

France-Germany Note: Full-text (February 2017)

"A crisis-resistant Common European Asylum System (CEAS)

1. The new CEAS, currently being negotiated in Council, must be crisis-resistant. In the future case of a potential mass influx of migrants and asylum-seekers, Europe needs sufficient means of reaction. Our citizens expect us to learn the lessons from the crisis of 2015/2016.

2. The most essential lesson from the 2015/2016 crisis is: a mass influx can only be stemmed or prevented in close cooperation with neighbouring countries of the EU. Europe cannot ensure the protection of its external borders (in particular sea borders) exclusively by its own means. The EU-Turkey agreement has been the game changer in the Eastern Mediterranean in 2016. Together with further measures, it has led to a significant decrease in the smuggler-driven - and often deadly - illegal migration to Greece. The agreement is based on three interacting elements: 1) return of asylum seekers (without an assessment on the merits) in order to discourage illegal, smuggler-driven migration; 2) opening of legal, humanitarian pathways for persons in need of protection; 3) improving living conditions for refugees in the partner country by using EU financial means. The combination of these three elements renders access controllable and steerable. It puts a stop to smugglers' networks. At the same time it ensures that Europe lives up to its humanitarian responsibility not to seal itself off against people from third countries who are in need of protection, and to provide help to people in need of protection in third countries. The EU-Turkey agreement therefore is, notwithstanding its still existing implementation deficits, a blueprint for future European asylum policy, also vis-à-vis other neighbouring States.

3. In its current shape, the CEAS does not sufficiently offer possibilities to conclude agreements modelled after the EU-Turkey agreement with other neighbouring States. This is mainly due to the high requirements which must be met in order to implement returns of asylum seekers (without an assessment on the merits). In practice, the following requirements are being derived from art. 38 of the EU Asylum Procedures Directive with a view to conditions in the third country: respect of the non-refoulement principle (no expulsion or return to a

persecuting State); safety from threat and persecution; humane conditions as regards reception and accommodation; medical care; access to education and labour market. An additional condition is the requirement of a formal legal procedure of status determination and acknowledgement. Most neighbouring countries of the EU, in particular those south of the Mediterranean, do not meet all of these requirements. The CEAS in its current shape thus mainly limits the EU to agreements comprising the elements 2) and 3) mentioned above. This is unproblematic as long as accession numbers do not exceed a certain level. It is different though in a case of crisis, i.e. in case of a mass influx.

4. If one asks how far the CEAS reform proposals tabled in summer 2016 are suitable to strengthen the system's crisis-resistance, the answer is sobering. It is true that the draft provisions clarify that the third country need not be a contract State to the Geneva Convention and that it does not have to implement an asylum procedure according to the Convention. However, as far as the material standards mentioned under no. 3 are concerned, the extensive approach of the current system persists. This follows from Art. 45 of the draft EU Asylum Procedures Regulation in conjunction with its recital no. 37. These provisions might even be interpreted in such a way that, beyond said standards, a right to family reunification must be provided for refugees in the third country, at least in principle. Furthermore, the draft provisions stipulate a tightening of the so-called "genuine link" criterion: para 3 of art. 45 of the draft states that a State may be considered as a safe third country for a particular asylum seeker if, for instance, the State has been a transit country for this asylum seeker and, in addition, is geographically close to his country of origin. According to this definition, to which courts would attach great importance in the legal assessment of other constellations as well, Turkey would be a safe third country for Syrians - but not (no longer), for example, for Afghans. In consideration of all these circumstances, it is evident that the tabled draft provisions would not significantly broaden Europe's migration policy options in the case of a crisis. They would partly even limit the scope of options compared to the current regime.

5. It is therefore necessary to enter into a process of political reflection, and to conclude this process quickly. Time is short. At heart is the

question of a specific crisis mechanism in European asylum law that would - only - spring into action if in view of a mass influx, the Council, at the request of the Commission or an affected Member State, so decided by qualified majority. The key element of such a crisis mechanism would be the stipulation that, in case of a crisis, a State may also be considered as a safe third country if it respects the non-refoulement principle and - potentially on the basis of respective guarantees taken by the EU - it provides to returned or transferred asylum seekers safe and humane living conditions, at least meeting the standards of art. 3 of the European Convention on Human Rights (ECHR). It would suffice if these requirements were fulfilled only in those regions where asylum seekers would be transferred to. The prohibition of mass expulsion as stipulated in the ECHR would remain binding. Both a transit State and a third State ready for reception could qualify as safe third country. With EU support, the possibility of status determinations, perhaps conducted by UNHCR, would have to be given in the safe third country. For persons in need of protection, resettlements to Europe or to other States would have to be offered.

6. In order to ensure an effective operation of such a crisis mechanism, complementing provisions could be discussed. Affected Member States could be permitted to assemble all asylum systems in arrival zones on their own territory for the purpose of speedy admissibility assessments. Other Member States could be obliged to provide an affected Member State with up to 1,000 asylum officers (through EASO) and up to 150 judges. Judicial protection against inadmissibility decisions relating to safe third countries could be shaped in the same way as in the case of so-called first countries of asylum (no suspensive effect of an appeal). It should be examined whether decisions by (national) public authorities on the admissibility of an asylum application as well as on appeals against such decisions could be categorised as acts of European legal nature. Such a step (while raising very complicated questions of European law) could significantly facilitate the deployment of public officials and judges from other Member States in practice.

7. The conformity of said crisis mechanism with primary law (European treaties) would be ensured. The Geneva Convention, as referred to by the asylum law guarantees of the European Charter of Fundamental

Rights, does not forbid to shape the requirements of safe third countries according to the protection standards enshrined in the ECHR. Neither the provisions of the current CEAS nor the draft provisions tabled are required by the European Charter of Fundamental Rights; they clearly exceed it.

8. The new CEAS will remain in force for many years. We do not know how, and where, migration crises will unfold during this period. Thus the system must be designed in a flexible way, and it must be capable of coping with any eventuality, also by way of opening clauses if necessary. This is not about building a "fortress Europe". It is about combatting illegal immigration, which has already cost the lives of thousands, and about replacing it by a regulated system of legal admissions, combined with humane living conditions, assured by the EU in third countries. Leaving the decision on access to Europe to criminal, ruthless smugglers would mean a rejection of a responsible, comprehensible policy that the citizens of Europe rightly expect."