection should not

bear significant implications, as a number of MS already protect those persons under national law and many grant them certain rights. Proposal includes:

- a. Supplement Art. 15 with paragraph 2 requesting MS to grant subsidiary protection also in cases when international obligations prevent expulsion;
- b. Recital 26 should be deleted, as well as the terms "individual threat" and "internal or international armed conflict" in Art. 15(c); amend Art. 17(1) and 19 to state that exclusion from subsidiary protection should only be considered when there is no issue of absolute prohibition of refoulement based on the circumstances of the case.

With regard to denial of protection, the authors suggest that:

1. To prevent misinterpretation by MS of Art. 14(4) and (5) as exclusion or cessation clauses (which already happens in practice), these provisions should be moved to Status Rights' part of the Directive. This would ensure that MS apply this article strictly as termination of "residence status" ("asylum" in the meaning of the EU Charter on Fundamental Rights), rather than refugee status or subsidiary protection as such, which would also ensure the elimination of risks pertaining to compliance with the Refugee Convention.
2. Art. 2 would benefit from defining the concept of exclusion and revocation. Such a clarification would reduce disparities in MS exclusion practices and ensure compliance with the Refugee Convention.
3. Observance of MS obligations under human rights law may only be ensured if a requirement is introduced to apply exclusion/revocation and when there is no issue of absolute prohibition of refoulement based on the circumstances of the case. Alternatively, provisions on exclusion should be stated in non-obligatory terms in these Articles. As a result, only those persons falling under art. 17 and with regard to whom no international obligations apply would be excluded and effectively removed from the territory of the EU.

As the practice of several MS shows that they do not apply the cessation provisions correctly, clarification on what cessation means through defining it among the main notions in art. 2 of the Directive would ensure better harmonisation of MS cessation practices, reduce the number of cases of preliminary rulings to the Court of Justice and secondary movements. This as a result would minimise occurrence of legal limbo situations for persons for whom protection was legally ended in a premature way, but who cannot de facto as yet enjoy national protection. It would also save resources that would be spent as a result of premature cessation and the need to examine the applications once again. The notion of cessation to be inserted in Art. 2 needs to include inter alia the requirement to assess the previous risk, the durability of its elimination, the absence of new risks and the availability of effective protection, as well as reinforce the difference between the right to protection and corresponding residence permit.

The Commission in its Recast Proposal for Qualification Directive addresses a number of issues identified as concerns above. In regard to inclusion clauses, the Recast Proposal solves completely the problem in Art. 9(3), partly solves the problems in Art. 7, 8 and 10(1)(d), but does not respond to problems in Art. 5 and 9(2)(e). The Proposal does not touch upon the scope of subsidiary protection, despite the evidence that not all persons in need of protection are currently eligible for protection under QD. The Recast Proposal does

not also address any of the legal and practical problems related to exclusion and revocation of status, presumably because of the sensitivity that exists around these issues among the MS. It is believed that cessation provisions will be resolved by the jurisprudence of the Court of Justice and practice of MS, but these issues are also not addressed. Given that a number of issues (exclusion, cessation, revocation and scope of subsidiary protection) fall beyond the negotiable limits of the Recast Proposal, these issues remain to be addressed in the future.

## **CHAPTER 3: STATUS OF PROTECTED PERSONS**

### **1. GENERAL CONSIDERATIONS**

Two essential issues are dealt with in Chapter III related to the Status of Protected Persons: the detention of asylum seeker and the taking into account of the situation of vulnerable asylum seekers and vulnerable refugees having special needs. These two issues are analyzed in a horizontal way through the various relevant legal instruments of the EC (the reception conditions directive, the asylum procedure directive, the Dublin regulation and in addition the qualification directive regarding the second issue). The analysis focuses mainly on the content of the second generation of instruments that is the texts proposed by the Commission. The valuation of the Commission proposals can nevertheless imply an examination of the first generation instruments (texts currently into force). In addition, mentioning the texts proposed by the Parliament and/or the Council proves sometimes useful when these authorities have already come to a conclusion about the texts of the Commission.

On the border between the above mentioned issues, a third one is tackled: the detention of vulnerable asylum seekers with special needs. This question is dealt with in the reception conditions directive proposal through the analysis of the texts of the Commission, the Parliament and the Council.

#### **1.1. The detention of asylum seekers: Main problems and Recommendations**

If one can underline, the fact that the loss of freedom has become commonplace for foreigners - including many asylum applicants - as an instrument used to control migratory flux, one must agree that from a legal point of view, taking into consideration international standards, asylum seekers can be subjected to detention. The main relevant international standards are found in article 31 of the Geneva Convention, article 9 of the International Covenant on Civil and Political Rights (ICCPR), article 5, § 1 of the European Convention on Human Rights (ECHR) and article 6 of the European Charter of Fundamental Rights. The case of law relating to them and the Court of Justice of the European Union case of law must also be taken into account.

Thus the legal debate relating to the detention of asylum seekers does not question the principle of the detention itself but the basic conditions of the detention (including the reasons for detention), procedural guarantees and the framing of the conditions of detention. The reception conditions directive Commission proposal is overall positive regarding these three elements. In addition, without any doubt, the introduction of the new articles 8 to 11 contributes to a better harmonization in the EC objective sought within the framework of the first phase of the CEAS.

First of all, concerning the reasons for detention, the text restricts the loss of freedom to four cases only exhaustively listed (article 8 § 2, a) with d)). By doing so, from the point of view of the rights of asylum seekers the Commission proposal constitutes a progress in comparison with the reception conditions directive in force. This latter one leaves an important margin of appreciation to the Member States. The reasons for detention suggested by the Commission do not cause any problem taking into consideration the international law. Nevertheless three of these reasons give way to interpretation and/or miss clearness. Thus details and/or modifications must imperatively be given to the wording.

Beside the four reasons enumerated in the reception conditions directive proposal, the Commission has provided for a very specific reason in the Dublin regulation proposal. Article 27 § 2 of this text makes it possible to hold an asylum seeker subject to a decision of transfer to the State responsible for the determination of his application, if there is a risk of absconding. Detention due to a risk that the asylum seeker may abscond is thus limited to the case of a person under the Dublin procedure and subject to a decision of transfer.

However, in the reception conditions directive proposal, the Council has added a fifth reason for detention being precisely the risk of absconding. Unlike the Dublin regulation Commission proposal, the risk of absconding mentioned by the Council is stated in a general and non-restrictive way: it applies to any asylum seeker regardless of the procedure and at any time.

This raises the issue of a proper balance to be found between the right for the states to fight illegal immigration and the asylum seekers' right to freedom. The Council proposal does not ensure it. At the same time, the four reasons suggested by the Commission in the reception conditions directive proposal and the specific reason provided for in the Dublin regulation proposal do not apply to some situations and this create a legal gap. An arrangement was proposed to meet these problems.

Concerning the asylum seekers' guarantees, they are generally in conformity with the international law with the exception of a few points, (for example the applicant's right to be given information about the reasons for his/her placement in detention in a language he/she understands).

The Council proposal deserves a special attention regarding the detention conditions, since in matter of lodging it sets an exemption likely to enter into conflict with the decisions of the European Court of Human Rights.

Two important questions of principle must finally hold the attention of the Community legislator: the possible fixation of an optimal duration of detention and the application of principle of the reception conditions directive proposal to asylum seekers. This last issue should not be underestimated, considering the current position of a certain number of MS that consider that the reception conditions directive in force does not apply to asylum seekers. Even if the drafting of the reception conditions directive Commission proposal has reduced the risk of divergent interpretations, it has not managed to make it disappear totally. It is essential to add an explicit provision stipulating the application of principle of the directive to applicants hold in detention.

## **1.2. Taking into account of the situation of vulnerable asylum seekers with special needs: main problems and Recommendations**

The reception conditions directive in force is the only Community instrument of first generation to give attention in a specific way to the situation of vulnerable asylum seekers with special needs. Indeed the Dublin regulation in force does not mention it and the directive procedure only touches the subject of the possible vulnerability of asylum seekers in an extremely marginal way. The situation of the identified refugees or the beneficiaries of subsidiary protection is quite different, since provisions partly identical to the reception conditions directive in force can be found in the qualification directive. The asylum procedure directive Commission proposal and the Dublin regulation proposal clear up this problem. In the draft, specific provisions devoted to vulnerable asylums seekers are now envisaged.

The European Council was asking for such a change: the Stockholm Program puts at the centre of the priorities of the Union a better protection of the vulnerable people. It is essential if one keeps in mind, among other cases, the children situation or the people who are victims of torture. The reception conditions directive in force provides itself several provisions relating to the situation of vulnerable asylum seekers - mainly articles 17 to 20-. Several reports however, have outlined the fact that many MS have failed to transpose and/or implement the aforementioned provisions. This is partly explained by the wording of the provision stating the general principle that the situation of vulnerable asylum seekers should be paid specific attention to (article 17). It does not expressly oblige the MS to set up a procedure of identification for these applicants, even if one can consider that this procedure is logically required by article 17 as the European Commission has underlined it in its report on November 26th 2007.

In any event, the reception conditions directive Commission proposal gives an adequate answer to the problems. Indeed, with the new article 21, the MS are very clearly compelled to bring in procedures of identification in order to assess the individual situation of any asylum seeker aiming at identifying whether or not he/she has special needs. However the timing for the different stages must still be better defined in order to allow the identification of the vulnerable people throughout the procedure. Moreover, the reception conditions directive Commission proposal raises a problem of concept that is the determination of the people and the special needs one intends to meet. Written as it is, the interpretation and implementation of article 21 is unclear. These two elements must be thought over again. Insofar, the Council drafting of article 21 cannot in any case be accepted, as it mentions two distinct concepts without establishing any links between them making its interpretation and its implementation more than ambiguous. Under these conditions, a detailed proposal for an amendment of article 21 has been proposed.

New protective provisions in favour of vulnerable asylum seekers with special needs are to be found in the asylum procedure directive Commission proposal (article 2, d and article 20) and in the Dublin regulation Commission proposal (article 30). For this reason they should be fully approved. However two major drawbacks must be underlined in these two texts. First of all, the lack (or the insufficiency) of coordination between the various instruments of second generation regarding the issue of vulnerable applicants. If the set of problems can partly be seen in a different perspective according to the specific framework of instrument you are looking at, some links and/or similarity must be considered. Some clues are given to guide the EC legislator when tackling this first problem. Concerning the

second drawback, the new provisions of the asylum procedure directive Commission proposal and the Dublin regulation Commission proposal can be compared with article 17 of the reception conditions directive in force. Indeed, even if these provisions protect asylum seekers having special needs, the States are not however, compelled to bring in specific procedures of identification in order to identify asylum seekers with special needs - as does article 17 of the reception conditions directive in force.

Of course one can always argue, as the Commission pertinently did it for article 17, that it is logically required by these protective provisions, since the procedure of identification is "... a core element without which the provisions of the directive aimed at special treatment of these persons will lose any meaning". It does not in anyway mean that the lack of specific provision give way, with regard to the application of article 17, to many deficiencies. This absence of explicit provision creates also a legal insecurity. The problem is particularly acute concerning the people with mental health disability or concerning victims of torture or violence. Indeed, these are vulnerabilities uneasy to detect. At the same time, their identification is essential in order to be able to take these vulnerabilities into account within the framework of the asylum procedure itself (by adapting the modalities of the procedure) and also to acknowledge the possible link between these states of vulnerability and evidence, which can become grounds for international protection. It is consequently recommended to expressly set the obligation for the States to bring in a mechanism ensuring the identification of vulnerable asylum seekers with special needs.

Finally concerning the qualification directive Commission proposal, the wording of the protective provision for vulnerable asylum seekers (article 20 §§ 3 and 4) cannot be implemented. Its drafting is identical to article 17 of the reception conditions directive in force. Consequently, the problem of express obligation for the States to bring in a procedure of identification remains. It is recommended to copy the drafting of the amendment related to article 21 of the reception conditions directive proposal even if some changes have to be made, as the people concerned are not asylum seekers but recognized refugees, or beneficiaries of subsidiary protection.

### **1.3. Taking into account of the situation of vulnerable asylum seekers with special needs placed in detention: main problems and Recommendations**

The detention of vulnerable asylum seekers set as a principle is neither at variance with the EC legislation nor with the international law. The absence of banning of the principle itself of detention of vulnerable people does not mean their detention will be considered to be legal and non arbitrary in all circumstances. Probably, more often than for other people, the judge will be attentive to the fact that the detention is neither illegal nor arbitrary and that its conditions do not breach the international standards. With regard to the detention conditions, asylum seekers in detention should in theory profit from the implementation of the minimal standards of the reception conditions directive among which protective standards are in favour of vulnerable applicants. However this is not the case in many MS. There are two reasons for it: on the one hand, as it was underlined (Title 2), some MS consider that the reception conditions directive in force does not apply to asylum seekers in detention, on the other hand many MS have not set up yet the procedure of identification of vulnerable asylum seekers (Title 3).

The reception conditions directive Commission proposal improves very efficiently the taking into account of these problems. Beside the answers that were already explained in titles 2 and 3, a specific provision was added by the Commission in the reception conditions



directive (article 11 § 5). The purpose of this provision is to avoid the loss of freedom of people whose physical or mental health condition could significantly deteriorate, as a result of the detention. Article 11 § 5 lays down the setting up of an individual examination, making it possible to assess the health condition of the applicant to appreciate how significantly it could be affected by detention. The Commission proposal should be fully accepted. One aspect of the individual examination must nevertheless be reformulated. The text of the Council is a retrograde step since it removed the reference to the individual examination envisaged by the Commission. This modification is likely to compromise the effective implementation of the stated principle. The text of the Council cannot consequently be accepted.

#### **1.4. Common observation to titles 3 and 4 relating to vulnerable asylum seekers with special needs**

The instruments of second generation proposed by the Commission contain new protective provisions in favour of vulnerable asylum seekers. This is with no doubt positive. However, the Commission has not often provided the means to make it possible to ensure the implementation of these protective measures. This definitely implies to bring in procedures. Then another issue appears with respect to a multitude of examinations, procedures and mechanisms of assessment. The various actors on the ground should be solicited in order to think of relevant ways to establish links between these various procedures, or some of them. Such a reflection seems essential to ensure the viability of the CEAS.

## **CHAPTER 4: THE ASYLUM PROCEDURES DIRECTIVE (APD)**

### **1. GENERAL CONSIDERATIONS**

This part of the report analyses, on the basis of a diagram of the procedures (see annex to the chapter), the main weaknesses of the APD (vacuity and insufficiency of the current minimum common standards; wide margin of discretion given to Member States; multiplicity of provisional provisions; numerous possibilities to derogate to the basic principles and guarantees of Chapter II of the Directive) and the variety of the different facultative procedures (with several standstill clauses) actually foreseen by the Directive, to conclude that the APD provides more for a “variety of procedural standards” than for a “standard procedure” and lacks the potential to ensure, regardless the Member State concerned, fair and efficient examination of an application for international protection and, in addition to back up adequately the “Qualification Directive”.

The principal aims pursued by the recast proposal of Directive of the Commission (single procedure for both forms of international protection; reinforcement of the procedural guarantees; simplification of the different procedures; modification of a number of notions and devices; enhancing gender equality and providing for additional safeguards for vulnerable applicants) are afterwards described, and the necessity is underlined to examine the recast programme of the second phase of the EU asylum instruments as a whole.

It is referred to in the international legal framework which has to be taken into consideration, inter alia, to ensure the respect of the principle of non-refoulement (Geneva Convention; European Convention of Human Rights; International Convention on the Rights of the Child; Charter of Fundamental Rights of the EU). Attention is also paid to the necessity to control the compatibility of the recast proposal with fundamental rights and

general principles of EU law, even as with the case law of the CJEU and the ECtHR. It is indeed essential to determine, when examining the different provisions of the recast proposal, what is legally required and what is more relied upon in a political debate between the different stakeholders.

## **2. MAIN PROBLEMS AND RECOMMENDATIONS ON THE BASIC PRINCIPLES AND PROCEDURAL GUARANTEES CONCERNING THE ADMINISTRATIVE PROCEDURES AT FIRST INSTANCE**

The recast proposal contains the establishment of a single asylum procedure for both forms of protection. The advantages of this option must be underlined.

The report analyses the APD and the recast proposal to determine if the access to the procedure and the procedural guarantees offered are satisfactory. The general conclusion is that the recast proposal answers to a large part of the critics expressed about the APD, while some concerns remain:

The right to remain during the procedure, even in case of extradition, has to be guaranteed taking into consideration the principle of non-refoulement and the absolute protection against removal guaranteed by article 3 ECHR. The recast proposal answers this critic of the current text.

### **Right to be informed and capacities of the determining authorities**

In order to avoid refoulement of asylum seekers in situation of mixed arrivals, border guards and immigration officials would benefit from training and clear instructions on how to answer asylum application and how to handle the needs of vulnerable groups. The recast proposal improves the capacities of the authorities, while an unjustified exception remains for the Dublin cases. In the same time, the identification of the authorities has to be clarified since the recast proposal continues to refer as well to "determining" as to "competent" authorities. The recast proposal contains also a new provision dedicated to the right to information of the applicant, namely in critical zones like transit zones. The effective access to the procedure depends indeed on this right to receive available and complete information.

### **Personal interview**

The APD lists many exceptions to the right to the personal interview, while an oral hearing is important for an asylum seeker, even if its application seems inadmissible or grounded on undue reasons, or to rebut a presumption of safety in case of application of the concepts of "first country of asylum" (FCA), "(European) safe third countries" ((E)STC), and "safe countries of origin" (SCO). Even when a personal interview is provided by the APD, its requirements are too vaguely formulated. However, the right to be heard is guaranteed by CJ case law and required by the UNHCR. With this regard, the new procedural safeguards provided by the recast proposal contribute to the effectiveness of a fair and efficient procedure and by this way could reduce the percentage of appeal.

### **Legal assistance**

The right to legal assistance is guaranteed by the APD but is limited. On the one side, its scope is problematic since the legal adviser could not have access to all the information contained in the applicant's file. On the other side, this right is guaranteed at the own expenses of the asylum seeker because the right to free legal assistance is limited to the

second (judicial) stage of the procedure. The recast proposal enlarges the access to the information of the applicant's file and the right to free legal assistance. On the one side, this right is not yet limited to the procedures on appeal. On the other side, the proposition removes the possibility to refuse to grant the free legal assistance to other procedures than judicial procedures and to limit it only if the appeal or review is likely to succeed. The right to legal assistance is not subjected to discussion under EU law and in the ECHR that imply that the effectiveness of a judicial remedy is conditioned by the right to legal assistance. Even if this right is as such not absolute, the same principles apply to the right to free legal assistance at the second stage (judicial review) of the procedure. At the first stage of the procedure (administrative procedure), even if the texts and the case law are not so explicit, one can deduce from the CJ case law and from the necessity of the practice that a right to free legal assistance at the first stage has also to be recommended, taking into account the specificity of the asylum matter.

### **Applicants with special needs**

One of the criticisms addressed to the APD is the lack of protection of the applicants with special needs. Only minors did benefit of a specific protection, while considered insufficient. Procedural rules have to be adapted to allow weaker applicants to be heard in right conditions. Moreover, to apply the same rules to situations significantly different, violates the principle of non-discrimination. Even if the recast proposal contains a new provision specifically dedicated to applicants with special needs, to guarantee an effective protection, the recast proposal should also: 1°) define more precisely the protected groups; 2°) oblige the Member States to make a systematic monitoring to identify those groups, since an application is introduced; 3°) and clarify the guarantees provided to each subgroups of the applicants with special needs.

### **Standards of examination**

In addition to the mere procedural provisions, the APD does also contain some rules on the examination of asylum applications ("standards of examination"). The question is if there is a need to better define those standards and if it would or not be possible to make concrete proposals in the amended Directive. Other ideas could be:

1. to charge EASO to deal with issues of "recommended standards of examination" by issuing guidelines, from which Member States may deviate, but may be obliged in that case to register their differences;
2. to realize, with the cooperation of EASO, experimental procedures concerning, inter alia, "joint processing" of examinations;
3. to incorporate Article 4 of the "Qualification" Directive in the APD.

## **3. MAIN PROBLEMS AND RECOMMENDATIONS CONCERNING GUARANTEES FOR A FULL EXAMINATION OF THE SUBSTANCE OF THE CLAIM**

The concrete application by each Member State of some concepts of the APD, like "FCA", "(E)STC", or "SCO", could lead to deprive an asylum seeker to an access to an effective protection because he will not benefit of a full examination of the substance of his/her application. All the specific uses of the different forms of the "safe countries" concept raise similar concerns: the question of the illegal entry and/or of the individual examination of the claim; the criteria for the determination of countries as "safe"; the determination of the authorities that should be responsible in such cases; the meaning of "effective protection" in the country considered as safe; the question of the "necessary link" between the

applicant and the third country concerned; the specific treatment of minors or vulnerable persons when applying those concepts. Even if some improvements are inserted in the recast proposal, they are not sufficient. In each case, the right to rebut the presumption of safety has to be explicitly recognized by the directive, as well on the procedural level as on the substantial level. The concept of CEAS is also not consistent with the option to refer only to "national" lists rather than to adopt "common EU" lists, with the possibility to involve the EASO. Moreover, about:

- the FCA, the terms "sufficient protection" are too weak and could be replaced by "effective [and available] protection".
- the STC: a removal to such a country could only occur on the basis of an agreement which clearly outlines the respective responsibility of the Member State and of this country;
- the SCO: providing that the use of those lists of SCO does not increase the burden of proof for the asylum-seeker, that each individual case will be examined fully on its merits, and that procedural guarantees are offered, the establishment of those lists could be acceptable. However, since the procedural guarantees required are the same than in the regular procedure, one may wonder if the complexity involved by this concept is really necessary for the Member States;
- the ESTC: if we consider that the same procedural guarantees would apply as for the STC, this concept would better be abandoned.

#### **4. MAIN PROBLEMS AND RECOMMENDATIONS ON THE ORGANISATION OF THE DIFFERENT ADMINISTRATIVE PROCEDURES AT FIRST INSTANCE**

At the hand of a comparative diagram (see annex to the chapter), the accent has first been put on the complexity of the procedures provided by the APD and on the effort of simplification that has been pursued in the recast proposal. At the end of this examination, we can conclude that the new framework of procedures proposed could be considered as much more accessible and comprehensive than the one actually provided by the APD. It would be theoretically possible, but unreasonable in practice, to plaid for the abolition of any kind of specific or accelerated procedure and for the use of only one procedure. Taking this into account, we can consider that the different procedures provided by the recast proposal are acceptable and in line with the international obligations of the Member States and with the case law of the CJ and of the ECtHR, in so far as:

1. the number of those procedures is reduced (inter alia with the abolition of the stand still clauses);
2. the power to decide on the merits of the claim is, as such as possible, given to the determining authority;
3. and the minimal guarantees lay down in the regular (ordinary) procedure, which are also reinforced by the recast proposal, would also apply to the accelerated or specific procedures, unless it appears absolutely incompatible with the specificity of those procedures, but at the condition that the exceptions provided are conform with the case law of the CJ and of the ECtHR.

Some comments or recommendations can however be made concerning some aspects of the new organization of the asylum procedures at first instance:

- the recast proposal should be completed in order to determine the consequences of failure to adopt a decision a first instance within the determined time-limits;
- concerning the “accelerated” procedures, which are now clearly distinguished from the “prioritized” procedures, the main problems posed by the APD are resolved by the recast proposal (limited list of cases; reinforcement of the procedural guarantees: personal interview; possibility to ask, at least, for a temporary suspensive effect of a judicial appeal), provided that time-limits to conduct such procedures should not be too short and that the applicant has to be given a realistic opportunity to prove his/her claim;
- concerning the “inadmissible applications” procedure, it is suggested, in addition to what has already been said concerning the “FCA” and “(E)STC” concepts, to examine some risks confusions resulting from some provisions of the recast proposal: confusion between some cases of “inadmissible applications” procedure and some cases of “preliminary examination” procedure of subsequent applications; what are the requirements for the “admissibility (personal) interview” provided by Article 30 (1) recast proposal?; who will take the decision: the determining authority or another “competent” authority?);
- the provisions of the recast proposal with regard the “border” procedure may be approved, but one concern remains: the fact that very short time frames that would be applied by Member States, among other to introduce an appeal, could render very difficult the exercise of rights and obligations by the applicant;
- the “preliminary examination” procedure of subsequent applications is, as a principle, acceptable. Concerning the APD, there are however some critics about the fact that this specific procedure can also be applied in circumstances where the first application has not been examined on its substance. It is indeed proposed in the recast proposal to modify the scope of this procedure that would only be applicable when a person makes a subsequent application after a final decision has been taken on the previous application or where the previous application has been explicitly withdrawn. It is also explicitly provided that, where a person with regard to whom a transfer decision has to be enforced pursuant to the “Dublin” Regulation, makes further representations or a subsequent application in the transferring State, those representations or subsequent application shall be examined by the responsible Member State in accordance with the “Asylum Procedures” Directive. It may be considered as a consequence, that most of the concerns expressed with regard to the scope of this procedure are met by the recast proposal. Concerning the foreseen exception to the right to stay in the territory during the administrative examination of a (second or multiple) subsequent claim after that a first subsequent claim has already been considered as “inadmissible” or as “(manifestly) unfounded”, further explanations would however be given on the following points:
  1. which right to an effective remedy against the expulsion or removal order: application of the “Return” Directive or of Article 41 recast proposal?
  2. what about the relations between the “competent” authority and the “determining” authority before such an order should be decided?
- in cases of withdrawing of the recognized international protection status, the right to free legal assistance is only recognized once the “competent authority” has

taken this decision; we do however not see how this difference of treatment can reasonably be justified with regard to the recognition of such right at all stages of the procedures in first instance. We also consider that the person concerned would have the right to a personal interview, in the place of a written statement of the reasons why it is not justified to withdraw the status, at least when he/she expressly request for such interview;

- is it intentionally or not that the recast proposal does not more contain any provisions concerning “national security problems”?

To conclude on this point, we recommend the Parliament to support the recast proposal and to examine if any proposed amendment to this proposal is at least in conformity with the case law of the CJ and of the ECtHR; we also suggest taking into consideration the problems mentioned above.

## **5. MAIN PROBLEMS AND RECOMMENDATIONS ON THE EFFECTIVENESS OF THE JUDICIAL PROTECTION PROVIDED BY THE APPEAL BODIES AT FIRST INSTANCE**

The accent has first been put on the fact that the APD, which gives Member States a wide margin of discretion for the organization of the judicial remedy is far from given assurance, such as demonstrated by the recent case law of the ECtHR (among other the possibility of a suspensive effect of a judicial appeal or the power recognized to the court or tribunal), that the national law or regulation of the Member States will effectively be in accordance with their “international obligations”. Therefore, this is not surprising that multiples differences appear between Member States with regard to the level of protection standards and procedural guarantees provided by each national judicial system. This statement does not conform with the aim pursued by the construction of the CEAS, among others, of a common asylum procedure with mutual recognition as the long term goal.

Furthermore, taking into account the consequences of the entry into force of Article 47 CFR (and Article 19 (1) TEU) and the interaction with the recent case law of the CJ and of the ECtHR, we can consider that the aim of the Commission to introduce in the recast proposal the minimal requirements for an effective remedy is a good step forwards and that the minimal requirements provided in the recast proposal (among others: the access to information in the applicant’s file by the court or tribunal and/or by the applicant and/or his/her counsellor and/or representative; the right to (free) legal assistance and representation; the automatic suspensive effect of the appeal or, at least, the possibility to ask for this suspensive effect until a first decision of the court or tribunal on the arguability of the claim; the scope of examination by the court or tribunal [full examination of both facts and law/examination “ex nunc”/examination “proprio motu”]) in general, conform with the minimal requirements provided by the case law of the CJ and the ECtHR.

Some specific recommendations have however been made in the report:

- the introduction in the Directive of a common minimum time-limit to introduce an appeal, time-limit which could vary regarding the procedure, which has been applied to the specific case;

- the recast proposal would also be amended to prevent that an expulsion order should be enforced during the time-limit open to lodge an appeal, or at least to ask for an interim measure of suspension which has expired;
- the recast proposal would also be completed to determine the consequences of the overstepping of the time-limits imposed for the court or tribunal to examine an appeal.

## CHAPTER 5: THE EXTERNAL DIMENSION OF ASYLUM

### 1. GENERAL CONSIDERATIONS

The area of freedom, security and justice that the Union shall 'offer to its citizens', pursuant to article 3(2) TEU, is supposed to remain penetrable to 'those whose circumstances lead them justifiably to seek access to our territory'. The Tampere Conclusions indeed established that "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 [...]" (§4). The Stockholm Programme has set out precisely that "people in need of protection must be ensured access to legally safe and efficient asylum procedures" (§1.1). At the same time, as the Tampere Conclusions recall (§3), "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" is to be taken into account. According to the European Pact on Immigration and Asylum, a proper balance is thus to be struck so that "the necessary strengthening of European border controls [does] not prevent access to protection systems by those people entitled to benefit under them".

In an environment of extraterritorial border surveillance and migration control, several solutions have been posted to offer guarantees to those who seek protection in or access to the European Union with varying degrees of success. Some of these mechanisms focus on the regions of origin and transit of refugee flows, as vectors of the international system of protection, with the objective of enhancing their protection capacity to manage protracted situations. Other initiatives engage directly with the individual refugee and his physical access to the territory of the EU Member States in a safe and orderly way. Still other measures, particularly those concerned with border surveillance and migration control in general, appear to largely neglect their impact on asylum seekers' and refugees' rights.

This chapter constitutes the contribution on the external dimension of asylum to the debate regarding the future development of the Common European Asylum System (CEAS). Our purpose is to identify the main legal questions regarding the administration of access to international protection in the EU Member States and to advance possible solutions. The chapter looks into the state of the art of the EU *acquis* on entry management with an impact on access to international protection, evaluating current shortcomings and putting forward short-term solutions. Future perspectives are assessed in Part III of the study. After a preliminary review of the obligations of the EU Member States with an effect on access to international protection, the measures adopted to administer migration in general are dealt with first. The Schengen Borders Code, visa policy, carrier sanctions, immigration liaison officers, and joint patrolling conducted under the auspices of the FRONTEX agency are all concerned.

Subsequently, the policy instruments implemented to manage refugee inflows in particular, are examined. Both the EU Joint Resettlement Programme and Regional Protection Programmes are assessed in Chapter 5. Offshore processing schemes, protected-entry procedures as well as, our recommendation for a comprehensive approach to access in the form of an overall protection-sensitive entry-management system are evaluated in Part III.

## **2. MAIN PROBLEM AREAS IDENTIFIED WITH REGARD TO ACCESS TO PROTECTION**

EU Member States' approach to the extraterritorial applicability of human rights obligations has been fragmentary thus far. There is no uniform understanding of the territorial scope of application of protection-related obligations, which risks seriously encroaching upon refugees' and asylum seekers' rights to protection against refoulement and to (leave to seek) asylum. There is a pressing need for a consistent approach to the issue of access to international protection in the EU, which requires the prior acknowledgment by the EU Member States of the mixed character of the migratory flows to which they are confronted and the recognition of extraterritorial protection-related obligations that may be engaged by the actions or omissions of their agents when they operate abroad. The rights of refugees and asylum seekers travelling in mixed flows should not be compromised by the extraterritorial intervention of the EU Member States. Those rights should be taken into account at all the stages in which the management of migration and asylum flows is carried out. If a priori there is no obligation to provide for international protection extraterritorially, where the EU and/or its Member States exert 'effective control' over an area in foreign territory or over persons abroad, for instance through the extra-territorialisation of their migration and asylum policies, their human rights obligations, as ensuing from international and EU law, may be engaged. In addition, international cooperation, be it with international organisations or with third countries, does not exonerate the Union or its Member States from their respective obligations. In these situations the persons concerned are brought under the jurisdiction of the Union and/or its Member States in such a way that EU law, including its fundamental rights' *acquis*, becomes applicable and must be duly observed.

In the absence of adequate monitoring and evaluation tools, the real impact of entry and pre-entry control measures on the rights of asylum seekers and refugees remains unknown. No such instruments exist with regard to the Schengen Borders Code, nor regarding visa policy or carrier sanctions. The information available with regard to the activities of Immigration Liaison Officers (ILOs) posted abroad is very limited, as is access to data concerning FRONTEX-led operations. Full disclosure is prevented by existing rules on the classification of risk analysis, evaluations and periodic reports in this domain.

The integration of protection-related considerations in the design and implementation of existing instruments of entry and pre-entry control is presently unsatisfactory. Clear entry requirements for refugees and asylum seekers are lacking. Although article 13(1) SBC indicates that 'special provisions concerning the right of asylum and to international protection' may apply when dealing with entry refusals, it remains silent as for what these 'special provisions' should concretely provide. All refugee-producing countries feature in the black list of Regulation 539/2001, putting a heavy burden to access international protection in the EU through the submission of refugees and asylum seekers to visa requirements. In addition, there are no uniform conditions for recognised refugees to obtain visas and the provisions on limited territorial validity visas (LTVs) seem insufficient to fully accommodate the obligations that might be owed to refugees yet-to-be-recognised in exceptional circumstances. Ultimately, actual access to visas is not guaranteed in practice, as the



diplomatic presence of the EU Member States in the third countries concerned is not compulsory. Against this background, the articulation of carrier sanctions with the respect of refugees' and asylum seekers' rights in relation to access to international protection is highly problematic. Considering that visas are not always available, carriers should be enabled to carry out full entry checks on the basis of the SBC provisions and the exceptions thereof. Similarly, ILOs' activities accommodation to the asylum dimension related to their action is not obvious. Their main task is precisely to prevent irregular immigration, without particular regard being had to the special position of those who need international protection. No specification of the procedures to be used in cases in which ILOs encounter refugees or asylum seekers or of any remedies available against their actions can be found in the ILOs Regulation. FRONTEX operations also pay insufficient attention to the rights of refugees and asylum seekers in transit. The lack of a uniform understanding of search and rescue obligations and of interdiction powers at sea among the Member States renders compliance with protection obligations further intricate. Cooperation with third countries in joint-surveillance missions has fostered further confusion in this regard.

The entire system of entry/pre-entry control has to be subject to the democratic oversight of the European Parliament and the judicial control of both national and European courts. However, entry refusals are not endowed with suspensive effect under article 13 SBC. In light of articles 19 and 25 of the Community Code on Visas, appeal rights against LTV visa denials are unclear. As far as private carriers' decisions are concerned, no remedies presently exist against exclusion from boarding in Directive 2001/51. Finally, remedies are also missing with regard to ILOs' and FRONTEX agents' actions or omissions in the relevant legislation.

In a context of prevailing extraterritorial entry controls, to ensure that the right to (leave to seek) asylum and to non-refoulement remain accessible in law and in practice, common measures should be codified to provide a safe and legal access to international protection in the EU. Article 78(2)(g) TFEU provides the EU legislator with the legal basis to adopt legislation 'for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection'. It would further appear that such measures shall be adopted as an integral part of the CEAS that the Union has to develop. Implemented and proposed initiatives in this realm comprise the EU Resettlement Programme, Regional Protection Programmes, which give rise to common concerns: they pursue high ambitions with limited financial and material means; doubts arise as for the voluntary nature of the participation in these measures, as their proponents maintain; so long as the real needs and capacities of the countries of first asylum these measure target are ignored, their impact will be limited; a requirement of consistency has been introduced with regard to the Global Approach of Migration, which constitutes a cause of concern, whereas coherence with the internal asylum *acquis* has been obliterated; the complementary nature of these measures with pre-existing legal obligations has not been clearly stated.

### **3. RECOMMENDATIONS**

The content of the main obligations binding upon the EU Member States vis-à-vis refugees and asylum seekers in transit, as enshrined in the international instruments to which the EU Member States have adhered and in EU law itself, is to be properly identified. The principle of non-refoulement, the right to (leave to seek) asylum, in their substantive and procedural components, should be well delineated and incorporated into each of the extraterritorial initiatives undertaken by the EU and its Member States with an impact on access to international protection. On the ascertainment that human rights obligations may be engaged extraterritorially, it should be clearly acknowledged that entry and pre-entry

controls shall be designed and implemented in a way that does not deprive refugees and asylum seekers of the protection that the prohibition of refoulement and the right to (leave to seek) asylum afford them in both their facets, substantive and procedural. In order to preserve the effect utile, entry and pre-entry controls, in the form of Schengen visas, carrier sanctions, the intervention of immigration liaison officers (ILOs), and the interdiction carried out in the course of FRONTEX-led operations, must be aligned with the fundamental rights' *acquis* of the EU. Activities pertaining to the 'external dimension of asylum' *stricto sensu*, such as the EU Resettlement Programme, Regional Protection Programmes, and proposals for Protected-Entry Procedures shall also be made compatible with these entitlements.

The real influence of pre-entry and entry management instruments on asylum seekers' and refugees' rights should be properly identified. Therefore, it is highly advisable that reporting obligations on the actors concerned, independent monitoring, evaluation mechanisms and the duty to collect specific statistical data relevant to the situation of refugees and asylum seekers in transit be introduced for the purpose. The existing information in relation to the activities of ILOs and FRONTEX-led missions should be declassified. Once the real dimensions of the legal concerns posed by general border and migration legislation with regard to refugees' and asylum seekers' rights become known, the streamlining of the existing legislation will be facilitated.

The rights of refugees and asylum seekers shall be duly incorporated in migration control and border surveillance strategies. Specific procedures and adequate legal safeguards must be introduced to ensure compliance with protection-related obligations. Ultimately, the instruments for which the alignment with the fundamental rights' *acquis* of asylum seekers and refugees under EU law reveals impossible will have to be abolished. Accordingly, clear procedures for the identification and referral of asylum seekers at entry and pre-entry shall be introduced in the Schengen Borders Code. In light of the *Munaf* and *WM* jurisprudence, visa lists should be configured and reviewed considering not only security and illegal immigration concerns, but also their possible human rights implications, to facilitate the fulfilment by the EU Member States of their extraterritorial protection obligations as appropriate. In order to achieve the Treaty objective of a 'common policy on visas', the current discretion accorded to the EU Member State in relation to visa requirements for recognised refugees should be eliminated. The conditions and the procedure to issue LTV visas to refugees and asylum seekers shall be clarified, to ensure that the Member States at issue are able to fulfil their extraterritorial international obligations, as appropriate. Yet, if the availability of visas cannot be guaranteed in practice, the institution of carrier sanctions must be entirely re-thought, if not abandoned. With regard to ILOs, better specification of their tasks and powers and the introduction of appropriate legal safeguards is essential. The same applies to FRONTEX missions, *vis-à-vis* both the action of the agency's personnel and that of the agents of the Member States participating in joint operations. Specific procedures and remedies shall be introduced to provide adequate legal safeguards to those seeking international protection recovered at sea.

Effective remedies, which are accessible both in law and in practice, must be introduced for each individual case in which the person concerned presents an "arguable claim" that his rights have been or risk being violated. Therefore, the wording of article 13(3) SBC shall be clarified, so that the position of refugees and asylum seekers with regard to appeals against entry refusals is brought in line with the requirements of an 'effective remedy' *ex* article 13 ECHR and article 47 EUCFR. The linguistic inconsistencies between articles 19 and 25 CCV shall be eliminated, so that refugee visa applicants do not see their applications truncated at the admissibility stage. Effective rights of defence and appeal should be introduced for

those affected by carriers' decisions. Yet, in practice, even if carriers would be de jure empowered to make full decisions on entry, it remains unclear how the exercise of effective remedies against their decisions and the right to judicial protection could be upheld in a meaningful manner. The impossibility to introduce the necessary legal safeguards in the carrier sanctions' scheme should hence lead to the abandonment of the policy. With regard to ILOs' actions, it is also uncertain that the legal safeguards and remedies that may be introduced in the ILOs Regulation could be effective in practice. Thus, as with carrier sanctions, the impossibility to introduce the necessary legal safeguards in their scheme should lead to their abolishment. With regard to the actions and omissions that may be undertaken in the course of a FRONTEX-led operation, the inconvenience of implementing offshore procedures is referred to above. It ensues that in the maritime context for remedies to be effective disembarkation in 'a place of safety' located within European jurisdiction may actually be required.

With regard to the limitations identified in relation to the EU Resettlement Programme and RPPs, several suggestions are provided: Given the fact that the financial and material means on which they rely are limited, to realize their humanitarian aspirations their coordination with other external humanitarian activities of the EU should be assured in practice; concerning the nature of the participation in these measures, there is ground to consider that, in view of the wording of article 78(2)(g) TFEU, participation in their implementation should be deemed compulsory; to maximise their humanitarian impact, RPPs and the EU Resettlement Programme shall translate a multilateral partnership with the countries of first asylum; in light of the duty to ensure consistency across the policies of the Union, enshrined in articles 7 TFEU and 21(3) TEU, flagrantly contradictory results between or within the external and the internal asylum acquis shall be considered in breach of this legal obligation. Therefore, the design and implementation of RPPs and the EU Resettlement Programme should take into account the relevant rules of the CEAS already in place; on the other hand, linking protection-related measures to migration management concerns, as those belonging to the Global Approach to Migration, risks detracting those measures from their primary humanitarian objectives; the existence of such measures cannot be used as a pretext not to grant admission, or not to provide protection in accordance with international and EU law as appropriate; the complementary nature of these measures must be made straightforward.

## **PART 3: LONG-TERM PERSPECTIVES FOR THE COMMON EUROPEAN ASYLUM SYSTEM**

It does not seem reasonable to expect changes of the European Treaties and therefore to come up with revolutionary proposals. Moreover, much can be done in the current treaty framework with the renewal of the policy due to the entry into force of the Treaty of Lisbon, as well as the Charter of fundamental rights and the creation of the European Asylum Support Office. Four perspectives should be considered for the development of the Common European Asylum System in the future.

### **SECTION 1: THE LEGAL PERSPECTIVE**

Three parameters must be taken into consideration.

#### **1. THE IMPACT OF ARTICLE 18 OF THE CHARTER OF FUNDAMENTAL RIGHTS**

This provision states that “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967, relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union ».

This provision reflects the complexity of the texts guaranteeing asylum in the European Union. Based on a mixing of the notions of asylum and refugee, the question of its precise meaning from the minimum procedural right to seek asylum to the maximum substantive right to territorial asylum, as well as of its effect (direct or not?), are open to interpretation and will need an interpretative ruling by the Court of Justice. It is nevertheless clear when it is read in conjunction with article 78, §§1 and 2 TFEU, that it creates for the European Union the positive obligations to guarantee the right to asylum by applying the principle of non-refoulement and adopting an appropriate status for protected persons encompassing refugees, subsidiary protection and even temporary protection.

#### **2. THE ACCESSION OF THE EUROPEAN UNION TO THE GENEVA CONVENTION**

The idea for the EU to accede to the Geneva Convention is expressed for the very first time in the Stockholm Programme. It is in line with article 78, §1 TFEU, following which the common asylum policy “must be in accordance with the Geneva Convention”.

Firstly, one may wonder if it is legally feasible. This seems to be the case from the point of view of the European Union. Its firmly established internal competence regarding asylum allows the Union to exercise it externally by acceding to the Geneva Convention, even if it must be clear that the Union would in this way not succeed to the Member States, as it does not grant asylum to refugees. However, the Geneva Convention covers several questions concerning refugees' rights that belong to the Member States and would appear to be a mixed treaty that the EU can only ratify partially because of the sharing of competences with its Member States.

The feasibility from the point of view of the Geneva Convention is more complicated. This Convention is indeed only open to State Parties that is not the case of the European Union.

This important obstacle can nevertheless be circumvented in two different ways. The first one is an amendment to the Geneva Convention that is not commendable because there is a risk to reopen a debate about its substance which could at the end be undermined. The second of a protocol to the Geneva Convention similar to the one used to organise the accession of the EU to the Convention of Human Rights seems to be the best option. Another more difficult problem might nevertheless appear. The Protocole n°24 on asylum for nationals of Member States of the European Union (the so called "Aznar" Protocole), excluding them from asylum in the EU, is generally considered as contradictory to the Geneva Convention and could be considered as an obstacle to the accession of the EU.

Before its technical feasibility, the added value of the accession of the EU should be at the core of the discussion. Its main value would be linked to the new status that the Geneva Convention would acquire in EU law. As an international convention ratified by the EU itself, the Court of Justice would become a direct interpreter of it and could give more weight to the interpretations given to its provisions by the UNHCR. However, even if it would obviously give it more weight as a key player at international level in the refugee policy, the accession of the EU to the Geneva Convention would not imply that it becomes automatically part of the Executive Committee of the UNHCR, whose composition is regulated by another procedure implying the quality of Member of the United Nations.

### **3. THE CHANGE FROM HARMONISATION TO REGULATION**

Directives have been used until now to adopt the first building blocks of the Common Asylum policy. These instruments were the only ones that could be used under the Treaty of Amsterdam limiting the competence of the EC to minimum standards. With the removal of this limitation by the Treaty of Lisbon, it is now possible to envisage the adoption of regulations. While directives are flexible instruments of harmonisation of national rules leaving a certain room of implementation to Member States that can and in certain cases have effectively undermined the coherence of the European Asylum Policy, regulations having direct effect are instruments of unification of national law that are much more effective to establish the necessary basis for a Common Asylum System. They should be used at least regarding the definition of persons to protect, their status as well as procedural guarantees for asylum seekers while types of asylum procedures would still be subject to directives. Because they have been proposed by the Commission before the entry into force of the Lisbon Treaty, the recasts are still directives. Due to the fact that it will be adequate to coordinate all the texts once they will be adopted, this moment should be the occasion to adopt a European Asylum Code based on regulations.

## **SECTION 2: THE INSTITUTIONAL PERSPECTIVE**

Despite the fact the Commission underlined from the beginning the need to coordinate national policies and not only to harmonise national legislations in order to build a coherent asylum policy in the EU, the Member States ignored the proposal to act in this way made in 2001. The practical cooperation envisaged in the field of asylum by the Hague Programme in 2004 developed therefore too slowly. A decisive step has however very recently been made with the creation of the European Asylum Support Office by a regulation of 19 May 2010.

Among the very diverse tasks of the new Office, the adoption of technical guidelines is particularly promising if they are, as we propose, properly used under the supervision of

the Court of Justice to guide the Member States in the assessment of the situation in countries of origin of asylum seekers, in order to improve the convergence and the quality of the decision making process in the field of asylum by national administrations. The political impetus given by the European Council in the Stockholm programme could allow the European Asylum Support Office to make up for the lost time with the development of the practical cooperation between Member States. It is therefore regrettable that the Council, as well as the Parliament have shown that they are not yet fully aware of the necessary policy changes by imagining that "The Support Office should have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection" in the preamble of its organic regulation. The mandate of the European Asylum Support Office should be aligned on the huge ambitions of the European Union in the field of asylum at the occasion of its evaluation in 2014.

### **SECTION 3: THE JURISDICTIONAL PERSPECTIVE**

The recognition of asylum as a fundamental right by the EU Charter requires logically a better protection by a judge. This is even more necessary throughout the European Union where protection is interpreted in various ways in similar cases in breach of equality of treatment between applicants. The current control exercised by the Court of Justice is necessary but remains insufficient as it allows a common interpretation of European rules in law, but not a common assessment of the situation in third countries in fact.

Proposing a new system is nevertheless not easy because the need for more jurisdictional control at European level should avoid creating a bottleneck. More particularly, it should also fit with the current organisation of jurisdictional control at EU level.

To reform the system by creating a European judge specialised in asylum is not feasible: the creation of a brand new European Appeal Court for asylum is not realistic because it does not respect the classical division of powers between the European and the national judges; the existing option to give more competences to the tribunal on the basis of article 256, §3 TFEU has not been welcomed by the Court; finally, the establishment of a specialised court in specific areas like asylum, has been made possible by article 257 TFEU, but cannot be used for all types of action.

To adapt the existing system by extending the competences of the Court of Justice appears to be the best way to regulate the Common European Asylum System. The creation of the European Asylum Support Office is an important step in the good direction. Even if they have currently been foreseen with a too narrow-minded approach, there exists the possibility for the office to adopt guidelines addresses to Member States. Moreover, judges can be associated in the working groups of the Office and therefore could contribute to their elaboration. The existence of guidelines in the field of European competition law and the specific value that has been given to these atypical acts by the jurisprudence of the Court could inspire EU asylum law. The idea consists of obliging the Member States to express special motives in their decisions when they do not follow the guidelines of the EASO.

This activity could develop under the control of the judge. First of all, regarding problems related to the legality of the guidelines that can never be excluded, article 263, §5 TFEU foresees that "Acts setting up agencies of the Union may lay down specific conditions and arrangements brought by legal or natural persons against acts of these agencies". Individuals could so find a possibility to ask the Court to review the legality of EASO's

guidelines. Secondly, regarding the respect of guidelines by the Member States which would be essential for the coherence of the Common European Asylum System, one could imagine to open a special request to the Court to give a ruling on a question of interpretation of the guidelines. Afterwards, the Commission could in case use the classical infringement procedures against member States and asylum seekers ask the national judge to review the legality of national decisions against the guidelines.

## **SECTION 4: THE SUBSTANTIAL PERSPECTIVE**

### **1. THE PROBLEMATIC OF ENVIRONMENTAL OR CLIMATE "REFUGEES"**

There is currently a large normative gap in international refugee law for persons fleeing their country of origin for environmental or climate reasons. At the European level, subsidiary or temporary protection could only be applicable to certain of those cases. At national level, those persons may only find a temporary protection in Finland and Sweden on the basis of provisions of national law or humanitarian resident permits based on practice in the UK or Denmark.

Knowing that the criteria to define subsidiary protection should be drawn from international obligations under human rights instruments and practices existing in member States, there seems to be enough ground for thinking to integrate environmental or climate "refugees" into subsidiary protection, as the European Parliament envisaged in 2002 to do during the second phase of the building of the CEAS. Due to the fact that the Commission has announced for 2011 a communication about the link between climate change, migration and development, as requested by the European Council in the Stockholm programme, the conditions seems to be met to take this problematic issue into consideration in the recast of the qualification directive.

### **2. FREEDOM OF MOVEMENT FOR PROTECTED PERSONS**

The problematic issue of freedom movement of protected persons in the European Union is not only considered as a question of individual rights, but also as a way to contribute to a better burden sharing between Member States in the field of asylum, in particular since internal "relocation" within the EU of protected persons from Member States facing particular pressures to others is used to implement the principle of solidarity within the EU.

The Commission proposed in 2007 to extend the scope of the directive 2003/109 on long term residents to protected persons. This proposal has been blocked because the five years period of residence requested to acquire this status has been considered too long by certain Member States. Another decisive argument against this proposal is that it can also be considered as insufficient because it does not guarantee freedom of movement to long-term residents as the Member States keep too much discretion on this point within the directive.

Starting from the point that it is mandatory for the EU institutions to guarantee a certain freedom of movement to protected persons following one of the two possible options based either on mutual recognition of protection by another Member State firstly, or the acquisition or residence rights in another Member State secondly, it is proposed to extend to protected persons the freedom to work in the European Union. Conditions regulating this

freedom should be similar to the provisions of directive 2004/38 on freedom of movement for European citizens, apart from a waiting period of three years corresponding to the renewal of the residence permit for protected persons in the recast proposal of the qualification directive in order to avoid abuse and build trust between Member States.

The Commission announces in its action plan implementing the Stockholm programme a Communication on a framework for the transfer of protection and mutual recognition of asylum decision for the year 2014. This deadline seems to long for a simple communication with regard to the aim of showing solidarity with Member States facing particular pressures.

## **SECTION 5: THE DISTRIBUTIVE DIMENSION**

As far as the distribution of protection seekers and protected persons is concerned, the Commission has opted for an “improved status quo” in the transition from the first to the second phase of the CEAS. This option is unsustainable in the longer term, and a fundamental reconsideration of existing arrangements will become necessary. In regard of the distribution of protection seekers, experience has shown that the Dublin system is unfair, wasteful, and inefficient – these three shortcoming being closely connected. Two elements of the system – guaranteed access to an asylum procedure, and the “one chance only” principle – are implied in article 78 TFEU and will in all likelihood be retained in their present form. By contrast, the Dublin criteria have proved unworkable in practice, and should in our view be abandoned. For any distribution system to be workable, a higher level of convergence of standards throughout the EU will have to be achieved and, crucially, greater relevance needs to be given to the preferences and interests of asylum seekers. This being the general direction for reform, there are several alternative models to consider.

The UNHCR model, allocating responsibility to the State where the application is first lodged, save where the applicant has close links to another Member State, would enormously simplify the process of responsibility determination, improve cost-effectiveness and be more integration-friendly. More radical, the ECRE model advocates giving protection seekers the choice of the responsible State. While maximising the advantages of the UNHCR model, it would likely be met with stiff resistance from Member States fearing “abuse” and burden-concentration to their detriment. In the alternative, systems based on an agreed “distributive key” could be devised, implying inter alia greater involvement of the EASO. However, in order not to recreate the problems observed under the Dublin system, any such system would still have to ensure that the preferences of asylum seekers are taken into account. It would of course be difficult to secure agreement on any of these models. To avoid political deadlock, they could however be usefully combined.

In particular, the UNHCR or ECRE models could be combined with an indicative distribution key, whereby “above quota” States would automatically receive increased assistance and benefit from relocation programmes. Whatever the system chosen, the “once chance only” principle and the resulting possibility of coercive “take back” transfers will remain. In light of non-refoulement obligations, this will make it necessary to retain also the sovereignty clause and attendant guarantees (e.g. effective remedies against transfers). Concerning the distribution of beneficiaries of international protection, two options are on the agenda: introducing mobility rights (examined in Section 4) and strengthening relocation programmes. Our first observation is that both avenues for reform are promising in their own right. They would usefully complement the reform of the Dublin system – not



constitute an alternative thereto. Our second observation concerns relocation programmes. Currently, such programmes are based on “double voluntarism”, and this might be a reason why they have remained largely symbolic to-date. To increase their impact, it might be necessary to render relocation schemes mandatory for the Member States. However, in view of avoiding high human costs and serious legal complications, we consider it crucial to retain the principle whereby relocation is voluntary for the beneficiaries of protection statuses.

## **SECTION 6: EXTERNAL DIMENSION OF ASYLUM**

### **1. GENERAL CONSIDERATIONS**

Attempting to strike the right balance between border control, migration management and access to protection, several proposals have been formulated in the realm of the external dimension of asylum. Some engage directly with the individual refugee and his physical access to international protection in a safe and orderly way. Both protected-entry procedures (PEPs) and offshore processing schemes (Council doc. 13205/09) have been quite comprehensively formulated and reappear periodically for negotiation at EU level. Building upon them, and on account of the findings of Chapter 5, a medium-term proposal for a ‘comprehensive approach’ to access to international protection is submitted at the end.

### **2. MAIN CONCERNS REGARDING PEPS AND OFFSHORE PROCESSING PLANS PROPOSED AT EU LEVEL**

It is highly uncertain that offshore processing programmes, as the proposed ad hoc protection programme in Libya, can be pursued in practice in accordance with international and EU law standards. The selection of addresses shall neither be discriminatory, nor amount to a penalty, as articles 3 and 31 GC must be observed. Detention must comply with article 5 ECHR levels, both at sea and upon arrival to Libya. Transfers to that country cannot be automatic, since the procedural guarantees attached to protection against refoulement, as established in the ECHR and the EUCFR, must also be fulfilled.

From Article 78(2)(g) TFEU, it appears that some mechanism shall be introduced ‘for the purpose of managing inflows of people applying for asylum’. Since international obligations vis-à-vis refugees and asylum seekers can be engaged extraterritorially, in a context of pervading pre-border controls, the codification of a system of protected-entry procedures to ensure access to protection in a safe and legal way may be considered. Excluding full offshore assessments of asylum claims, several arrangements could be envisaged.

### **3. RECOMMENDATIONS**

Considering the overly complex system that would have to be developed to ensure the compliance of an offshore processing scheme with relevant legal obligations, it is improbable that the initiative can be pursued in practice. Its abandonment is highly advised. EU Member States should not create situations in which the fulfilment of their obligations under international and EU law cannot be fully guaranteed.

With regard to PEPs, we recommend the use of LTVs, on the basis of a differentiated presumption, for the purpose of organising access to protection in a safe and orderly manner. Claims introduced from the country of origin would be presumed arguable, unless the asylum authorities of the Member State concerned disprove it. Conversely, claims submitted from third countries would be presumed unfounded, unless the applicant produces proof of the contrary. In any case, they shall remain complementary to the fulfilment of pre-existing legal obligations.

In the medium term, the preferred option should be to develop a comprehensive approach to access to international protection in the EU, which incorporates protection-sensitive components into the system of border management and entry control at all its stages, recognising the mixed character of migration flows and the extraterritorial applicability of human rights' obligations. Such an approach requires a multilateral management to be effective, conducted in partnership with the regions and countries of first asylum, the UNHCR and other relevant stakeholders. It is proposed that the institutional framework that The Hague Conference of International Private Law provides be used to for that purpose.



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

## POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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