

# From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration

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(eds.)**



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## ABOUT THE PARTNERS



The **European Policy Centre (EPC)** is an independent, not-for-profit think tank dedicated to fostering European integration through analysis and debate. The EPC's European Migration and Diversity Programme provides independent expertise on European migration and asylum policies. The Programme's analysis seeks to contribute to sustainable policy solutions and aims to promote a positive and constructive dialogue on migration.

The Programme follows the policy debate through a multidisciplinary approach, examining both the legal and political aspects shaping European migration policies. EMD analysts focus, amongst other topics, on the reform of the Common European Asylum System, the management of the EU's external borders, cooperation with countries of origin and transit, the integration of beneficiaries of international protection into host societies, the links between migration and populism, the development of resettlement and legal pathways, and the EU's free movement acquis. The Programme's team benefits from a strong network of academics, NGO representatives and policymakers who contribute to publications and policy events regularly.



The **Odysseus Academic Network** is a network of experts in immigration and asylum law in Europe. It was founded in 1999 by Philippe De Bruycker, Professor at the Institute for European Studies of the Université Libre de Bruxelles (ULB), with the financial support of the European Commission at its initiation. The network brings together legal experts from all EU members states, including Schengen associated states – like Norway, Switzerland and Iceland – and Turkey. It supports the training of the European Asylum Support Office, the studies of the European Migration Network and conducts research for the European Parliament and the European Commission under specific contracts.

The traditional activities of the network include hosting European thematic conferences; publishing collections of books; and studying EU migration and asylum law, including the transposition of directives and their implementation as well as comparative law analysis between the member states. Odysseus also organises the well-known and yearly Summer School on EU Migration and Asylum Law and Policy in Brussels, which has trained around 2,000 persons with very diverse backgrounds from all over Europe over the last two decades. Thanks to the support for Jean Monnet Networks as provided by the Erasmus+ programme, the Odysseus Network has recently enlarged its activities under the OMNIA (Odysseus Monnet Network for Immigration and Asylum) project, which includes an regularly maintained blog on recent developments of EU migration and asylum law and a virtual platform that gives access to databases and e-learning courses.



**EMN Finland** is the Finnish National Contact Point for the European Migration Network (EMN) that operates in connection with the Finnish Immigration Service.

National contact points have been set up in each EU member state, as well as in Norway, which also participates in the network. The network is chaired by the European Commission. The task of the EMN is to support policymaking in the EU by providing up-to-date, objective, reliable and comparable information on migration and asylum. In addition to politicians and government officials, information is also disseminated to the general public.

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The **Friedrich Naumann Foundation** for Freedom (FNF) is a foundation in the Federal Republic of Germany devoted to the promotion of liberal principles and to political education. The goal of the foundation is to advance the principles of freedom and dignity for all people in all areas of society, both in Germany and abroad.

The FNF is active in over 60 countries around the world, spanning Europe, Africa, Asia, North and Central America. Within these project countries, our regional offices work to support human rights, rule of law, and democracy. In order to achieve these aims, the foundation seeks to foster both international and transatlantic dialogue

through conferences, study tours, and publications, among other means. In addition, the foundation supports local, regional, and national initiatives, which advance the rights of minorities, the democratic control of security forces, and the strengthening of international human rights coalitions.

With offices in Brussels, Madrid and Prague, the FNF's European Dialogue Programme actively encourages the political debate and develops innovative liberal approaches and solutions. A lively dialogue bases on tolerance and mutual understanding. Our activities aim at promoting these basic values through intercultural exchange. Our projects act as liberal platforms for the Foundation's worldwide partners to debate issues of the European agenda.

## FOREWORD

### Konferenssin esipuhe

The European Conference from Tampere 20 to Tampere 2.0 marked the milestone of 20 years from the first Finnish Presidency of the EU Council and the important Tampere conclusions in the area of migration and asylum. During the 20 years since Tampere, migration has never ceased to be a topical issue, but now we truly find ourselves at a critical juncture, both globally and within the EU.

The pillars establishing the Tampere conclusions are still very relevant today as part of the comprehensive approach to migration. The period after the European elections and ahead of the nomination of the new European Commission is well suited for a future-oriented debate on the way forward for the EU's migration and asylum policy. These thematic discussions have been conducted across relevant Council bodies this autumn, and the takeaway from the Conference feeds very well into this work. Preparations for the next Multiannual Financial Framework are also ongoing and, regarding migration, one of the aims is to contribute to securing adequate and coherent funding for both long-term action and ad hoc needs.

Partnerships with countries of origin and transit of migration were recognised as central already 20 years ago, but the external dimension of our policy has gained in importance and variety since then. The Finnish Presidency promotes evidence-based, forward-looking migration policies and a whole-of-route approach. Tools across policy sectors should be fully mobilised to address the root causes of forced migration.

An important component of the external dimension is effective and sustained cooperation with third countries in return and readmission. Mutually beneficial and comprehensive partnerships are key to good results. The Finnish Presidency also puts an emphasis on supporting the reintegration of returnees, since a well-planned policy and practice could incentivise voluntary return and the sustainability of returns, and also contribute to positive developments in the local communities more generally.

Another essential element of the comprehensive approach to migration are legal pathways to the EU. Significant progress regarding the EU legislation in this area has been achieved during the past two decades. Therefore, the focus in current Council discussions is on making the existing legal channels attainable and providing accurate information on the applicable rules. Promoting the use of legal pathways is essential for the EU to meet current and future needs for skills. Moreover, it is an important demonstration of the EU's commitment to long-term partnerships with third countries. One of the key objectives for the Finnish Presidency is to promote the resettlement of refugees. Finland has long-standing traditions in resettlement and wishes to see this activity take root sustainably in all of the member states.

It is widely known that reforming the Common European Asylum System has proven to be challenging. The new Commission is expected to seek a fresh start for the reform, and the Finnish Presidency has aimed to facilitate the future negotiations by conducting a series of thematic discussions which go to the very core of why we need a common system and how the current rules need to be amended. The member states agree that solutions are urgently due and must be found at the European level.

The peak migratory years of 2015 and 2016 taught EU member states many valuable lessons, and now we need to ensure that we are better prepared for any future challenges. At the same time, the core values that European integration is based upon, such as the unconditional respect for human rights, have to be fully reflected in our policy. It is time to work towards securing trust and the spirit of cooperation among member states so that the next 20 years of our policymaking will be productive and equip us with long-lasting common solutions.

**Maria Ohisala**  
*Finnish Minister of the Interior*

## PREFACE

2019 marks the 20<sup>th</sup> anniversary of the European Council meeting in Tampere, Finland, where the member states of the European Union outlined the future for European migration and asylum policies. It was a time when Europe had just lived through the violent disintegration of former Yugoslavia and faced what was then the most serious migratory challenge since World War II.

Today, two decades later, Europe has just faced another migratory challenge, which is arguably even more serious. Even though the number of asylum seekers arriving at European shores and borders has significantly decreased since 2015, the consequences still reverberate strongly throughout the European Union and will likely continue to do so.

We do not know from where the next migratory challenge to Europe might originate. However, against the backdrop of climate change, the question seems to be a matter of when, rather than if.

I have myself witnessed the miserable situation of migrants in the registration and identification camps on the Greek islands. I have myself spoken to local authorities in Greece who feel let down by their European partners in the face of this tremendous organisational and social challenge. I have myself felt how the migration crisis of 2015 and its aftermath touch core values of the European Union; its ability to promote human rights as a universal concept and solidarity among its member states.

The European Union must offer safe and legal pathways for those who flee from persecution and war, as well as for those whose skills are needed in times of demographical change.

Human rights and European solidarity are also at the heart of the Friedrich Naumann Foundation for Freedom's (FNF) work, both globally and in Europe, which is why we have wholeheartedly joined our partners, the European Migration Network (EMN)-Finland, the Odysseus Network and the European Policy Centre (EPC) on a journey 'from Tampere 20 to Tampere 2.0'.

Time might have buried some of the ideas and concepts developed in Tampere in 1999. However, this year's 20<sup>th</sup> anniversary provides an adequate opportunity to revisit them. Finland holds the rotating presidency of the European Council, just like in 1999, and is as committed to finding compromises as it was back then. A new European Commission – which has declared migration and asylum one of its top priorities – will take office soon. More than 60% of the European Parliament is composed of new members, and it continues to take a strong interest in migration. Tampere might prove to be a valuable beacon for all of these institutions.

The chapters in this book do not only reflect the research conducted by its respective authors but are also based upon on a series of intense debates, which were the centrepiece of our journey from Tampere 20 to Tampere 2.0. These five meetings benefited from contributions by experts from three continents, including European Council and European Commission officials, national and European lawmakers, journalists, academics, military and police officials and human rights activists.

We hope that readers will find inspiration in this publication when reassessing and reshaping European migration and asylum policies.

Finally, yet importantly, I would like to thank especially Marie, Alberto and Philippe for their initiative and enthusiasm and our great cooperation.

We hope you enjoy the read.

**Sebastian Vagt**  
*Head of the FNF Security Hub*

# Introduction

Marie De Somer

## 1. THE ROAD TO TAMPERE 2.0

This publication is the result of a collaborative thinking exercise around the 20<sup>th</sup> anniversary of the 1999 Tampere European Council conclusions. With the benefit of two decades of hindsight, it is fair to say that these conclusions did indeed lay the groundworks for the EU migration policy agenda to come. Centred on four pillars – partnerships with countries of origin, a common European asylum system, fair treatment of third-country nationals and the management of migration flows – these conclusions provided guidelines and sketched out principles that remain relevant 20 years later.

In fact, in our work over the past year, we were often struck by how the original conclusions and their accompanying texts, advanced principles or addressed questions that could have just as well been spelled out today. To cite some examples, the conclusions acknowledged the need for “approximation of national legislations on the conditions for admission and residence of third country nationals”,<sup>1</sup> or called for “assistance to countries of origin and transit to be developed in order to promote voluntary return as well as to help authorities of those countries to strengthen their ability to combat effectively the trafficking of human beings”.<sup>2</sup>

Were the Tampere conclusions visionary, or has the EU’s migration policy not advanced sufficiently since 1999? The answer is likely to be a combination of both.

The revisiting of these conclusions has, in any case, proven to be a worthwhile exercise. Not only for the benefit of reflecting on its continued legacy but also, and more importantly, for the purpose of understanding how they can continue to inform EU migration policymaking today. Against the backdrop of the failure to reform the Common European Asylum System (CEAS) during the past legislature, and as a new European Commission is on the cusp of advancing a “New Pact on Migration and Asylum”, we are convinced of the timeliness of this exercise. We hope that the reflections brought together in this publication will provide a contribution to the upcoming work of the EU institutions and inform the thinking of experts and stakeholders working on the

areas covered.

All of these reflections, structured around eleven chapters, are the result of a collaborative process that started in the spring of 2019 with a series of roundtables in Brussels. These roundtables brought together various stakeholders working on the issues covered, including academics, policymakers, civil society and member state representatives. The discussions were organised around ‘background notes’ prepared by the authors of the chapters in this publication. The notes were further refined to take account of the results of the roundtable discussions, and through continued consultations that took place over the course of the summer. They formed the backbone to the different sessions of the Tampere 2.0 conference held in Helsinki on 24 and 25 October 2019, organised as a side event in conjunction with Finland’s Presidency of the Council of the European Union.

The chapters in this publication reflect the ideas that emerged out of the discussions held in Brussels, the consultations over the summer, and the Tampere 2.0 conference in Helsinki. This also implies that these ideas, and the policy recommendations that follow from them, do not necessarily always correspond with the author’s personal views. Instead, the collaborative and inclusive nature of the process was prioritised in the development of this publication, and all of the chapters are indebted to the rich feedback provided by a wide range of actors throughout the process.

## **2. IDEAS AND SUGGESTIONS FOR A NEW EUROPEAN CONSENSUS ON MIGRATION**

The first two chapters in this volume deal with overarching issues for the EU’s migration policy agenda. Iris Goldner Lang’s chapter opens with a review of the state of affairs of the financial instruments that support migration policies at the EU, national and local levels. She engages with key questions on how these financial instruments can be improved (e.g. better reporting, different earmarking), and if and how they can contribute to the larger objective of increasing solidarity on migration among member states. Evangelia (Lilian) Tsourdi’s chapter looks at the increased importance of EU agencies in the areas of migration and asylum. She assesses the agencies’ governance structures and provides recommendations for adequate fundamental rights oversight and enhanced independence. Similar to the preceding chapter, she also reflects on whether, and how, increased agency interventions are a way to strengthen EU-wide solidarity on migration.

The publication continues with two contributions on the EU’s relations with countries of origin and transit. Vincent Chetail’s chapter, first, looks at the migration-development nexus. He

highlights that the relations between migration and development are much more complex and subtle than commonly assumed. While the two intersect, development is not an answer to migration and vice versa. The recommendations advanced focus, instead, on how to enhance coherence between the EU's migration and development policies, or how to better identify and integrate local needs in the elaboration of migration-development partnerships. Elspeth Guild's chapter, next, critically engages with the inclusion of border control and migration management objectives in the EU's migration agenda vis-à-vis third countries. She calls, amongst others, for a stronger role of the European External Action Service in the framing of EU relations with third countries on migration, and a better monitoring of human rights safeguards as guaranteed in the EU Charter.

Moving to the internal dimension of the EU's migration policies, Kees Groenendijk's chapter provides a comprehensive overview of the EU's legislative progress in the area of legal migration since the 1999 Tampere Council conclusions. He calls for a better implementation of the legislation already in place, including through a stronger position-taking and monitoring by the European Commission. Other recommendations include enabling the intra-EU mobility of lawfully resident third-country nationals after two years of lawful residence in a member state. Such opportunities should not be limited to highly-skilled workers only. The following chapter, jointly prepared by Ilke Adam and Daniel Thym, critically reviews the progress made towards a "more vigorous integration policy", as called for by the original Tampere conclusions.<sup>3</sup> They provide a comprehensive series of recommendations, including focusing on integration as 'equality' in order to move towards a better recognition of the obligations of society as a whole. They also call for a better implementation of the integration clauses within the EU's legal migration acquis, and they highlight the importance of ensuring that European Social Fund Plus funds are earmarked for projects which effectively benefit immigrants.

The next pair of chapters reviews the CEAS and the debates around the reform of the Dublin regulation. Lyra Jakulevičienė has reviewed the EU's achievements in creating a common European asylum system, as well as the challenges that remain outstanding. The latter include – in line with observations made in other chapters in this publication – a deficit in common implementation practices as well as a deeper gridlock around the fundamental values and principles that should guide EU legislation in this area. The recommendations provided in her chapter focus, amongst others, on a better understanding and management of secondary movements and a further harmonisation of the conditions under which the subsidiary protection status is granted. Francesco Maiani's chapter, next, tackles the highly politicised

debates around the reform of the Dublin regulation and, more specifically, the question of responsibility allocation. The chapter highlights how the current Dublin rules are inefficient and explains why that is the case. The recommendations provided invite experts and policymakers to reflect on some of the overarching questions surrounding these debates, including the various trade-offs implicit in the design of any responsibility-allocation model or the question on how much solidarity is needed for the good functioning of the CEAS. The chapter also calls on EU legislators to take asylum applicants' agency seriously by selecting responsibility criteria that correspond to their aspirations and real links, and by reflecting on choice-based systems (which could range along a continuum of 'full free choice' or 'a limited range of options').

A final pair of chapters considers questions related to the management of migration flows. Marie De Somer's chapter critically reviews the state of affairs in the Schengen zone. She highlights that the EU's free movement area has not been border control-free for over four years and provides reflections on three different scenarios that could sketch the way forward. The chapter warns against introducing further conditionality links between Schengen and Dublin as this could worsen the already apparent spillover of the Dublin crisis into the Schengen zone, at the expense of the latter. The chapter on return and readmission, next, highlights the need for adequate fundamental rights standards in return procedures in order to safeguard not only returnees' rights but also the effectiveness and overall credibility of the EU's return policies. A series of recommendations are provided including, amongst others, the need to uphold the primacy of voluntary departure and the requirement of strengthening the EU and national legal frameworks that apply to non-removable returnees.

In a final chapter, Philippe De Bruycker concludes with a series of overarching reflections on the principles that should guide a new European consensus on migration, including solidarity and the need for 'commonality' in common EU migration and asylum policies. His chapter also revisits some of the central recommendations provided throughout the publication and links them together.

We hope that this publication will provide readers with inspiration and food for thought that can guide us towards a new, and much needed European consensus on migration.

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<sup>1</sup> European Council (1999), [Tampere European Council 15 and 16 October 1999: Presidency conclusions](#), Tampere, para.20.

<sup>2</sup> *Ibid.*, para.26.

<sup>3</sup> *Ibid.*, para.18.



# Financial framework

Iris Goldner Lang<sup>1</sup>

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# PART 1: ASSESSMENT OF THE CURRENT SITUATION

It is striking that nothing had been foreseen in the Tampere conclusions regarding the funding of the new visa, border, migration and asylum policies. Generally, these policies have taken up only a small percentage of the general EU budget (1.4% in 2016), and this percentage has grown rather modestly over the budgetary periods.<sup>2</sup> This is partially due to the intergovernmental nature of these policies up to the adoption of the Treaty of Amsterdam.

A more ambitious budget for these policies is being contemplated under the upcoming 2021-27 Multiannual Financial Framework (MFF).<sup>3</sup> The previous experience of insufficient funding during the 2015-16 refugee influx, which led to the reshuffling of funds and significant use of contingency margins and flexibility instruments, is one of the factors to spur these developments.

However, the emphasis of the upcoming MFF is on the fight against irregular migration and smuggling, and border-control capacity building. Consequently, the proposal suggests a significant increase in allocations to the external dimension of migration management and asylum and a comparably smaller raise for their internal dimension. The fact that the budget for these policies is undergoing the highest increase in relative terms supports the argument that it is politically easier to negotiate a budgetary increase in this politically sensitive area than to agree on a change of EU migration and asylum legislation.

The new MFF also aims to strengthen flexibility in order to address emergencies, as a considerable share of the Asylum and Migration Fund (AMF) and the Integrated Border Management Fund (IBMF) would not be nationally pre-allocated, but instead allocated to the needs that are deemed most pressing in regards to future developments. Additionally, the new MFF attempts to increase complementarity and links with other funds. As an example, integration would be covered by the European Social Fund Plus (ESF+) and the European Regional Development Fund (ERDF), as part of the European Structural and Investment Funds (ESIF); whereas national allocations from the ESIF would be determined not only on the basis of a member state's GDP but also its level of migrant arrivals.

Finally, the problem remains that the general EU budget – including funds for migration, asylum and borders – remains too modest to cover the actual needs. Consequently, political will is needed to enhance the EU budget. This could be done by contemplating the forms of MFF resources and including new types of EU traditional own resources (currently limited to customs duties and sugar levies). A more radical reshaping of EU resources would allow for more profound redistribution. However, for the time being, the EU budget should be addressed as it now stands, with all its limitations.

## PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

The newly proposed MFF is facing a number of challenges. The most pressing ones will be addressed in the following order:

A. solidarity, budget distribution and cost-sharing between the EU and member states;

B. flexibility tools and emergency measures;

C. a coherent external dimension of EU migration and asylum policies;

D. involvement of civil society and local authorities;

E. funding of asylum management and other activities that impact refugee rights; and

F. conditionality.

### A. Solidarity, budget distribution and cost-sharing between the EU and member states

Due to a combination of several factors – the most prominent being the member states’ different geographical positions and appeal to asylum seekers, and the impact of EU asylum rules on them – the involvement of member states in asylum provision is varied. This has resulted in very diverse and uneven financial implications, putting significant pressures, especially on southern member states creating the EU’s external borders. It is therefore logical that EU asylum legislation – and the financial and other impacts it creates for different member states – is accompanied by the obligation of solidarity and the fair sharing of responsibility between states, as enshrined in Art.80 TFEU. Solidarity can be implemented in a myriad of ways, such as through joint EU funding, ‘sharing’ refugees in a relocation system or operational activities organised at the EU level, including the enhancement of the role of EU agencies.<sup>4</sup>

However, while acknowledging the fact that the EU budget only plays a complementary role and should not replace national expenditures in the areas of migration, asylum and borders, the fact remains that the current EU budget covers a very small part of national financial needs in this area, whereas most expenditure comes directly from national budgets. This is not likely to change with the new MFF, as EU allocations will only cover a minor part of national expenses. In addition, the current allocation of the Asylum, Migration and Integration Fund (AMIF) to member states is not always proportionate to the number of asylum requests they receive, because the criteria for distribution are outdated, thus calling into question the fairness of distribution across the EU. This suggests that the EU budget could be amended to promote solidarity and improve responsiveness to the member states’ needs.<sup>5</sup> This could be done through a number of structural changes, suggested below.

**It is therefore logical that EU asylum legislation – and the financial and other impacts it creates for different member states – is accompanied by the obligation of solidarity and the fair sharing of responsibility between states, as enshrined in Art.80 TFEU.**

**EU financial contributions to member states should be calculated to optimise the fair implementation of EU solidarity, and to reflect the needs of the most affected states. In order to multiply the solidarity effect of the distribution between member states, relative figures based on their wealth (i.e. GDP) rather than absolute figures should be used.**

The proposal for the upcoming AMF<sup>6</sup> goes in the right direction by using a more nuanced distribution key which combines a fixed amount of €5 million per member state, with a variable amount calculated by weighing statistical information for each member state of the three years preceding the date the AMF is applied. The proposal suggests using different statistical data for each of the three AMF “specific objectives” (SOs) (“asylum”, “legal migration and integration”, and “countering irregular migration”):

1. The number of asylum applicants would serve as the dominant criterion of the SO *asylum*.
2. The number of third-country nationals (TCNs) who have obtained a first residence permit would serve as the dominant criterion (60%) of the SO *legal migration and integration*.
3. The number of illegally residing TCNs who are subject to a return order (50%) plus the number of TCNs who have left a member state voluntarily or under coercion following a return order (50%) would serve as the criterion of the SO *countering irregular migration*.

The proposal also advances an update of the distribution key on the occasion of the midterm review, which will take place in 2024. This review would enable a more informed insight into the efforts, needs and absorption capacities of the member states, which are subject to change with time.

#### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

- What would be the best distribution key of the EU migration, asylum, and border budget to improve EU solidarity, not only in emergencies but also in regular funding policy?
- Should member states that are less involved in the implementation of policies contribute more in other ways, including financially (i.e. flexible solidarity)?
- Should the EU migration, asylum and border budget be increased to contribute more to national expenditures?

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

1. *EU financial contributions to member states should be calculated to optimise the fair implementation of EU solidarity, and to reflect the needs of the most affected states. In order to*

*multiply the solidarity effect of the distribution between member states, relative figures based on their wealth (i.e. GDP) rather than absolute figures should be used.*

*2. Part of EU funding should be earmarked to enable actions that promote solidarity and mutual trust, such as relocations and joint actions.*

*3. The migration, asylum and border control budget should be increased in order to contribute with a higher share to national expenditures.*

*4. The mode of distribution of migration, asylum and border funding should ensure a fair subnational distribution so that allocations are more nuanced by being attributed to regions and cities that need it the most.*

## B. Flexibility tools and emergency measures

The past few years have witnessed the importance of emergency measures and flexibility tools needed to respond to changing migratory inflows into the EU. This placed major financial pressure on the modest EU migration, asylum and border budget. Past experience has exemplified the importance of mechanisms that enable flexibility and allow for emergency assistance. During the 2015-18 period, the Flexibility Instrument was used four times and the Contingency Margin twice, and they jointly covered 46% (€4.3 billion) of the financing for migration, asylum and border control.<sup>7</sup> The MFF proposal increased flexibility in order to respond to emergencies.<sup>8</sup> To that effect, part of the AMF and IBMF budget would not be nationally pre-allocated, but be determined on the basis of future developments and needs.

### THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

► Should there be more flexibility in funding to enable quick and efficient responses to unexpected events and emergencies, and to ensure that the funding is directed to the member states and final beneficiaries who need it most?

► How can the right balance between flexibility and predictability be achieved in order to attain the long-term strategic objectives of funding? Should the emergency/flexibility measures evolve into permanent mechanisms?

### INITIAL SUGGESTIONS AND IDEAS INCLUDE:

*5. The right balance should be found between the amount of the budget earmarked for emergencies and the pre-allocated budget in order to ensure the predictability of the spending and its coherence with the strategic objectives.*

*6. Part of the flexibility spending should be structurally included in the permanent pre-allocated EU migration, asylum and border budget in order to prevent the 'crisis' mode and emergency funding from becoming a regular *modus operandi*.*

## C. A coherent external dimension of EU migration, asylum and border policies

The EU has been placing more emphasis on the external dimension of its migration, asylum and border policies, accompanied by a multiplication of external financial instruments that address these issues.<sup>9</sup> External measures have been allocated significantly more resources than internal ones. Between 2015 and 2018, 57% (€12.5 billion) of the total EU funding planned in response to the 2015-16 refugee influx was allocated to measures outside of the EU, whereas 43% was allocated to the internal dimension.<sup>10</sup>

The external dimension of asylum, migration and border policies is mostly taking place through the financing of cooperation with third countries, in order to reduce migration flows and enhance return and readmission. A number of instruments are in place under Heading 4 of the EU budget, “Global Europe”:<sup>11</sup> the Development Cooperation Instrument (DCI), which includes the Global Public Goods and Challenges (GPGC) programme; the European Neighbourhood Instrument (ENI); and the Instrument for Pre-Accession (IPA II). Additional instruments which are at least partly outside of the EU budget are also in place: the European Development Fund (EDF), the EU Emergency Trust Fund for Africa, the EU Regional Trust Fund in Response to the Syrian Crisis, and the EU Facility for Refugees in Turkey. The Trust Funds and the Facility are partly financed by the EDF, DCI and ENI and partly via additional contributions from member states. The mixed nature of these funds leads to a lack of transparency, accountability and democratic control over them. It is difficult to trace where and how these resources are used in practice.

The new instrument proposed by the European Commission – the Neighbourhood,

Development and International Cooperation Instrument (NDICI), with a proposed budget of €89.2 billion for the 2021-27 period – is intended to streamline the funding of the EU’s external action by merging ten existing regulations, including the ENI and DCI.<sup>12</sup>

### THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- ▶ Are the priorities of the external dimension of EU migration and asylum policies (i.e. the fight against irregular migration and border management) complementary to the basic premises of the internal dimension (i.e. accessing EU territory and requests for international protection as well as refugee rights)? Is the emphasis on the protection of the external borders creating an adverse effect on these premises of the internal dimension?
- ▶ Are the priorities of humanitarian aid and development cooperation (reduction or eradication of poverty) coherent with the priorities of the external dimension of EU migration and asylum policies or is the development aid being used as a tool to achieve the EU’s migration and border-control interests?
- ▶ Is the fact that major resources have been and will continue to be invested outside the EU creating a risk of excessive dependence on third countries in the management of migration, asylum and borders, and creating leverage in their relations to the EU?
- ▶ Is there sufficient coordination inside the Commission between the Directorate-Generals (DGs) – Migration and Home Affairs (HOME), International Cooperation and Development (DEVCO)

and Neighbourhood and Enlargement Negotiations (NEAR) – to ensure the coherence of their interests, priorities and measures? Is the division of tasks among these three DGs clear enough to prevent the funding of parallel structures and overlapping activities?

➤ Should the multiplication of instruments, particularly those that are (partially) outside the EU budget, be avoided due to the risk of fragmentation and the lack of transparency, accountability and democratic control?

### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

*7. Activities taken within the sphere of the external dimension of migration, asylum and border policies must be complementary to the basic premises of the internal dimension.*

*8. Better coordination should exist among the Commission DGs to ensure coherence and prevent the funding of parallel structures and processes.*

*9. The Commission should provide more comprehensive reporting on the funding of migration, asylum and border control measures outside of the EU in order to enhance transparency, accountability and democratic control, particularly in the case of mixed funding.*

## **D. Involvement of civil society and local authorities**

NGOs have been some of the most important actors in supporting a fair asylum system, in promoting asylum seekers' and migrants' rights, and in assisting their integration.<sup>13</sup> Their work on integration and social inclusion is important for all categories of TCNs, including family members and second- and third-generation migrants. They are crucial in improving the generally weak status of refugees and other TCNs in their respective host societies.

The involvement of NGOs in refugee integration has been twofold.<sup>14</sup> First, they provide resources and support to refugees, thus treating refugees as passive beneficiaries of their assistance. Second, NGOs are indispensable in building migrants' capacities through the promotion of their political and social empowerment by enabling their active participation

**The mode of distribution of migration, asylum and border funding should ensure a fair subnational distribution so that allocations are more nuanced by being attributed to regions and cities that need it the most.**

**The right balance should be found between the amount of the budget earmarked for emergencies and the pre-allocated budget in order to ensure the predictability of the spending and its coherence with the strategic objectives.**

in political processes and other activities. Their involvement in the context of integration is all the more important as member states preserve the competence to adopt integration measures, and the EU can only support member states' actions in this area (Art.79(4) TFEU). Consequently, the EU's competence to promote refugees' and other TCNs' social and political participation remains extremely limited. Member states enjoy discretion on whether to allow for TCNs' political participation and other forms of formal self-organisation.

The involvement of civil society is highly important for all of these reasons and should be encouraged through provisions on the partnership principle in the AMF. The funding rules for AMIF have created significant barriers to the participation of civil society organisations. Furthermore, it is questionable whether the available funding is actually spent for integration purposes, as there is no publicly available data on actual spending patterns.

Lastly, cities and other local authorities have been playing an ever-growing role in the integration of TCNs, as the vast majority reside in urban areas and so their needs are best addressed locally.

## **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:**

- Are NGOs and local authorities sufficiently involved in the different stages of EU funding? If not, what should be done to improve their contribution to the planning and accessing of funding?

## **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

*10. The involvement of civil society actors and local authorities in all phases of the funded projects, from planning to implementation, should be enhanced. The partnership principle should be included in the AMF to ensure the inclusive participation of NGOs, including migrant- and refugee-led organisations.*

*11. The application and participation criteria for the funding of projects should be altered to enable easier access by and the participation of civil society actors, including smaller NGOs and those with a more operational focus. This should be done by lowering the co-funding requirements and simplifying administrative and reporting requirements.*

*12. Checks should be made to ensure that the funding allocated to member states for the integration of TCNs is reaching and being spent mainly by regional and local authorities.*

## **E. Funding of asylum management and other activities that impact refugee rights**

The current trend in the migration, asylum and border budget is to place more emphasis on the external dimension. This has led to investing more resources in cooperation with third countries regarding border controls. However, these efforts should not lead to the neglect of asylum management and refugee rights.

## **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

- Is a sufficient part of the asylum funding focused on refugee rights, by being earmarked for the enhancement of efficient human rights compliant asylum procedures,

reception conditions and refugee integration?

- Are adequate mechanisms in place to ensure that the earmarked funding for asylum procedures, reception conditions and integration is used most efficiently? Will the reduction of EU co-financing for integration as determined by the ESF+ (i.e. 70% for less developed regions, 55% for transition regions, 40% for more developed regions) have a negative impact on the socio-political inclusion of refugees, and will it create additional burdens on member states (see subsection A)?

### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

*13. Funding aimed at refugees should not be redirected to other objectives, such as border control and the fight against irregular migration.*

*14. A sufficient part of asylum funding should be earmarked to enhance human rights compliant asylum procedures, reception conditions and refugee integration across the EU, thus obliging member states to preserve minimum standards in their allocations. Additionally, part of the total ESF+ allocation should be earmarked for the integration of TCNs, whereas a specific part of that funding should be earmarked exclusively for the integration of refugees. Adequate procedures should be put in place to ensure the most efficient use of the earmarked funding and address the needs of vulnerable persons.*

*15. Monitoring and training activities should be supported by sufficient funding in order to ensure compliance with EU asylum law. Such funding should be directed at national officials (e.g. training reception centres staff), NGOs and international organisations (e.g. monitoring return activities).*

*16. Higher EU co-financing rates should be introduced for member states' integration activities.*

*17. The programming documents (i.e. the Partnership Agreement and National Programme) should require member states to include independently sourced data and evidence on national needs and policy choices in order to prevent the funding of national priorities that diverge from EU priorities.*

**The Commission should provide more comprehensive reporting on the funding of migration, asylum and border control measures outside of the EU in order to enhance transparency, accountability and democratic control, particularly in the case of mixed funding.**

**A sufficient part of asylum funding should be earmarked to enhance human rights compliant asylum procedures, reception conditions and refugee integration across the EU.**

**Conditionality should be politically supported within the member state it is directed to. Efforts should be invested to promote the values supported by the conditionality rules to obtain political and societal support within the member state concerned.**

## F. Conditionality

In addition to the enabling conditions contained in the Common Provision Regulation (CPR) for EU funds, the new MFF relies on conditionality more than ever.

First, the MFF proposal links cohesion funds (i.e. the ESF and EFDF) with the number of refugees taken in each member state, with the aim of integrating them. This link should not be viewed as conditionality *sensu stricto*, but as an element of the distribution key of cohesion funds whose purpose is to incentivise member states and reflect the situation on the ground. The proposal has opened the debate on the objectives of the structural funds, as well as spurred some opposition from several member states.

Second, conditionality is becoming the EU's dominant approach towards third countries, thereby linking funding to the latter's cooperation in readmission and border management.<sup>15</sup> While the EU conditions its aid on cooperation, third countries in turn demand more funding by threatening to open the doors to migration flows. This redirects the development aid objectives to interest-driven migration and border management objectives.<sup>16</sup>

Third, the rule of law conditionality – which applies not only to migration and asylum but to the entire EU budget – is embodied in the newly proposed Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the member states.<sup>17</sup> The proposed Regulation establishes a link between a member state's violation of the rule of law and the suspension of EU payments.<sup>18</sup>

The EU approach to the rule of law enables the establishment of common norms that can increase its power and legitimacy as well as the protection it provides across the EU by creating common standards for

defining the rule of law and common criteria and mechanisms for the establishment and sanctioning of its violation. However, the suspension of payments is only acceptable under EU law provided that there is a sufficiently strong causal relation between a member state's violation of the rule of law and the risk that this would impact the successful implementation of the specific operation supported by its respective EU funding. This might not always be the case, as not all generalised deficiencies as regards the rule of law are susceptible to impacting the member states' effective use of EU funds. One may also wonder to what extent the rule-of-law conditionality will lead to the transformation of anti-rule-of-law trends in the concerned member state, which opens up the question of whether it will do more harm than good by creating a climate prone to anti-EU positions.

### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:**

- How can the negative consequences of the rule of law conditionality approach be avoided, while at the same time reaching its aims?

### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

*18. Conditionality should be politically supported within the member state it is directed to. Efforts should be invested to promote the values supported by the conditionality rules to obtain political and societal support within the member state concerned.*

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<sup>2</sup> For an analysis of the use of EU funds for migration, asylum and integration in the 2014-2020 budgetary period, see Darvas, Zsolt; Guntram Wolff; Francesco Chiacchio; Konstantinos Efstathiou and Inês Gonçalves Raposo (2018), [EU Funds for migration, asylum and integration policies](#), Brussels: European Parliament. See also Westerby, Rachel (2019a), [Follow the Money II: Assessing the use of EU Asylum, Migration and Integration Fund \(AMIF\) funding at the national level 2014-2018](#), Brussels: United Nations High Commissioner for Refugees and European Council on Refugees and Exiles.

<sup>3</sup> See *European Council*, [“Multiannual financial framework for 2021-2027: negotiations”](#) (accessed 06 November 2019). For an analysis of the proposal for the new Multiannual Financial Framework, see Westerby, Rachel (2019b), “The Way Forward: A Comprehensive Study of the new Proposals for EU funds on Asylum, Migration and Integration”, Brussels: United Nations High Commissioner for Refugees and European Council on Refugees and Exiles; Westerby, Rachel (2018), [“The way forward”: A reflection paper on the new proposals for EU funds on Asylum, Migration and Integration 2021-2027](#)”, Brussels: United Nations High Commissioner for Refugees and European Council on Refugees and Exiles.

<sup>4</sup> On different facets of solidarity, see Goldner Lang, Iris (2018), [“The EU Financial and Migration Crises: Two Crises – Many Facets of Solidarity”](#) in Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds.), *Solidarity in EU Law: Legal Principle in the Making*, Edward Elgar Publishing, pp.133-160.

<sup>5</sup> For the discussion on the economic benefits of promoting solidarity and improving asylum management in the EU, see van Ballegooy, Wouter and Cecilia Navarra (2018), [The Cost of Non-Europe in Asylum Policy](#), European Parliamentary Research Service.

<sup>6</sup> European Commission (2018a), [Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund](#), Strasbourg.

<sup>7</sup> D’Alfonso, Alessandro (2019), [“External border control and asylum management as EU common goods: a budgetary perspective”](#), Badia Fiesolana: European University Institute, p.24.

<sup>8</sup> For a discussion on flexibility in the proposal for the new Multiannual Financial Framework, see Knoll, Anna and Pauline Veron (2019), [“Migration and the next EU long-term budget: Key choices for external action”](#), European Centre for Development Policy Management.

<sup>9</sup> For an overview of the funding instruments in the EU’s external policies on migration, asylum and borders, see den Hertog, Leonhard (2016), [“Money Talks: Mapping the funding for EU external migration policy”](#), Centre for European Policy Studies.

<sup>10</sup> *Ibid.*, p.29.

<sup>11</sup> See European Commission, [“EU funding programmes 2014-2020 > Heading 4: Global Europe”](#) (accessed 06 November 2019).

<sup>12</sup> Immenkamp, Beatrix (2019), [EU Legislation in Progress: 2021-2027 MFF. A new neighbourhood, development and international cooperation instrument: Proposal for a new regulation](#), Brussels: European Parliamentary Research Service.

<sup>13</sup> On the importance of civil society in promoting migrants’ integration, see European Council on Refugees and Exiles and Platform for International Cooperation on Undocumented Migrants (2019), [“Promoting socio-economic inclusion of migrants and refugees in the next EU budget \(2021-2027\)”](#), Brussels. See also Beirens, Hanne and Aliyyah Ahad (2019), [“Money Wise: Improving how EU funds support migration and integration policy objectives”](#), Brussels: Migration Policy Institute.

<sup>14</sup> Goldner Lang, Iris (2019), [“Self-Organisation of Third-Country Nationals in the EU: Polycentric Governance by the ‘Other’”](#) in Josephine Van Zeben and Ana Bobic (eds.), *Polycentricity in the European Union*, Cambridge: Cambridge University Press, pp.186-207.

<sup>15</sup> For a discussion on conditionality in the external dimension of migration, see Knoll and Veron (2019), *op.cit.*

<sup>16</sup> For a discussion on the emphasis on the border protection objective, see Cortinovia, Roberto and Carmine Conte (2018), [“Migration-related conditionality in EU external funding”](#), Research Social Platform on Migration and Asylum, Brussels.

<sup>17</sup> European Commission (2018b), [Proposal for a Regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States](#), Brussels.

<sup>18</sup> For an analysis of the proposed Regulation, see Goldner Lang, Iris (forthcoming), “The Rule of Law, the Force of Law and the Power of Money in the EU”, *Croatian Yearbook of European Law and Policy*, Volume 15.



# Agencies

Evangelia (Lilian) Tsourdi<sup>1</sup>

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## TAMPERE CONCLUSIONS

*22. A common active policy on visas and false documents should be further developed, including closer co-operation between EU consulates in third countries and, where necessary, the establishment of common EU visa issuing offices.*

*24. The European Council calls for closer co-operation and mutual technical assistance between the Member States' border control services, such as exchange programmes and technology transfer, especially on maritime borders, and for the rapid inclusion of the applicant States in this co-operation.*

# PART 1: ASSESSMENT OF THE CURRENT SITUATION

The 2015 spike in arrivals of individuals seeking asylum in the EU highlighted the limitations inherent in the legal design and implementation modes of the EU asylum and border policies. The initial implementation design foresaw that national executives assume responsibility for the application of European law in the main. The institutionalisation of practical cooperation through EU agencies has begun to unsettle this, however. EU agencies are now at the forefront of policy implementation for two primary reasons: to overcome the policy implementation gap and enhance interstate solidarity. Their mandate was initially heavily focused on activities such as information exchange, training and risk analysis. It has constantly been expanding, and so have their human and financial resources. Focusing specifically on the *de jure* and *de facto* mandate expansion of the European Asylum Support Office (EASO) and the European Border and Coast Guard Agency (EBCG, commonly referred to as Frontex), two broad trends become apparent:

- ▶ Firstly, the operational expansion of EU agencies' mandates has led to patterns of joint implementation, with their staff and experts deployed in fields such as border control, returns and the processing of asylum claims. For example, Greek national law allows EASO-deployed experts to conduct parts of the asylum process that entail administrative discretion (i.e. to emit non-binding opinions on the admissibility of claims and conduct interviews in the merits stage, while the final decision on admissibility and on granting international protection rests with the Greek Asylum Service). These developments point to the gradual emergence of an "integrated European administration".<sup>2</sup> In addition,

these agencies are increasingly operational in third countries due to bilateral or multilateral agreements. This is linked with the impetus of the EU on externalising protection obligations, as exemplified by the 2016 EU-Turkey deal.

- ▶ Secondly, their mandate has expanded to encompass functions that far exceed support, including operational support and administrative cooperation. Reference is made to monitoring-like functions, as well as to functions which have the potential to steer policy implementation. Monitoring-like functions include Frontex's vulnerability assessment, which could lead to recommendations; a binding decision of measures set out by its Management Board; or, in cases where the external borders require urgent action, a Council implementing act prescribing measures which become binding for the member states. Nevertheless, there is no 'right to intervene' in a member state – not for the EBCG, nor for the EU institutions (e.g. enforcing deployments on the ground). The ultimate measure is recourse to the procedure to reintroduce internal border controls, as foreseen in Article 29 of the Schengen Borders Code (2016/399).

Given the member states' support for increased agency involvement, to better respond to functional pressures and the unmet interstate solidarity imperative as well as to implement cooperation with non-EU countries in migration, these two trends will only intensify. They may well become the precursor of more radical shifts in the implementation modes of these policies.

## PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

The mandate expansion of EU agencies appears to be based on the recognition that external border management and asylum provision are, in essence, regional public goods that benefit all member states regardless of their geographic position (i.e. regardless of their proximity to EU's external borders). This also entails that external border management and asylum provision are shared responsibilities between the EU and its member states. The fact that it is shared has consequences on how the asylum and external border control policies are to be implemented, and how the financial and human resource costs for their operationalisation are distributed (Art.80 TFEU).

It also implies a shift towards forms of joint implementation whereby EU agency staff, deployed experts from member states and national administrators work side by side in implementing EU policies. In addition,

it means a shift from a predominantly national financing component towards more centralised funding, both directly through EU funds and indirectly by benefitting from agency deployments and joint implementation patterns. EU agencies also have a central role in operationalising the cooperation between the EU and non-EU countries in managing migration from non-EU countries, which increasingly includes the externalisation of protection obligations and containment of migrants in third transit states.

This chapter focuses on possible pathways for the sustainable development of increased agency involvement, which address member states' needs while remaining within the existing constitutional and political limits of the EU treaties; and responding to the challenges of resourcing, independence, accountability and respect for fundamental rights.

### A. Balancing joint implementation and supervision

The recently agreed Regulation on the European Border and Coast Guard (EBCG 2019) enounces European integrated border management as “a shared responsibility of the Agency and of the national authorities responsible for border management”, while recognising in the same article that “Member States shall retain primary responsibility for the management of their sections of the external borders.”<sup>3</sup> Increased EBCG resources (financial, human) and the executive powers foreseen for its statutory staff and deployed national personnel (subject to the

authorisation of its host member state) can be understood as effective means by which the EU can undertake its responsibility in operationalising European integrated border management. No legal text explicitly enounces this conception of shared responsibility in the context of asylum; not even the proposal for a revamped European Union Agency for Asylum (EUAA 2016).<sup>4</sup> However, the increased operational role foreseen for deployed experts and EASO staff – whether *de jure*<sup>5</sup> or *de facto* – can be considered as implicitly moving in the same direction.

The monitoring-like functions of EU agencies (e.g. EBCG's vulnerability assessment and role of liaison officers, EUAA's monitoring mechanism) are inscribed in a different trend. These processes can be seen as supplements of the Commission's supervision mandate. These mechanisms are circumscribed in their focus on technical and operational aspects (i.e. the existence of capabilities, infrastructure). In fact, they serve a double purpose: on the one hand, they identify particular pressures to mobilise assistance and map out weaknesses in order to remediate them; on the other, they are linked to the gradation of enforcement-type measures that could culminate into the adoption of Council implementing acts.

The two limbs of the expanded mandates – supervision and operational – are linked. Structural shortcomings and capacity issues first identified through the supervision-like processes could then be (partially) overcome through the additional deployment of human and technical resources and enhancement of joint implementation actions. There is also an inherent underlying tension, especially if these monitoring-like functions gradually expand from technical aspects to the supervision of the implementation of the policies themselves, as was the European Commission's initial conception of the EUAA monitoring mechanism.<sup>6</sup> In this case, the agencies would be called on to play a double, and at times contradictory role: implementing jointly while simultaneously supervising the implementation of these. The example of the current operationalisation of the 'hotspot approach' in Greece is telling.

#### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:**

- What is the best approach in addressing the potential tension between the two roles (i.e. joint implementation and monitoring) of the expanded mandates of the EBCG, and potentially the EUAA?

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

- 1. Involving European Commission staff (along the lines of the Schengen evaluation and monitoring mechanism) and the European Parliament in the monitoring processes, in order to make it more objective and impartial, as required by Art.70 TFEU.*
- 2. Strengthening the role of the agencies' Executive Director, in terms of the culmination of measures leading up to the adoption of Council implementing acts.*

**EU agencies are now at the forefront of policy implementation for two primary reasons: to overcome the policy implementation gap and enhance interstate solidarity.**

**It implies a shift towards forms of joint implementation whereby EU agency staff, deployed experts from member states and national administrators work side by side in implementing EU policies.**

## B. Rethinking the agencies' governance to ensure their independence

**These numbers point to structural involvement in policy implementation, and consequently to structural forms of interstate responsibility-sharing.**

In order to operationalise their mandate effectively, agencies must be independent of national interests and political influences. Independence is an element that is highlighted in the agencies' founding regulations,<sup>7</sup> albeit with different nuances.<sup>8</sup> At the same time, EU agencies are institutionally and functionally dependent on EU institutions and member states. This is exemplified through the design of their internal governance structures, specifically the member state-dominated management boards<sup>9</sup> and the process by which they operationalise their mandate, which is inherently collaborative. Management boards have far-reaching functions in regards to the planning and operationalisation of the agencies' mandates, including pivotal roles in the monitoring-like functions.

It has been observed that “having all Member States represented at agency boards is in line with the conceptual understanding of the EU executive as an integrated administration and is an expression of the composite or shared character of the EU executive.”<sup>10</sup> When the European level, through an EU agency, starts to be more implicated in policy implementation, including through the deployment of statutory staff and experts on the ground, member states are understandably keen to have a strong say. The operational tasks undertaken are intrinsically linked with the implementation of asylum and external border control policies, and the duty to implement the EU asylum and external border control policies legally rest with the member states. While external border control management is increasingly admitting that it is a shared responsibility, member states still retain the “primary responsibility”, according to the EBCG 2019.<sup>11</sup> Therefore, it cannot be concluded that the national level is seeking to ‘reappropriate powers’ through the back door.

At the same time, the independence challenge posed should not be underestimated. There could be an underlying tension surrounding the agencies' supervision functions that are linked to a gradation of enforcement-type measures that lack a genuine ‘right to intervene’, and to the strong role of the agencies' Management Board in these processes. Finally, another danger is that given the distribution of power and political stakes in the field of asylum and border controls, the EBCG and the future EUAA risk being captured by strong regulators and

used as ‘proxies’ to control weaker ones.<sup>12</sup> Indeed, understanding ‘national interest’ in these fields as one-dimensional does not do justice to the divergence of interests between member states, nor their power differential.

### **THESE CONSIDERATIONS RAISE THE FOLLOWING QUESTIONS:**

- ▶ Through which mechanisms or processes could the enhanced functions of EU agencies be reconciled with their internal governance structures?
- ▶ To what extent can their independence be ensured through accountability mechanisms?

### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

3. *Launching a study to analyse the numerous mechanisms of accountability of agencies to avoid unnecessary accountability overload.*
4. *Strengthening the independence of the agencies’ Executive Director towards the agencies’*

*Management Boards (e.g. by removing the disciplinary authority over the Executive Director, suspending or dismissing the Executive Director from the remit of the Management Board).*

5. *Rethinking the composition of the management boards of the agencies (e.g. foreseeing a role for the European Parliament as non-voting member at the very least, to enhance political scrutiny).*

6. *Strengthening the role of the European Parliament as a political accountability forum for agencies, by enhancing the means (e.g. answering ad-hoc questions in writing, informing on Management Board meetings through a comprehensive and meaningful record) and measures of its disposal to influence agency dynamics.*

7. *Establishing political accountability arrangements before national parliaments (e.g. reporting obligations or hearings). Joint parliamentary accountability mechanisms involving both the European Parliament and national parliaments that go along the lines of the European Union Agency for Law Enforcement Cooperation’s (Europol) Joint Parliamentary Scrutiny Group could be considered.*

## **C. Enhancing European solidarity through agencies**

By deploying operational personnel (made available through member states’ administrations or personnel) and equipment (made available through member states or their equipment), the EBCG and EASO enhance the human and financial resources of individual member states by drawing from the EU budget. Further agency activities – for example, the European Union Agency for the Operational Management of Large-Scale IT

Systems in the Area of Freedom, Security and Justice (eu-LISA), the creation of standardised training modules for national administrators through the EBCG or EASO, and the creation of centralised Country of Origin Information (COI) to assess asylum applications – create economies of scale, thus boosting implementation capacities further.

The modes of functioning of area of

**Consecutive amendments to the EBCG Regulation have led to the development of novel fundamental rights oversight mechanisms, such as an independent Fundamental Rights Officer, a civil society-dominated Consultative Forum and ombudsman-type processes complete with an individual complaints mechanism.<sup>18</sup>**

freedom, security and justice agencies undoubtedly make them an indirect vessel for interstate solidarity, which seems to be more politically palatable compared to other envisaged forms of responsibility-sharing, such as relocating persons among member states. Nevertheless, the operational element was initially tied down to the notion of emergency, rendering it – in theory – an exceptionality, given that the entire operationalisation of the solidarity principle under Art.80 TFEU was emergency-driven.<sup>15</sup>

However, the EU seems to be moving away from such emergency-driven conceptions of agency involvement (and indirectly of intra-EU solidarity and fair sharing). This is exemplified by EBCG’s move to increase its operational (i.e. statutory) staff to 3,000 by 2027, while the number of staff to be provided by member states for long-term secondments (i.e. minimum of 24 months, extendable once for an additional 12 or 24 months) should reach 1,500 by 2027, and for short-term deployments should reach 5,500 by 2027.<sup>14</sup> The total would amount to 10,000.

These numbers point to structural involvement in policy implementation, and consequently to structural forms of interstate responsibility-sharing. The new enhanced role of the agencies in return policy, including in the coordination and organisation of return operations,<sup>15</sup> points to this direction as well. Similar, but meeker, steps are portrayed in EUAA 2016, which decouples operational support from situations of disproportionate pressure, envisaging that operational support would be available in a broader context provided it remains limited in time.<sup>16</sup> While these developments are potentially forthcoming de jure, the boost in EASO personnel (e.g. Greek-speaking personnel recruited and paid by EASO) assisting the Greek Appeals Committees through the provision of COI portrays the same de facto development, albeit on a more limited scale.

### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:**

- How can interstate solidarity and fair responsibility-sharing be meaningfully enhanced through structural interventions of EU agencies?

### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

*8. Launching a study by an expert group on the member states’ asymmetric responsibilities of border and asylum policies, to concretely evaluate the breadth of the solidarity gap between*

member states and the desirable size of EU compensation.

9. Pushing for greater augmentation of statutory agency staff, as established in EBCG 2019, to address the difficulties raised by the short-term deployment model.

10. Creating a standing corps for EASO, as for the EBCG, with augmented statutory staff. Also, make staff from national administrations

available for longer-term secondments (i.e. a minimum of 24 months).

11. Decoupling agency operational involvement from the notion of emergency further, to cover structural needs.

12. Allocating most of the general EU budget towards border and asylum policies, from which EU agencies (and member states) can draw.

## D. Addressing the challenge of fundamental rights

The exercise of executive powers and tasks entailing executive discretion by EU agency (deployed) staff result in greater direct interaction with individual migrants and asylum seekers, consequently potentially affecting their fundamental rights. The EU public liability regime is fully applicable in such situations, and individuals may have recourse for violations before national courts or the Court of Justice of the European Union (CJEU) if the strict conditions of *locus standi* for the latter are fulfilled.<sup>17</sup> In addition, agency deployments in third countries raise additional fundamental rights concerns and the need to coordinate action with international level stakeholders.

However, there also appears to be a need for the development of extrajudicial accountability mechanisms, to both ensure the oversight of fundamental rights and establish flexible procedures through which individuals can claim redress for violations of their fundamental rights (e.g. the right to good administration, privacy, data protection). Consecutive amendments to the EBCG Regulation have led to the development of novel fundamental rights oversight mechanisms, such as an independent Fundamental Rights Officer, a

civil society-dominated Consultative Forum and ombudsman-type processes complete with an individual complaints mechanism.<sup>18</sup> The mandate of the Fundamental Rights Office is further strengthened in the EBCG 2019, thanks to the enhancement of its capacities and the creation of fundamental rights monitors.

### THESE DEVELOPMENTS RAISE THE FOLLOWING QUESTIONS:

- ▶ How can the enhanced operational activities of EU agencies be ensured to match with the adequate mechanisms at the EU level, thus guaranteeing individuals' effective access to justice?
- ▶ Do the EU agencies that conduct seemingly 'less operational' tasks (e.g. eu-LISA) require greater fundamental rights oversight?

### INITIAL SUGGESTIONS AND IDEAS INCLUDE:

13. Replicating the enhanced fundamental rights oversight mechanisms that have been

established for the EBCG in other EU agencies, most notably EASO (e.g. the Fundamental Rights Office). Under the EASO framework, fundamental rights monitors should be involved in the evaluation of the quality of EASO's asylum processing (e.g. vulnerability assessment, admissibility interviews), including case sampling and proceeding observation.

14. Developing ombudsman-type procedures that are flexible, non-adversarial and can include violations beyond the realm of strict legality (e.g. administrative irregularities linked to asylum processing which violate soft norms such as guidance notes) further (e.g. individual complaints mechanism). Ensuring during the implementation of these procedures that a concrete follow-up to the individual complaints assessment is established, and the organ examining these complaints enjoys functional independence and the necessary operational capacity (staffing).

15. The political accountability fora (i.e. European Parliament, national parliaments) paying special attention to fundamental rights issue reporting and linking this to the measures at their disposal to influence agency dynamics.

16. Undertaking activities in third countries – including deployments – in close partnership with international stakeholders, especially UN agencies and organs, to enhance legitimacy and respect for fundamental rights.

**Joint implementation patterns and the augmentation of the financial and human resources available to EU agencies could act as precursors to deeper forms of integration, eventually leading to a full 'Europeanisation' of these policies' implementation modes.**

## **E. Possible paths, from joint implementation to full Europeanisation**

Joint implementation patterns and the augmentation of the financial and human resources available to EU agencies could act as precursors to deeper forms of integration, eventually leading to a full 'Europeanisation' of these policies' implementation modes. This should not be specifically linked with political aspirations of an increasingly federalised EU, but rather could be viewed as a pragmatic approach to implementing policies that lead to the provision of regional public goods. Member states are subject to asymmetric pressures that are linked with objective factors (e.g. geographic position) and issues of legal design (e.g. the Dublin system's responsibility allocation). This line of thinking admittedly relates to a broader time horizon than the next multiannual

policy framework, but it is nevertheless worthwhile to reflect upon the legal and political practicality of such implementation modes.

Political limits are constantly shifting, and further Europeanisation should take place on a needs-based model and may therefore only concern a limited number of overburdened member states, while those able to implement their own responsibilities with less EU support remain unaffected. In terms of existing legal limits, the CJEU's 'Meroni/Short Selling' criteria are not breached as long as executive discretion does not allow agencies to develop policies on their own.<sup>19</sup> Art.4(2) TEU and Art.72 TFEU could be interpreted as refuting the full substitution of national authorities by an EU agency in the context of external border management, as they affirm that public order remains the responsibility of member states. In addition, Art.78(2)(e) TFEU, which foresees that member states are to be responsible for the examination of asylum applications, excludes the establishment of centralised assessment of claims. This is food for thought in the event that the treaties would be revised in the future.

*that are willing to rely upon EU agencies to implement parts or the entirety of integrated border management on their territory.*

*18. For asylum policy: establishing a flexible, needs-based model whereby asylum policy remains in the remit of national administrations that are supervised by the EU, except in the case of member states that are willing to rely upon EU agencies to implement the asylum policy, whether it be wholly or in parts, on their territory.*

## **THESE DEVELOPMENTS RAISE THE FOLLOWING QUESTIONS:**

- Should we aim for the centralisation of external border control and asylum policy in the EU? How can this be achieved within the legal limits?

## **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

*17. For integrated border management: establishing a flexible, needs-based model that would allow for differentiation. National authorities would maintain the primary responsibility for integrated border management under EU supervision, except in the case of (overburdened) member states*

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- <sup>2</sup> Tsourdi, Evangelia (Lilian) (2016), "[Bottom-up Salvation? From Practical Cooperation towards Joint Implementation through the European Asylum Support Office](#)", *European Papers*, Volume 1, Number 3, pp.997-1031. See also De Bruycker, Philippe (2016), "[The European Border and Coast Guard: A New Model Built on an Old Logic](#)", *European Papers*, Volume 1, Number 2, pp.559-569.
- <sup>3</sup> European Union (2019), [Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulations \(EU\) No1052/2013 and \(EU\)2016/1624](#), Brussels, Art.7(1), p.65.
- <sup>4</sup> European Commission (2016), [Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation \(EU\) No 439/2010](#), Brussels.
- <sup>5</sup> See *ibid.*, Art.19 and 21, pp.32-34.
- <sup>6</sup> *Ibid.*, Art.13, pp.27-28.
- <sup>7</sup> See e.g. European Parliament and the Council of the European Union (2010), [REGULATION \(EU\) No 439/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 May 2010 establishing a European Asylum Support Office](#), Art.2(4), p.14; European Parliament and the Council of the European Union (2018), [REGULATION \(EU\) 2018/1726 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice \(eu-LISA\), and amending Regulation \(EC\) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation \(EU\) No 1077/2011](#), Rec.36, p.104; European Parliament (2019), *op.cit.*, Art.93(3), p.389.
- <sup>8</sup> See e.g. European Parliament and the Council of the European Union (2010), *op.cit.*, Art.2(4), p.14; European Parliament (2019), *op.cit.*, Art.93(3), p.389.
- <sup>9</sup> See e.g. European Parliament and the Council of the European Union (2010), *op.cit.*, Arts.25-27, p.20; European Parliament (2019), *op.cit.*, Art.99, p.409.
- <sup>10</sup> Vos, Ellen (2016), "EU Agencies and Independence" in Dominique Ritleg (ed.), *Independence and Legitimacy in the Institutional System of the European Union*, p.218.
- <sup>11</sup> European Parliament (2019), *op.cit.*, Art.7, p.109.
- <sup>12</sup> Ripoll Servent, Ariadna (2018), "[A New Form of Delegation in EU Asylum: Agencies as Proxies of Strong Regulators](#)", *Journal of Common Market Studies*, Volume 56, Issue 1, pp.83-100.
- <sup>13</sup> Tsourdi, Evangelia (Lilian) (2017), "[Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System](#)", *Maastricht Journal of European and Comparative Law*, Volume 24, Issue 5, pp.667-686.
- <sup>14</sup> European Parliament (2019), *op.cit.*, Annex I, p.483.
- <sup>15</sup> *Ibid.*, Art.51 and 54, p.247 and 258.
- <sup>16</sup> See European Commission (2016), *op.cit.*, Art.19, p.32-33.
- <sup>17</sup> Fink, Melanie (2018), *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' Under the ECHR and EU Public Liability Law*, Oxford: Oxford University Press.
- <sup>18</sup> Rijpma, Jorrit (2016), [The Proposal for a European Border and Coast Guard: evolution or revolution in external border management?](#), Brussels: European Parliament.
- <sup>19</sup> Chamon, Merijn (2016), *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, Oxford: Oxford University Press.

# Migration and development

Vincent Chetail<sup>1</sup>

3

## TAMPERE CONCLUSIONS

*11. The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development.*

# PART 1: ASSESSMENT OF THE CURRENT SITUATION

The Tampere conclusions have approached the relationship between development and migration in a rather general and oblique way, as made apparent in paragraph 11 quoted above. Acknowledging the relevance of development within a comprehensive approach to migration was not new at the time. It was already endorsed in 1992 by the European Council in the Edinburgh Declaration on principles of governing external aspects of migration policy.<sup>2</sup> Despite the vagueness of their provisions, the Tampere conclusions have provided an important impetus for a vast number of subsequent initiatives aimed at specifying the measures to be taken in this vast area.

Since the adoption of the Tampere conclusions in 1999, the migration-development nexus has become a major EU tool for its partnerships with third countries. Its primary focus is to address the root causes of migration with the view of preventing the arrivals of migrants and asylum seekers in the European territory. A plethora of policy documents adopted by the European Commission and the European Council have promoted the role of development to address the root causes of migration and facilitate the conclusion of readmission agreements with third countries.<sup>3</sup>

Mainstreaming migration in development cooperation has been further reinforced by many other regional processes, including most notably the Valletta Action Plan on Migration, which was adopted by heads of states and governments of Africa and Europe in November 2015. This plan was also accompanied by the launch of the EU Emergency Trust Fund for stability and addressing the root causes of irregular

migration and displaced persons in Africa, based on resources coming mainly from EU development instruments (especially the European Development Fund).

In parallel to the EU and other related regional initiatives, discussions about the migration-development nexus have become truly global since 2006. The UN General Assembly organised the first High-level Dialogue on International Migration and Development in 2006, which resulted in the creation of the Global Forum on Migration and Development. In 2013, a second High-level Dialogue produced the very first declaration on migration and development, agreed upon by all UN member states. As a result of this momentum, migration has been mainstreamed within the 2030 Agenda for Sustainable Development. Reciprocally, the recently adopted Global Compact for Safe, Orderly and Regular Migration (GCM) includes development assistance among several of the objectives to be implemented by UN member states.

However, in stark contrast to the preventive stance of the EU, the UN instruments promote a more inclusive and balanced approach to the migration-development nexus. As exemplified by the Sustainable Development Goals and the GCM, the positive contribution of migration to the development of both countries of origin and destination coexists with the root causes approach as a long-term objective.

The migration-development nexus is indeed at the junction of two conflicting paradigms: the root causes one follows a control-oriented approach to alleviate migration pressure from countries of origin through development assistance, whereas a more positive viewpoint of migration

focuses on its potential for development in both countries of origin and destination. While these two contradictory driving forces still coexist to a large extent, the ambiguity of the migration-development nexus has been instrumental in the dialogues between states of destination and origin at the bilateral, regional and international levels.

While dialogue in the sensitive field of migration is a virtue in itself, the concrete achievements of EU policy towards third states remain very limited so far. This calls for a new approach based on mutually beneficial cooperation and informed by a sound evidence-based understanding of the potential and limits of the complex interlinkages between migration and development.

## PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

The ambiguous nature of the relations between migration and development represents by far the main challenge to be addressed by decision-makers. The interactions between migration and development are much more subtle and complex than it is commonly assumed. A large body of evidence has shown that they are far from being negatively correlated processes.<sup>4</sup> While the two intersect at their margins, development is not an answer to migration and vice-versa.

On the one hand, contrary to the simplistic assumption of the root causes approach, development initially leads to an increase rather than a decrease in migration, in so far as economic growth in developing countries raises new opportunities and encouragements to find a better life abroad. This phenomenon, called the 'migration hump', tends to disappear in the long run, when the level of development in the country of origin reaches a more stable stage.

On the other hand, international migration remains a selective process, simply because the poorest of the poor – who live on less than \$1 a day – do not have the resources needed to go abroad. The survival migration of the poorest is thus primarily within

their country of origin (generally from rural to urban areas). From this angle, development cannot be a substitute for international migration but rather an objective in its own right, conducted for the very purpose of poverty reduction. Otherwise, a development policy targeting the reduction of migration pressure carries the risk of diverting international aid away from non-sending countries, which include the poorest regions of the world.

The dilemmas of the root causes approach to migration are numerous and overlap with many other cross-cutting areas, including peace and security, climate change, demography, democratic governance and the rule of law, trade and investment. While mobilising a huge amount of money and energy, the root causes mantra is bound to be ineffective if the complexity of the migration-development nexus is not taken seriously by decision-makers. It may also raise unrealistic expectations among both EU member states and third countries, as well as for their public opinion and population.

As documented by a vast array of policy and academic studies,<sup>5</sup> the lessons learned from past experiences highlight three main interrelated challenges for the EU:

- The challenge of cooperating with third countries through a more balanced approach with the view of taking into account the competing interests at stake and finding mutually beneficial compromises.
- The challenge of policy coherence, as a result of the numerous EU stakeholders involved in migration and development, all with different and sometimes conflicting agendas.
- The relevance and efficiency of the EU policy in this vast field, because the complex interactions between migration and development are context-specific by nature and any measures should thus be tailored to the local needs and realities of the countries of origin.

## A. Prioritising poverty reduction as the central objective of development policy

As mentioned above, the main drawback of the EU policy on migration and development is to prioritise migration control over poverty reduction. The limits inherent to this approach materialise at two levels, both the EU's migration policy as well as development policy.

- First, the EU current obsession with the root causes of migration is counterproductive from the perspective of its migration control policy for two main reasons: it relies on a flawed perception of the migration-development nexus and exacerbates tensions with third states, as illustrated by the recurrent temptation of the EU to subordinate development assistance to the externalisation of migration control in and by countries of origin and transit.
- Second, using development assistance to curb irregular migration undermines the core objectives and principles of development policy. This has raised longstanding criticisms from development actors, NGOs and academics because it affects development effectiveness and diverts assistance from those most in need.

From a legal perspective, this imbalance between the objectives of development assistance and those of the EU migration policy may even constitute a violation of the TFEU. According

**The concrete achievements of EU policy towards third states remain very limited so far. This calls for a new approach based on mutually beneficial cooperation and informed by a sound evidence-based understanding of the potential and limits of the complex interlinkages between migration and development.**

**A more balanced and comprehensive perspective should be promoted by the EU between its traditional root causes approach and acknowledgement of migration as a positive contribution to the economic development of both its member states and third countries.**

to Art.208, the primary objective of the EU development cooperation policy is the reduction of poverty. The same provision further underlines that the Union shall take into account this primary objective in implementing policies that are likely to affect developing countries.

#### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:**

- How to ensure that priority is given to poverty reduction in the EU development policy?

**The EU focus on the root causes of migration has not only failed to achieve its objectives and incentivise cooperation of third countries. It has also been criticised for its lack of accountability and its poor compliance with international law and the rule of law.**

**The divergent approaches and objectives followed by migration actors and development agencies are exacerbated by the lack of policy coherence within the EU.**

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

*1. Establishing a compatibility test with Art.208 TFEU systematically before elaborating and adopting any new instruments and decisions in the field of migration and development.*

*2. Carrying out a compatibility test with Art.208 TFEU during the implementation of any instruments or decisions adopted in the field of migration and development.*

## **B. Balancing the root causes approach with the positive contribution of migration to the development of both countries of destination and origin**

A more balanced and comprehensive perspective should be promoted by the EU between its traditional root causes approach and acknowledgement of migration as a positive contribution to the economic development of both its member states and third countries.

The root causes approach to migration remains relevant in the long term to mitigate the adverse drivers and structural factors that hinder people from building and maintaining sustainable livelihoods in their countries of origin. Besides its long-term nature, this approach should be truly comprehensive by addressing not only economic opportunities in countries

of origin but also the rule of law and good governance. Likewise, development cooperation is only one tool among many others to address the root causes of migration. It should work in tandem with a more open and fair policy of trade and investment in third countries, as well as a robust strategy of peacekeeping and conflict prevention.

The measures to be adopted in this area are thus numerous and virtually cover any aspects related to the EU migration and asylum policy, as well as its broader policy on external relations. If the interactions between migration and development are understood in a more literal and restrictive sense, the root causes approach is unable to incentivise the cooperation of third states as long as it is not accompanied by other proactive measures aimed at improving the positive contribution of migration for economic development.

#### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

- ▶ How can the root causes approach be combined with the positive contribution of migrants to development?
- ▶ What should the main components of a truly balanced and comprehensive approach of the migration-development nexus be?
- ▶ How can the cooperation of third states with the EU on migration and development be incentivised?

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

*3. Facilitating remittances in countries of origin by reducing the cost of remittances and promoting transfers in productive investment.*

*4. Empowering diasporas to contribute to sustainable development in their countries of origin and migrant integration in EU member states.*

*5. Mitigating the brain drain by creating an EU compensation fund for third countries, especially when those recruited by member states have been educated and trained in their countries of origin.*

*6. Capitalising on lawful channels for labour migration at all skills levels to incentivise third countries' cooperation and meet the member states' labour markets' needs.*

*7. Expanding the number and types of long-term visas for students and of humanitarian visas for asylum seekers and vulnerable migrants.*

*8. Facilitating the sustainable reintegration of returning migrants – whether it is voluntary or not – through a holistic approach which most notably ensures that they are provided equal access to employment opportunities, basic services and justice in countries of origin, with the assistance of the EU.*

**The EU needs a holistic strategy for the twofold purpose of maximising the benefits of migration and minimising its negative effects.**

## C. Designing and implementing development assistance and migration partnerships with third countries with due respect for international law

The EU focus on the root causes of migration has not only failed to achieve its objectives and incentivise cooperation of third countries. It has also been criticised for its lack of accountability and its poor compliance with international law and the rule of law. Many stakeholders have addressed this longstanding criticism within and outside the EU on three main counts:

- ▶ First, the willingness of the EU to overlook the poor human rights records of some third countries in order to achieve its own objective of migration control has been frequently denounced as contradicting the fundamental values of the EU and weakening its international reputation and legitimacy, as well as its own policy and commitments toward democratic governance and the rule of law. This is also counterproductive because cooperating with abusive governments undermines the effectiveness of development assistance and perpetuates a vicious circle of repression and corruption that causes people to flee their own countries.
- ▶ Second, some measures aimed at preventing irregular migration may affect and, sometimes, violate the basic human rights of migrants under international law. Among other well-documented instances, this most notably concerns the right to leave any country and the prohibition of arbitrary detention as grounded in a broad range of international conventions ratified by both EU member states and third countries.
- ▶ Third, another concern relates to the fact that the measures adopted by the EU are

adopted and implemented without regard to the binding agreements of third countries governing the regional, sub-regional and bilateral free movement of persons. This is particularly obvious in Africa, where many regional economic communities have been established to facilitate the free movement of persons as a tool of sustainable development. The numerous existing agreements on the free movement of persons are bound to be reinforced at the continental level once the newly adopted Protocol to the Treaty Establishing the African Economic Community relating to Free Movement of Persons, Rights of Residence and Rights of Establishment<sup>6</sup> comes into force.

### THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:

- ▶ How to design, negotiate and implement migration-development partnerships with third states with due respect for the values of the EU, the local needs of countries of origin and their national contexts?

### INITIAL SUGGESTIONS AND IDEAS INCLUDE:

9. *Operating a systematic assessment of human rights records when identifying potential partners and designing development assistance and migration partnerships.*
10. *Identifying local needs and carrying out a compatibility test with international law when negotiating and elaborating migration-development partnerships.*

11. Establishing independent follow-up and reporting processes during and after the implementation phase.

## D. Improving the policy coherence of the EU policy on migration and development

The cross-cutting and multidimensional nature of the migration-development nexus inevitably entails some degree of heterogeneity and fragmentation. However, the divergent approaches and objectives followed by migration actors and development agencies are exacerbated by the lack of policy coherence within the EU. Due to the vast number of EU institutions, funds and policies involved in migration and development, the institutional landscape has never been so piecemeal and incoherent.

The reasons for this are not only institutional but also, and more fundamentally, political by nature: they primarily result from the absence of a truly common position among member states. In such a politically sensitive and polarised context, the root causes approach has become the lowest common denominator without regard to the broader and much more nuanced picture of the migration-development nexus.

This situation entails two main consequences. At the macro/political level, the EU lacks and accordingly needs a common understanding and a holistic strategy for the twofold purpose of maximising the benefits of migration and minimising its negative effects. At the micro/operational level, migration and development actors compete for the same funding (e.g. the Emergency Trust Fund for Africa, which is mostly composed of development funds), and their various actions are not coordinated in a cogent and efficient manner.

### THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:

- How to improve the coherence of the EU policy on migration and development with due regard to the broad number of stakeholders and interests at stake?

### INITIAL SUGGESTIONS AND IDEAS INCLUDE:

13. *Creating a coordination mechanism which gathers the EU institutions involved in migration and development.*
14. *Establishing clear and balanced policy objectives to guide funding decisions and operational priorities.*
15. *Creating a database of good practices.*

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<sup>2</sup> European Council (1992), *European Council in Edinburgh 11-12 December, 1992: Conclusions of the Presidency*.

<sup>3</sup> See e.g. European Council (2002), *Presidency Conclusions Seville European Council 21 and 22 June 2002*, DOC/02/13, Brussels; European Commission (2005), *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Migration and Development: Some concrete orientations*, COM(2005) 390 final, Brussels; European Council (2006), *Brussels European Council 14-15 December 2006: Presidency conclusions*, 16879/06, Brussels; European Commission (2016), *Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, COM(2016) 385 final, Brussels; European Union (2017), *The New European Consensus on Development: 'Our world, our dignity, our future'. Joint statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission*.

<sup>4</sup> See e.g. De Hass, Hein (2006) "[Turning the tide? Why 'development instead of migration' policies are bound to fail](#)", Oxford: International Migration Institute. Chetail, Vincent (2008), "[Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue](#)", *German Yearbook of International Law*, Volume 51, pp.183-216. Lavenex, Sandra and Rahel Kunz (2008), "[The Migration-Development Nexus in EU External Relations](#)", *Journal of European Integration*, Volume 30, Issue 3, pp.439-457. Zanfrini, Laura (2015), "[Migration and Development: Old and New Ambivalences of the European Approach](#)", Milan: Initiatives and Studies on Multiethnicity Foundation. Fratzke, Susan and Brian Salant (2018), "[Moving Beyond 'Root Causes': The Complicated Relationship between Development and Migration](#)", Migration Policy Institute. Funk, Marco; Frank Mc Namara; Romain Pardo and Norma Rose (2017), "[Tackling irregular migration through development – A flawed approach?](#)", Brussels: European Policy Centre. Latek, Marta (2019), *Interlinks between migration and development*, PE 630.351, European Parliamentary Research Service.

<sup>5</sup> *Ibid.*

<sup>6</sup> African Union (2018), "[Protocol to the Treaty Establishing the African Economic Community relating to free movement of persons, right of residence and right of establishment](#)".

# The Global approach and the partnership framework

Elsbeth Guild<sup>1</sup>

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## TAMPERE CONCLUSIONS

### A. A COMMON EU ASYLUM AND MIGRATION POLICY

#### I. PARTNERSHIP WITH COUNTRIES OF ORIGIN

11. *The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development.*

12. *In this context, the European Council welcomes the report of the High Level Working Group on Asylum and Migration set up by the Council, and agrees on the continuation of its mandate and on the drawing up of further Action Plans. It considers as a useful contribution the first action plans drawn up by that Working Group, and approved by the Council, and invites the Council and the Commission to report back on their implementation to the European Council in December 2000.*

#### D. STRONGER EXTERNAL ACTION

59. *The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition and implementation of other Union policies and activities.*

60. *Full use must be made of the new possibilities offered by the Treaty of Amsterdam for external action and in particular of Common Strategies as well as Community agreements and agreements based on Article 38 TEU.*

61. *Clear priorities, policy objectives and measures for the Union's external action in Justice and Home Affairs should be defined. Specific recommendations should be drawn up by the Council in close co-operation with the Commission on policy objectives and measures for the Union's external action in Justice and Home Affairs, including questions of working structure, prior to the European Council in June 2000.*

# PART 1: ASSESSMENT OF THE CURRENT SITUATION

The Tampere conclusions call for a comprehensive approach to migration that involves other countries, development policy and human rights. It also calls for greater coherence among member states and the EU in both internal and EU policies. In this chapter, this author examines how this call for more coherence and cooperation – both internal and external – has resulted in a problematic elision of border control and migration management, which in turn has led to negative externalities for the EU and its reputation.

Border control consists of measures to ensure that those persons who enter the EU at external border controls have the necessary documents and are not a threat to national security, as indicated in the relevant EU databases such as SIS II (i.e. the second generation Schengen Information System). It does not and cannot be a tool of migration management which is about how long and for what purposes third-country nationals (TCNs) remain in the EU. As Frontex, the EU Border and Coast Guard Agency has explained, a border guard has an average of 12 seconds to determine entry or refusal of entry at the EU's external borders.<sup>2</sup> This is adequate time to ensure that the document presented is in order and quickly check SIS II to make sure the person is not to be excluded – but nothing further.

TCNs who after entering wish to remain longer or carry out activities other than those of a visit need to be the subject of migration management, but this is not an activity which can be integrated into border management. Not only do people's interests and objectives change and vary before and after entry, but the decision on whether they should be permitted to remain longer than a visit depends on national

rules and regulations, too. Some of these migration management activities have been shifted to a pre-sift through mandatory visa requirements (e.g. family reunification, economic migration) which take place abroad.

Much criticism has been levied at these controls – delays, extra charges and bureaucratic burdens for families, or businesses seeking to employ TCNs. Choices which have been made supposedly authorised by the Tampere conclusions to extend the extraterritorial aspect of migration management and merge it with border controls have led to negative externalities in human rights compliance, efficiency, relations with third countries and resource allocation for the EU. Instead of pursuing this dead-end further, the EU needs to focus on the positive approach to partnership with third countries as intended by the Tampere conclusions. Following its traditional approach to cooperation with third countries in border and migration management (i.e. clearly separated as policy areas), the (a) liberalisation of visa requirements and border controls and (b) liberalisation of working conditions, access to self-employment and intra-corporate transfers of employees will provide a better foundation for future EU action in respect of both.

The argument that better border control (in particular, extraterritorially) is necessary to address a deep deficit in migration management as regards the irregular arrival and stay of TCNs in the EU is unsupported by the evidence provided by Frontex. To start, the question of whether there is a problem of irregular migration is never addressed. According to Frontex's risk analysis for 2019,<sup>3</sup> out of over 300 million entries at the EU's external border in 2018, approximately

90 million were EU/EEA nationals while the rest were TCNs. A total of 190,930 persons were refused entry at the external borders of the EU. This constitutes approximately 0.0006% of the total entries. This very low percentage of people refused entry at the external border does not transform into substantial pressure for irregular border crossing.

Also, according to the Agency, there were a total of 150,114 illegal border crossings into the EU, of which 114,276 were by sea.<sup>4</sup> This constitutes approximately 0.0005% of entries at external borders. One argument sometimes put forward is that few people are refused entry at the external border because the ‘unsuitable’ ones are ‘weeded out’ at the visa stage. However, the European Commission tells us that of the approximately 16 million Schengen visas applied for in 2018, only 9.6% were not issued.<sup>5</sup> The political problem with these statistics is that they do not reveal a crisis in terms of pressure on the EU external borders. In fact, according to Frontex, the pressure is minuscule and dropping.<sup>6</sup> Any policy which is designed to address a statistical non-compliance issue of less than 0.0005% as a ‘serious’ problem lacks credibility.

**The EU should not promise actions which it cannot deliver in its arrangements with third countries**

**The EU should respect regional integration regimes in other parts of the world, just as it expects other regional bodies to respect the Schengen area.**

In this chapter, the author makes four arguments regarding the incorporation of border control and migration management in EU relations with third countries:

1. The inclusion of border control and migration management objectives in the EU’s external relations with third countries must never undermine the EU’s role in the international community, in particular as regards its commitment to the full protection of human rights, the rule of law and democracy (see Part 1, A).
2. The EU should not promise actions which it cannot deliver in its arrangements with third countries (e.g. visa liberalisation as the quid pro quo for action by the other state; see Part 1, B). The EU must always bear in mind in its negotiations with third countries that the people it designates as ‘unwanted’ migrants are nationals of other states entitled to the protection of their state of nationality, including as regards their treatment on EU territory (i.e. consular protection).
3. The EU should respect regional integration regimes in other parts of the world, just as it expects other regional bodies to respect the Schengen area. The abolition of border controls and free movement of persons is a major objective of many regional bodies, including the African Union (AU), Economic Community of West African States (ECOWAS) and Mercosur to mention just three. The EU should not pursue political projects that are contrary to regional free movement regions with third

countries (e.g. Morocco and the control of its borders with ECOWAS states; see Part 1, C).

4. Responsibility in international relations is central to successful outcomes with third countries. The EU's blatant discrimination against the nationals of some countries in comparison with those of others, for example regarding access to short-stay visas and cheap visa-light travel the EU's new European Travel Information and Authorisation System (ETIAS), which mimics the US' Electronic System for Travel Authorization, diminishes the EU's standing as a responsible and equitable player in international relations (see Part 1, section D).

Traditionally, issues of migration and visa liberalisation in international agreements have related to the protection of nationals of the states entering into the agreements. They have included equal treatment in working conditions and social security and visa liberalisation. It was not until the 2000s that the EU broke with this tradition of liberalisation and began to pursue a policy of coercion in its international agreements with third countries regarding their citizens. The first readmission agreement, with Hong Kong, dates back to 2004.<sup>7</sup> At least these coercive agreements were adopted in accordance with EU rule of law requirements.

From 2005, the EU developed the Global Approach to Migration and Mobility (GAMM)<sup>8</sup> which aimed to adopt a broader approach that not only focused on the EU interest regarding the fight against irregular migration, but also legal migration and development in favour of third countries and later on international protection. The GAMM led to an increasing reliance on more informal types of interstate arrangements (e.g. mobility partnerships). This approach has not resulted in the EU being able to offer improved access to TCNs for economic purposes. Instead of transparency and clarity in EU relations with third countries, there has been less certainty

and little obvious benefit for either side. While the EU claimed that the GAMM was based on the principle of 'more for more' (i.e. more cooperation in the fight against irregular migration leads to more benefits for third countries), the EU started to also rely on the principle 'less for less' (i.e. less cooperation in the fight against irregular migration leads to sanctions against third countries). It moved to the new Partnership Framework,<sup>9</sup> again 'arrangements' rather than agreements with third states, thus not legally binding. In 2016, the EU added financing as an important component of the less-for-less approach, creating several trust funds in the aftermath of the 2015-16 refugee arrivals via Turkey. This refocused the Global Approach on the fight against irregular migration as the main priority in its relations with third countries, despite the broad approach of the Valletta Summit and action plan of 2015.

In pursuit of these objectives, the EU and its member states have adopted policies which include 'push- and pull-backs', refusals of disembarkation from boats carrying out humanitarian assistance and the criminal prosecution of their captains, seizure of said boats and harassment of staff. These have resulted in deaths at sea in the Mediterranean – 840 in 2019 at the time of writing. The EU and member states' policies against irregular migration are not benign: they result in violent deaths in the Mediterranean.

The reason for these negative externalities is the confusion of border control and migration management. Due to the EU's conflation of the two administrative fields, interior ministries and EU officials pretend that if they can direct border controls in third countries far from EU borders to ensure that other countries (e.g. Libya, Turkey, Morocco) do not admit to their territory people who might come to the EU but which the EU might not want, better migration management can be achieved for the EU. Death in the Mediterranean is not the only

consequence of the externalisation of EU migration policies. It also has a chilling effect on the EU's relations with third

countries, as shown by the four concrete examples below.

## A. 'Irregular' departures from Libya

The 2015 European Agenda on Migration,<sup>10</sup> adopted because of the so-called refugee crisis, sets out a plan of action to save lives and combat the smuggling and trafficking of migrants. The Agenda called for the use of the Common Security and Defence Policy to achieve this objective and resulted in a military intervention in international waters in the Mediterranean which aimed to destroy the business model of smugglers, called Operation Sophia. A year prior, the Italian Navy had carried out Mare Nostrum, a search and rescue operation, to save lives in the Mediterranean, mainly in respect of irregular departures from Libya. Disenchanted with the lack of EU solidarity regarding the reception of migrants and refugees rescued, the Italian authorities ended the programme. Pressure rose on the EU to act, and the outcome was Operation Sophia.

From the start, however, questions regarding compliance with international law arose. The European External Action Service (EEAS) managed to convince the UN Security Council to issue a resolution permitting the EU to launch a naval action in the Mediterranean. The Operation commenced in 2015 with a mission inter alia to save people, prevent human trafficking, dismantle smuggling networks and enhance the capacity of the Libyan border guard. But with the change of interior minister in Italy, EU member states withdrew their ships and so showed that their goal is not to save lives. The EU's authority in the international community has not been enhanced by its inability to achieve its stated objective to save lives in the Mediterranean.

This is exacerbated by allegations against EU member states of human rights violations in the field of external action. The European Court of Human Rights held in a landmark case that so-called push-backs whereby the Italian Navy returned migrants seeking to come to Italy from the high seas to a third country with a problematic human rights record constituted a breach of migrants' human rights.<sup>11</sup> Since then, Italy has entered into agreements with Libya regarding responsibilities for rescue, which are challenged by human rights organisations and researchers as constituting pull-backs, where small boats are pulled back into Libyan territorial waters and ports to avoid their potential arrival in Italy.

A new low for the EU's reputation was reached when a communication was submitted on 3 June 2019 to the Office of the Prosecutor of the International Criminal Court, alleging the EU and member state responsibility for death by drowning in the Mediterranean. As such, they constituted crimes against humanity. The core of the communication calls for the prosecution of senior EU and member state officials on the following grounds:

*“The evidence provided to the Prosecutor is diverse and includes an expert opinion on the situation of migrants in Libya; a victim statement confirming, for the first time to the best of our knowledge, the involvement of the Libyan Coast Guard (LYCG) in smuggling, trafficking and detention of migrants; internal documents of high-level EU organs, framing the*

*commission of multiple crimes against humanity within the context of a predefined plan executed pursuant to a policy aimed at stemming migration flows of Africans; statements by policymakers, made before, during and after the commission of the crimes, that establish their awareness of the lethal consequences of their decisions and implicate them in the alleged crimes; and reports by civil society organizations on the “dire and unacceptable” human rights situation in Libya.”<sup>12</sup>*

The information contained in this communication is indeed troubling – but the EU and its member states’ actions vis-à-vis Libya did not end there. In 2017, the French government announced actions to free migrants held in slave-like conditions in Libya. This resulted in some UN agencies becoming engaged in evacuating migrants from Libya to Niger. The outcomes have been fairly chequered with some resettlement to European states but also some migrants abandoned in Niger. Why Niger? When the need arose to find a state to which to evacuate migrants from Libya, the EU and its member states planned to engage with Niger, Mauritania and Mali. The latter two states desisted quickly. Niger has been highly politically unstable for decades, having suffered a coup d’état in 2010, and after returning to democracy remains highly volatile. Niger’s weak political class with a substantial legacy of legitimacy problems acquiesced to the requests in return for financial contributions from the EU.

## B. The EU-Turkey statement

The EU-Turkey statement of 2016<sup>13</sup> was the result of negotiations to seek an agreement that Turkey would prevent Syrians and others from leaving Turkey and heading towards Greek islands in particular, in return for substantial funding, some resettlement of Syrians from Turkey and the lifting of mandatory visa requirements for Turkish nationals. It was brokered in 2016 when the EU received larger than expected arrivals of refugees (mainly Syrian), sparking a reception crisis across the continent.

The deadline for lifting the mandatory visa requirement on Turkish nationals coming to the EU was the end of June 2016.<sup>14</sup> However, visa liberalisation has not yet happened. The unreliability of the EU in these negotiations with Turkey has unfortunate consequences for the EU’s reputation as a trustworthy partner in the international community.

**The EU’s authority in the international community has not been enhanced by its inability to achieve its stated objective to save lives in the Mediterranean.**

**The traditional position of the EU external policy has been based on reciprocity. Nevertheless, objectives in the area of readmission do not lend themselves to reciprocity. This is because the states with which the EU seeks to return nationals do not have populations of EU citizens which they wish to expel to the EU.**

The traditional position of the EU external policy has been based on reciprocity. Nevertheless, objectives in the area of readmission do not lend themselves to reciprocity. This is because the states with which the EU seeks to return nationals do not have populations of EU citizens which they wish to expel to the EU. They also tend to be countries in fairly weak economic and political situations in relation to the EU. The top two countries of origin of people detected as irregularly staying in the EU are Ukraine and Albania.<sup>15</sup> These are also the top two countries of origin of people returned from the EU. They are also neighbours with fragile economies and, in the case of Ukraine, very pressing political problems.

**One of the contributing factors to the current situations has been the relative weakness of the EEAS in the EU structure at a time when interior ministries of the member states have sought to use EU external relations for border control and migration management concerns.**

## **C. Morocco and the repositioning of politics**

The EU has economic and political links of long standing with Morocco. Cooperation agreements between the two date from the 1960s. However, pressure on Morocco in respect of border control and migration objectives have intensified in particular since 2005 and the introduction of the GAMM. Morocco has been included in all EU-Mediterranean initiatives in the field with a view to engage the Moroccan authorities ever more profoundly in EU efforts to diminish irregular migration, notwithstanding Frontex evidence that it is statistically insignificant. Yet, the EU has insisted on applying pressure on Morocco to agree to a readmission agreement. Finally, the failure of the EU mobility partnership with Morocco to result in increased access for Moroccan workers in the EU has cooled relations.

Morocco is now reassessing its position in international relations, moving away from the EU and associating itself with Africa – in particular, its position within the AU. It has also applied for membership of ECOWAS (the West African economic community). ECOWAS has already instituted a common ID card system which ensures border control free movement among its states for its nationals. Should Morocco's application be successful, it will cement the country's position as a leader in Africa, and remove it further from EU policies which seek Morocco carrying out border control activities at its external borders with African states, against nationals of other African states to diminish the pressure to arrive in the EU.

## D. EU visa policy

The EU agreed on a substantial reform of the Visa Code 810/2009 with Regulation 2019/1155, which ties the cost, processing time of visas and availability of multiple entry visas to the success rate of member states' return efforts to the relevant country. The idea, proposed by the Commission and accepted by both the Council and the Parliament, is that nationals of countries on the EU's visa blacklist should be punished for the inability of EU member states to return people (i.e. both nationals of the state and where permitted, non-nationals who travelled through) to their state. This collective punishment would take the form of an increase of visa costs (from the proposed €80 to €120 or even €160) or exclusion from simplified visa application procedures, waivers for holders of diplomatic and service passports, the 15-day visa processing time, access to multiple entry visas.

This could constitute discrimination on the basis of nationality within the class of states which are on the EU's visa blacklist. While the international community is becoming increasingly intolerant of discrimination on the basis of nationality in immigration procedure,<sup>16</sup> the EU appears to be embracing it in a particularly arbitrary form. The vast majority of people who will be punished by the new Visa Code have no control over or influence on the rates of return of their fellow countrymen and women from EU states yet are the objects of this discrimination.

In comparison, the EU's new policy of pre-travel authorisation (i.e. ETIAS) will require nationals of these privileged states to obtain pre-travel authorisation to go to the EU (but at a cost of €7) and will not be dependent on the 'good' immigration behaviour of their fellow citizens. This kind of blatant discrimination on the basis of nationality is not conducive to good international relations.

## PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

One of the contributing factors to the current situations has been the relative weakness of the EEAS in the EU structure at a time when interior ministries of the member states have sought to use EU external relations for border control and migration management concerns. Ensuring effectiveness in the EU external relations means indeed questioning whether these concerns are a coherent part of external relations.

If the EU is not to alienate important neighbours such as Morocco, international

relations must be holistic and the EEAS sufficiently powerful to block border control or migration management demands of the Commission's Directorate-General for Migration and Home Affairs (DG HOME) and member state interior ministries when the consequences of pursuing them are disadvantageous to the international relations of the EU and its reputation. There are both short- and long-term consequences, and the EU should not be seen to be funding military dictators or oppressive regimes in return for carrying out its coercive border and migration policies.

The example of Ukraine shows a different tendency. Notwithstanding an influx of Ukrainians to the EU at a rate of half a million a year since the 2014 Russian annexation of Crimea, the EU's external policy has been to reinforce cooperation with that state. No pressure has been brought to bear on the Ukrainian authorities to prevent their nationals from leaving, nor measures taken in the EU to prevent their arrival. To the contrary, in 2017, the EU institutions lifted the mandatory visa requirement on Ukrainians so that they could lawfully enter the EU, rather than irregularly.

**1. All of the composite parts of the state must be considered in order of their relevance and importance, such as the positions of foreign affairs ministries, social ministries, interior ministries, border agencies and intelligence services. This will require stronger institutional support for EEAS and the voices of the other Commission DGs in framing policies which affects the reputation of the EU.**

**2. The EEAS should pay particular attention to developments regarding international policies of groups of third states on borders and migration, and ensure that EU policies are not diametrically opposed to developments in other regions, such as regimes of free movement of persons in the AU, Mercosur, etc.** The impacts of coercive and exclusionary EU migration policies on international relations – such as the Free Movement Protocol to the Treaty Establishing the African Economic Community<sup>17</sup> versus EU pressure to remove ‘unwanted’ migrants from Libya to Niger and elsewhere – must be considered more carefully.

**3. For the EU's effectiveness and legitimacy as an international actor, it must deliver on what it promises in negotiations. If the EU is unable to deliver on labour migration opportunities which it seeks to offer**

**other states in international relations contexts, it must refrain from making any promises.** The EU's reputation is damaged by its failure to deliver on commitments made in the border control/migration management field.

**4. Correct application of existing international commitments in agreements, such as the non-discriminatory access to education on the same basis as EU citizens, as stated in the ACP-EU Partnership Agreement.**<sup>18</sup>

**5. Discrimination on the basis of nationality in the treatment of foreigners is increasingly unacceptable in international law and relations. The EU should avoid both overt and covert discrimination on the basis of nationality in its visa, border, migration and asylum policies.**

**6. The EU must cease funding or otherwise supporting pull-back operations (like in the case of Libya) when they lead to a real risk of inhuman or degrading treatment in order to respect the policy promoted by the Commission.** In 2018, the Commission's annual report on the EU Charter of Fundamental Rights (the Charter) stated the following:

*“Funding instruments in the areas of migration, border management and security for the next Multiannual Financial Framework (MFF): These proposals highlight the need to use funds in full compliance with Charter rights and principles. Actions implemented with the support of EU funds should take particular account of the fundamental rights of children, migrants, refugees and asylum seekers and ensure the full respect of the right to human dignity, the right to asylum, and the rights of those in need of international protection and protection in the event of removal.”*<sup>19</sup>

**EU efforts to control and improve the**

**conditions of migrants in detention centres as well as evacuate migrants to their country of origin or transit countries, with the help of international organisations, should have been quicker and more important.** However, these more-than-necessary accompanying measures cannot justify a policy leading to the violation of absolute human rights, like the prohibition of inhuman or degrading treatments that migrants face when sent back by the Libyan Coast Guard, with the unacceptable support of the EU and its member states.

**7. The Commission must ensure that internal consultations about the compatibility of policies and measures with the Charter are effectively done even in cases of emergency.**

**8. On the basis of Art.2 TEU regarding the EU's values, the EU has a role in protecting EU citizens who are being criminalised for humanitarian action in support of migrants and refugees. It must call for a stop to judicial actions against NGOs and their personnel who are involved in search and rescue activities at sea that are in line with international and maritime law.**

**9. Another aspect of concern has been the creation of funds, such as the EU Emergency Trust Fund for Africa, which are deployed according to special rules without regard for the Charter, and lack effective monitoring following the European Court of Auditors' Special Report n°32.<sup>20</sup>**

**For the EU's effectiveness and legitimacy as an international actor, it must deliver on what it promises in negotiations. If the EU is unable to deliver on labour migration opportunities which it seeks to offer other states in international relations contexts, it must refrain from making any promises.**

**The EU should avoid both overt and covert discrimination on the basis of nationality in its visa, border, migration and asylum policies.**

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# Legal migration

Kees Groenendijk<sup>1</sup>

5

## TAMPERE CONCLUSIONS

### III. FAIR TREATMENT OF THIRD COUNTRY NATIONALS

*20. The European Council acknowledges the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin. It requests to this end rapid decisions by the Council, on the basis of proposals by the Commission. These decisions should take into account not only the reception capacity of each Member State, but also their historical and cultural links with the countries of origin.*

*21. The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.*

# PART 1: ASSESSMENT OF THE CURRENT SITUATION

## A. The legislative landscape

Since 2003, the Union legislator has adopted a series of directives in the field of legal migration of third-country nationals (TCNs). Moreover, TCNs are covered and protected by the Race Equality Directive 2000/43, adopted as a consequence of point 19 of the Tampere conclusions and other Union law instruments, such as the social policy directives. The EU Charter of Fundamental Rights grants most fundamental rights to “everyone”, irrespective of nationality or immigration status. Finally, the Employer Sanctions Directive 2009/52 protects undocumented third-country workers.

Currently, seven directives on legal migration are in force in the EU. These include the Family Reunification Directive 2003/86, the long-term resident (LTR) directive 2003/109 and the Students and Researchers Directive 2016/801. In addition, four directives address the admission and rights of workers: the Blue Card Directive 2009/50 on highly qualified workers, the Single Permit Directive 2011/98, the Seasonal Workers Directive 2014/36 and the Intra-Corporate Transfer (ICT) Directive 2014/66. Together, these seven directives relate to the three main categories of immigrants who come to the EU for purposes other than asylum: family reunification, study and employment.<sup>2</sup> The main categories not yet covered are workers who are not highly skilled and are coming for (temporary) employment of more than nine months, and self-employed TCNs and investors.

The early legal migration directives of 2003 and 2004 are still in force, except for two

major changes. First, in 2011, the personal scope of the LTR Directive was extended to refugees and beneficiaries of subsidiary protection. Second, the 2003 Researchers Directive and 2004 Students Directive were merged in 2016, introducing more room for intra-EU mobility and the right for students to look for employment in the member state of graduation. The Commission’s highly publicised 2016 proposal to recast the 2009 Blue Card Directive<sup>3</sup> was unsuccessful due to disagreements between member states, mainly about their ability to maintain their national schemes for the admission of highly-qualified workers in parallel to the European Blue Card scheme.

The three most recent legal migration directives, adopted in 2014 (i.e. ICT Directive and Seasonal Work Directive) and the 2016 Students and Researchers Directive are far longer and more complex than the migration directives adopted in 2003/2004. In fact, the latest directive is almost five times as long as the Family Reunification Directive.<sup>4</sup> This complexity is due, for one, to the increasing need to find compromises between the conflicting aims or interests of member states. In addition, it is also linked to member states’ reticence against granting new competences to EU institutions in this field, in order to keep room for national policies. These reasons also explain why the idea of a legally binding EU Immigration Code, tabled by the Commission in 2010,<sup>5</sup> was dropped a few years later. It would have required very long and complex negotiations and, probably, a transfer of more competences

from member states to the EU. In the current political climate, such negotiations would likely result in a reduction of migrants' rights.

## B. Connections to the Tampere agenda

**Publicity and explicit naming of non-compliant member states in reports will support immigrants, their organisations and lawyers in their political or legal actions aimed at ensuring correct implementation practices.**

### 1. FAIR TREATMENT AND HUMAN RIGHTS

The Tampere conclusions, in line with Article 79(1) TFEU, instructed the Union legislator to ensure “fair treatment” of TCNs legally residing in member states. It has been argued that “fair treatment” equals compliance with human rights. However, this interpretation would deprive the fair treatment clause in the TFEU of its *effet utile*. Human rights treaties and the Charter guarantee almost all human and fundamental rights to “everyone”, including TCNs. Hence, “fair treatment” must imply protection above the minimum level of human rights.

The right to admission and the rights of admitted TCN immigrants granted by the legal migration directives clearly go far beyond the minimum level guaranteed by the European Convention on Human Rights (ECHR) and, since 2009, the Charter. The directives grant a right to family reunification, admission for study or employment for certain categories of workers, under conditions specified in the instruments and many other rights not guaranteed by current European or human rights standards.

The Tampere conclusions also stated that the EU legal migration instruments should take the reception capacity of member states into account, as well as their historical and cultural links with the countries of origin. This guideline is not explicitly reflected in any of the seven directives. The directives' frequent optional or may-clauses and exceptions nevertheless create room, to some extent, for member states to take those three factors into account when adopting national rules within the framework set out by the directives.

### 2. PARTIAL APPROXIMATION

Most legal migration directives did not introduce a new EU residence status but rather laid down common rules on admission conditions, procedures or migrants' rights after

admission. On the contrary, the LTR directive and the Blue Card Directive did introduce a new residence status. Both types of directives undeniably contributed to the “approximation of national legislation on the conditions for admission and residence”, as intended by the Tampere conclusions.<sup>6</sup> For the directives that instituted a new common EU residence status, this effect is – at least in part of the member state – clear (e.g. there are three million valid EU LTR residence permits in 2017).

For the other directives, the approximation was more the result of amendments to national legislation to comply with the EU rules, reducing the national rules to the prescribed level, or introducing national rules on issues that had not yet been covered by national rules before. Moreover, the common rules created a minimum standard (far above the minimum of human rights instruments) which prohibited the introduction of lower or more restrictive national rules. This effect is visible when comparing, for instance, the Family Reunification Directive with the national rules of two member states which are not bound by that directive – Denmark and the UK. The UK has introduced high fees and a very high income requirement. Denmark has introduced a minimum age of 24 years for spouses, a requirement of ‘special ties’ with Denmark, a requirement that the application of reunification with children can only be lodged within two years after the sponsor acquired a permanent status, and privileged rules that only apply to spouses who have held Danish citizenship for at least 28 years. Such requirements would be clearly prohibited by the Family Reunification Directive. Some of the Danish requirements are even incompatible with the ECHR or the EEC-Turkey association law.<sup>7</sup>

### 3. ACCEPTANCE AND IMPLEMENTATION OF DIRECTIVES BY MEMBER STATES

The Tampere Council’s request for “rapid decisions” on the legal migration instruments proved to be too optimistic. Especially in

the field of labour migration it proved to be difficult to reach agreement between member states. The first two directives in that field (i.e. Blue Card and Single Permit) were adopted only a decade after Tampere. Generally, the implementation and correct application of the directives in member states took considerable time as well.

The central dilemma is that in legal migration (as in asylum), the aims and political interests of member states vary considerably due to differences in geographical locations, economic situation, language and (colonial) history. However, common interests and aims can only be achieved by applying binding EU rules. Accordingly, member states remain reluctant, as shown by the slow and difficult process of EU approximation of national rules in the area of labour migration since 1999, to give up room of manoeuvre and national policies (as part of their ‘sovereignty’), which is the inherent effect of adopting and effectively implementing common rules.

The Family Reunification Directive was adopted in 2003 and had to be implemented in 2005. The first reference by a national court to the Court of Justice (CJEU) in the case *Chakroun* was made in 2008 and the Court’s judgment came in 2010. It took another five to seven years before immigration officials, lawyers and judges in the member state from which the reference was made began to take all elements of that judgment into their practices seriously. References from other member states asking for an interpretation of the Directive were made only from 2013 onwards.<sup>8</sup>

The 2003 LTR Directive had to be implemented in 2006. According to Eurostat data, a total of 1.2 million EU LTR permits had been issued two years later. In 2017, the total number had increased to over 3 million.<sup>9</sup> The first CJEU judgment on this directive came in 2012.

A reference to the CJEU is an indication that the EU instrument and its implementation

raise issues. Apparently, it is important to grant member states and their institutions, courts and lawyers time to become familiar with EU rules if they are to be taken seriously. The absence of references is no guarantee that the national practice complies with a directive.

In addition, the actual acceptance and application of legal migration directives vary considerably between member states. This is visible with directives that introduced a new EU residence status while allowing for parallel national status (i.e. the LTR Directive and the Blue Card Directive). In Germany, France, Sweden, Portugal and Belgium, less than 3% of LTR TCNs have an EU LTR permit; while in Austria, Italy, the Czech Republic, Romania, Estonia and Finland, 50% to 100% of LTRs acquired EU status.

In Germany and Austria, Turkish nationals are the largest TCN group. In both countries, the integration requirement is at the same level. Nevertheless, according to Eurostat data in 2017, less than 1% of LTRs in Germany had EU status, while in Austria it was 94%. Political choices, administrative instructions or practices and the incorrect idea that the national status is better than EU status most probably explain the difference between those two member states. Generally, the EU status is more favourable because national permits do not allow free mobility within the EU and provide less protection against expulsion.

In 2019, only 27% of the highly-skilled third-country workers admitted in the EU received a Blue Card. In Germany and the Czech Republic, almost all highly-skilled workers received EU permits. In Finland and the Netherlands, however, it was less than 5% – instead, almost all received a national permit.<sup>10</sup>

**No legislative change should be considered before a serious evaluation of the practices and experiences in the member state has been carried out.**

#### **4. NATIONALITY LAW**

One issue mentioned in the Tampere conclusions – “the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident”<sup>11</sup> – was not addressed by the Union legislator in the past two decades, mainly due to the lack of competence. The CJEU judgments in *Rottmann* and *Tjebbes* confirmed that it is generally up to each member state, having due regard to international law, to lay down the conditions for acquisition and loss of nationality.<sup>12</sup> However, the judgments also highlighted that EU rules on free movement and Union citizenship do restrict, to a certain extent, this freedom when it comes to national rules relating to the loss of nationality.

Moreover, the debate on the EU-wide consequences of certain member states granting their nationality to third-country investors illustrates how legislation and practices of nationality law will increasingly become an issue for consultation and discussion between member state, and action by the Commission. The latter has held discussions with Maltese and Cypriot authorities on the inclusion of an effective residence criterion in their investor citizenship scheme legislation, which resulted in amendments of the legislation in both states.<sup>13</sup> This could also be applied to the intra-EU mobility and labour market consequences that result from the acquisition of Union citizenship by other TCNs naturalising after long residence in a member state.<sup>14</sup> The relationship between the integration and labour market position of immigrants, on the one hand, and their acquisition of the nationality of their country of residence on the other is well established.<sup>15</sup>

The EU has developed several other instruments to reach an approximation of national rules, separate from binding legislation that can already be used to address the above issues. These include expert committees, working groups of national civil servants convened by the Commission, the development of legally non-binding guidelines and the so-called ‘open method of coordination’.

## PART 2: RECOMMENDATIONS FOR THE FUTURE

### A. General considerations

All legal migration directives are based on the principles that guided the gradual development of the rules on free movement since 1961: equal treatment coupled with access to employment and education, family reunification, and a secure residence right to enhance the integration of the migrant in the host society. The Tampere conclusions explicitly referred to “rights and obligations comparable to those of EU citizens”, and for long-term residents, to “rights which are as near as possible to those enjoyed by EU citizens”.<sup>16</sup> Comparable rights do not mean the same rights; ‘rights which are as near as possible’ does not imply equal rights.

**Not mention “circular migration” or “opening up channels for legal migration for employment” when member states are not prepared to offer serious and concrete opportunities for TCNs without higher education.**

Academic and political debates, as well as judicial disputes on this issue, tend to focus on the differences between the rights of EU citizens under the Citizens' Rights Directive 2004/38 and the rights granted to TCNs in the legal migration directives. Undeniably, those latter directives do not grant the same, but rather fewer rights to TCNs. It should not be forgotten, however, that the principles and rules on the free movement of Union citizens acted as a model. During the drafting and negotiating of the directives and during the interpretation by the Court, those principles were taken into account.<sup>17</sup> In the years to come, the EU should continue to stick to them.

## B. Existing *acquis* and how to take it forward

**A proposal for a directive on the admission of TCN entrepreneurs for establishment, self-employment or investment should not set common admission conditions.**

1. In its recent reports on three legal migration directives (Family Reunification Directive, LTR and Single Permit), the Commission rightly decided not to propose legislative amendments, but to monitor and support the instruments' correct implementation by member states instead. Until 2019, the Commission stimulated the correct implementation, mainly through so-called 'pilot procedures'. In the past decades, only one infringement case on the incorrect application of a legal migration directive reached the Court regarding the level of fees for residences permits.<sup>18</sup> The judgment in that case resulted in better implementation of legal migration directives in several other member states.

In July 2019, the Commission decided to start formal infringement procedures against seven member states concerning the incorrect implementation or application of six out of the seven legal migration directives. In two of its three recent reports, the Commission explicitly mentions member states that are not correctly implementing the directive(s) by name. This monitoring of a more active and public nature is the right way forward.

In addition, the Commission could consider publicly announcing the start, end and results of pilot procedures in this field. Such publicity and explicit naming of non-compliant member states in reports will support immigrants, their organisations and lawyers in their political or legal actions aimed at ensuring correct implementation practices. It will also increase the chances of these directives being taken seriously by national courts.

2. The Students and Researchers Directive had to be implemented by 2018. The Commission's report on member states' implementation of the Directive is set for 2023. No legislative change should be considered before a serious evaluation of the practices and experiences in the member state has been carried out. This also applies to the two directives adopted in 2014, the

Seasonal Work Directive and ICT Directive.

Better coordination between policies on migration and those on education, research and foreign affairs – at the EU as well as national levels – could lead to the admission of more students and researchers in the EU, in particular by promoting the innovative mechanism of admission of researchers.

## C. Labour migration

Considering the large differences in labour market needs and member states' opposition to the 2016 proposal for a new Blue Card Directive, a common policy on the admission of highly-skilled workers or the temporary admission of workers without high skills appears to be unrealistic. As long as employers, workers and national authorities prefer the flexibility of the national admission schemes and consider the EU directives in this field as too complex, member states will prefer to issue residence permits under their national schemes. The complexity of the recent labour migration directives is at least partly due to the predominance of Ministries of Home Affairs over the Ministries of Economic Affairs and of Social Affairs in the legislative process. Prior to 2001, it was these latter ministries that played a predominant role in the legislative and policy debates both at the EU and national level.

3. EU policy documents should not mention "circular migration" or "opening up channels for legal migration for employment" when member states are not prepared to offer serious and concrete opportunities for TCNs without higher education. Creating false expectations outside the EU risks backfiring and should be avoided.

4. The EU and member states have an interest in creating visible and viable

alternatives for irregular labour migration. Hence, the Commission could:

(a) conduct a systematic evaluation of experiences in member states that introduced liberal rules on admission for employment in recent years (e.g. Sweden, Spain, Germany's *Fachkräfteeinwanderungsgesetz*).

(b) check which member states would be interested in participating, on an optional basis, in an EU jobseekers visa scheme for TCNs with or without a certified job offer in the member state.

(c) check which member states would be interested in participating, on an optional basis, in the supply-driven Expression of Interest model developed by the Organisation for Economic Co-operation and Development. The model entails creating a pool of pre-screened, highly-skilled candidates which could serve national or EU schemes. The Commission should also check the possible advantages of this model compared with the current EU Skills Profile Tool, and whether the high investment in such a model would be justified by the interest among member states;

(d) develop an EU scheme to improve understanding among employers and authorities in member states about

educational and professional qualifications acquired outside the EU.

5. The EU institutions should clarify whether their understanding of the notion of “common immigration policy” in Article 79 TFEU with regard to labour migration is that an EU policy should only be *complementary* to member states’ policies. It should also clarify whether it considers that the future labour market and demographic needs are better addressed at the national rather than EU level. What role would the Council and the Parliament play in such an interpretation of the Treaty? How would such an interpretation fit with the aim of making the EU more attractive for highly-skilled workers from outside the EU, and with the idea of one EU labour market?

6. The Commission’s Legal Migration Fitness Check observed that the current directives do not cover two main categories: the admission of temporary migration (more than the maximum of nine months per year covered by the Seasonal Workers Directive), and the admission of TCN entrepreneurs for establishment, self-employment or investment (who are currently not covered by the Single Permit Directive). Increasing flexibility on the labour market (e.g. employees increasingly being replaced by

fully or partially self-employed persons) could be a reason to consider the latter issue.

Considering the member states’ reaction to the 2016 proposal for the Blue Card Directive recast, a proposal for a directive on the admission of TCN entrepreneurs for establishment, self-employment or investment should not set common admission conditions. However, the new proposal could cover the admission procedure and equal treatment by proposing rules similar to those in the Single Permit Directive but adapted to the circumstances of self-employment. Furthermore, the Directive should provide for intra-EU mobility – similarly to the ICT Directive and the new Students and Researchers Directive – and a standstill clause. The personal scope could also cover start-ups, truck drivers, airline pilots and inland shipping crews. In case the EU would wish to set limits to the GIG economy with a labour market characterised by the prevalence of short-term contracts or freelance work as opposed to permanent jobs, a minimum investment in the member state of residence could be required. Moreover, the EU should start implementing the right of establishment as provided in agreements with the Western Balkans, Russia and other third countries.

## D. Long-term residence status and intra-EU mobility for third-country nationals

7. The EU legislator should refrain from introducing administrative sanctions that create new barriers for the acquisition of EU LTR status, such as in Article 44 of the 2016 proposal for a Qualification Regulation (COM(2016)466). Such sanctions that require reliable information on possible irregular residence in another member state will be hard to apply correctly and

fairly. They will be counterproductive to the integration of TCNs and create a barrier to intra-EU mobility. The Union legislator should stimulate not punish intra-EU mobility of admitted TCNs.

8. For seasonal workers or other third-country workers with periods of lawful employment of more than five consecutive

years in a member state, those periods should count for the five years of lawful residence required to obtain EU LTR status in order to avoid their permanent exclusion from that status even after being lawfully employed for eight or ten years. This would require a minor amendment to the Seasonal Workers Directive.

9. Stimulate intra-EU mobility of lawful TCN residents with two years of lawful residence in one member state and a confirmed job offer in another. Intra-EU mobility should not be limited to highly-skilled workers. Several member states have an urgent demand for medium- or low-skilled workers. Why admit workers from outside the EU to meet that demand rather than workers who are already lawfully present in the EU? This could reduce irregular employment since the workers would no longer be ‘locked’ in one member state. This would also be a way to implement the principle of EU priority.

10. The practical experience of the more flexible and practical rules of the 2014 ICT Directive (as a new model based on mutual recognition) and on intra-EU mobility as found in the 2016 Students and Researchers Directive should be systematically evaluated. This can form the basis for proposals for opening up intra-EU mobility to lawfully resident third-country workers more generally.

**The Union legislator should stimulate not punish intra-EU mobility of admitted TCNs.**

**Intra-EU mobility should not be limited to highly-skilled workers.**

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- <sup>2</sup> European Commission (2019a), [Commission Staff Working Document: Fitness Check on EU Legislation on legal migration](#), Brussels, Part 1, p. 22.
- <sup>3</sup> European Commission (2016), [Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment](#), Strasbourg.
- 4 The Family Reunification Directive has 18 preambles and covers 7 pages in the Official Journal of the European Union (OJ) and the long-term resident directive has 26 preambles and covers 10 pages. The 2014 Seasonal Work Directive has 55 preambles and covers 16 pages, the 2014 Intra-Corporate Transfer Directive has 48 preambles and covers 22 pages, and the 2016 Students and Researchers Directive has 68 preambles and covers 37 pages in the OJ. The latter two are seven and five times as long as the first one, respectively.
- <sup>5</sup> European Commission (2010), [Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme](#), Brussels. See also Peers, Steve (2012), ["An EU Immigration Code: Towards a Common Immigration Policy"](#), European Journal of Migration and Law, Volume 14, Issue 1, pp.33-61.
- <sup>6</sup> European Council (1999), [Tampere European Council 15 and 16 October 1999: Presidency conclusions](#), Tampere, para.20.
- <sup>7</sup> See European Court of Human Rights, Judgment of the Grand Chamber of 24 May 2016, [Case of Biao v Denmark](#), Application no. 38590/10; Judgment of the Court of 12 April 2016, [Caner Genc v Integrationsministeriet](#), C-561/14; and Judgment of the Court of 10 July 2019, [A v Udlændinge- og Integrationsministeriet](#), C-89/18.
- <sup>8</sup> Judgment of the Court of 10 July 2014, [Naime Dogan v Bundesrepublik Deutschland](#), Case C-138/13; Judgment of the Court of 17 July 2014, [Marjan Noorzia v Bundesministerin für Inneres](#), C-338/13.
- <sup>9</sup> European Commission (2019b), [Commission Staff Working Document: Fitness Check on EU Legislation on legal migration](#), Brussels, Pt.2, p.378; Eurostat, ["Long-term residents by citizenship on 31 December of each year"](#) (accessed 13 November 2019).
- <sup>10</sup> European Commission (2019b), op.cit., p.283 and Annex 9.
- <sup>11</sup> European Council (1999), op.cit., para.21.
- <sup>12</sup> Judgment of the Court of 2 March 2010, Rottman, C-135/08 and judgment of the Court of 13 March 2019, Tjebbes a.o., C-221/17.
- <sup>13</sup> European Commission (2019c), [Investor Citizenship and Residence Schemes in the European Union](#), Brussels, p.6; Carrera, Sergio (2014), ["How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship in the union?"](#) Brussels: Centre for European Policy Studies.
- <sup>14</sup> Ahrens, Jill; Melissa Kelly and Ilse van Liempt (2016), ["Free movement? The onward migration of EU citizens born in Somalia, Iran and Nigeria"](#), Population, Space and Place, Volume 22, Issue 1, pp.84-98. van Liempt, Ilse (2011), ["From Dutch dispersal to ethnic enclave in the UK: The relationship between segregation and integration examined through the eyes of Somalis"](#), Urban Studies, Volume 48, Issue 16, pp.3385-3398. de Hoon, Marloes; Maarten Vink and Hans Schmeets (2019), ["A ticket to mobility? Naturalisation and subsequent migration of refugees after obtaining asylum in the Netherlands"](#), Journal of Ethnic and Migration Studies.
- <sup>15</sup> Organisation for Economic Co-operation and Development (2011), [Naturalisation: A Passport for the Better Integration of Immigrants?](#), Paris.
- <sup>16</sup> European Council (1999), op.cit., para.18 and 21.
- <sup>17</sup> See e.g. Judgment of the Court of 03 October 2019, [X v Belgische Staat](#), C-302/18.
- <sup>18</sup> Judgment of the Court of 26 April 2012, [European Commission v Kingdom of the Netherlands](#), C-508/10.

# Integration

Ilke Adam<sup>1</sup> and Daniel Thym<sup>2</sup>

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## TAMPERE CONCLUSIONS

### III. FAIR TREATMENT OF THIRD COUNTRY NATIONALS

*18. The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.*

*19. Building on the Commission Communication on an Action Plan against Racism, the European Council calls for the fight against racism and xenophobia to be stepped up. The Member States will draw on best practices and experiences. Co-operation with the European Monitoring Centre on Racism and Xenophobia and the Council of Europe will be further strengthened. Moreover, the Commission is invited to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty on the fight against racism and xenophobia. To fight against discrimination more generally the Member States are encouraged to draw up national programmes.*

*21. The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.*

# PART 1: ASSESSMENT OF THE CURRENT SITUATION

Member states have long rejected extensive European intervention in immigrant integration policies. Instead, the Treaty of Lisbon established a power “to provide incentives and support for the action of Member States”,<sup>3</sup> thereby excluding any direct harmonisation of national legislation. Yet, this does not exclude the adoption of measures on different legal bases, such as social policy or

directives on immigration and asylum. As a result, there are segments of a supranational legislative framework for integration complemented by soft policy instruments, which all build on the initial ambition set out at the 1999 European Council in Tampere for a “more vigorous integration policy”.<sup>4</sup> The EU approach essentially embraces four domains, which are outlined below.

## A. Rules in immigration directives

The Family Reunification Directive 2003/86/EC and the long-term residents (LTR) directive 2003/109/EC were controversially discussed during the legislative process, especially with regards to the underlying integration concept. While the European Commission had initially seen the strengthening of the rights of migrants as an instrument to advance integration, member states defended an approach wherein rights are seen as a reward for integration.

Both directives comprise what may be called ‘implicit’ and ‘explicit’ integration requirements for the attribution of a visa or residence permit. While the former do not use the term ‘integration’, they nevertheless rely on proxies for integration, such as economic self-sufficiency, the length of stay or the absence of extensive criminal convictions. Moreover, all of the directives guarantee equal treatment in diverse domains for those covered by their scope. These ‘implicit’ provisions on integration are less controversial. By contrast, ‘explicit’ rules that employ the term ‘integration’ were highly contentious

during the legislative process and continue dominating many domestic and supranational debates. Corresponding ‘may clauses’ were used in particular for language requirements, thereby triggering a process of policy diffusion, with more and more member states introducing explicit integration conditions over the past 15 years.

This policy shift has been criticised by many academics from different disciplines. The criticism mainly points to the fact that introducing integration requirements, when too strict, might foster exclusion rather than inclusion.<sup>5</sup> The European Court of Justice (ECJ) confirmed language requirements to be compatible with the Family Reunion and LTR directives in 2015, since they “greatly facilitate[e] communication [...] and [...] encourage[e] interaction and the development of social relations” among nationals and third-country nationals (TCNs).<sup>6</sup> States are required, however, to lay down hardship clauses for those with special needs or whenever pre-departure language tests are disproportionate.

## B. Funding

Besides legislation, the EU adopted specialised funding instruments on the basis of Art.77-80 TFEU, which cover projects on immigrant integration. The original European Fund for the Integration of third-country nationals (EIF) was replaced by the Asylum, Migration and Integration Fund (AMIF) during the 2014-20 cycle. To our knowledge, we still lack an evaluation of AMIF-funded activities to national integration policies. An evaluation study of the EIF showed that member states emphasise linguistic training and civic orientation courses disproportionately and that EU funding contributed to spreading civic integration courses.<sup>7</sup>

It should be noted that the AMIF decreased the budget for integration measures, although additional money for integration projects is available under other funds on different legal bases, like the European Social Fund (ESF). Ongoing debates about the next Multiannual Financial Framework (MFF) plan to deal with integration-related projects under the future 'Europe Social Fund Plus' (ESF+) and the enhanced asylum and migration fund.

**EU institutions could make a renewed effort to emphasise the linkage between diverse policy areas instead of only speaking about explicit integration policies.**

## C. Soft policy instruments

To compensate for the limitation of the EU's competence, the Commission had recourse to soft policy instruments that are meant to stimulate member states to evaluate and rethink their integration policies. The four initiatives mentioned below are complemented by a website on European integration,<sup>8</sup> statistics, handbooks, agendas and the Commission's 2016 Action Plan on the integration of TCNs.<sup>9</sup>

In a joint effort of the Council of the European Union and member state representatives, the EU established the Common Basic Principles for Immigrant Integration Policy in the EU (CBP), which may be considered the "eleven commandments of the EU integration policy".<sup>10</sup> The underlying idea of integration as "a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States"<sup>11</sup> has been taken up widely across Europe. It is complemented by an inspection of different policy areas, including employment, education, naturalisation and political participation. It should be noted, thus, that it is not limited to language courses and civic integration.

National Contact Points (NCPs) on Integration were established in member states from 2003 onwards, to facilitate regular meetings of national representatives to identify and exchange best practices and foster mutual learning. While evaluating the impact of such a policy learning tool is difficult, research suggests that there is little evidence of norm diffusion through NCPs, which often concern lower-ranked civil servants.<sup>12</sup> However, that does not unmake the diffusion processes established through other platforms and activities mentioned above.

The EU contributed to the professionalisation and finetuning of the indicators of immigrant integration.<sup>13</sup> Eurostat's migrant integration report<sup>14</sup> was complemented by the EU's joint publication with the Organisation for Economic Co-operation

and Development, *Settling in 2018*,<sup>15</sup> thereby allowing for increasingly professional measurements of ethnic and racial inequalities in Europe. Research shows that there is no straightforward link between states' investments in integration policies and integration on the ground. This is so because integration is fostered by a wide range of variables that go beyond explicit integration policies.

More recently, the European Commission is focusing more on the need to mainstream integration across all policy sectors and levels. In 2015, the Commission created an Inter-Service Group on the integration of third-country nationals, which unites the relevant directorates. The need for policy coordination was also strongly highlighted in the 2016 EU Action Plan on the integration of TCNs.

## D. Measures beyond the area of freedom, security and justice: anti-discrimination policy

Other policy measures contribute to immigrant integration beyond the legal scope of the original Tampere conclusions and the area of freedom, security and justice.

As the EU defines integration as a “two-way process of mutual accommodation by all immigrants and residents of Member States”,<sup>16</sup> anti-discrimination policies are key to integration. The Race Equality Directive 2000/43/EC set up or extended anti-discrimination laws across Europe. Research shows that the legislation is poorly implemented in many countries and that support for national equality bodies varies significantly. The ECJ adopted a narrow approach to the definition of race when it

excluded unequal treatment on grounds of the place of birth from the scope of the Directive,<sup>17</sup> thereby indirectly vindicating narrow domestic practices, even though the Directive can be used to challenge state practices in other policy fields than migration law (e.g. discrimination against the Roma community<sup>18</sup>).

More relevant than the Race Equality Directive in the legal practice of member states and the ECJ is the Equal Treatment Directive 2000/78/EC, which concerns different grounds of discrimination and is limited to employment and occupation. On its basis, important judgments on religion were delivered, which will be considered below.

In line with the CBP, many other policies should be considered as contributing to immigrant integration. Among the areas of (limited) EU competence, activities in the field of social policy should be mentioned alongside measures supporting economic

growth, thereby facilitating labour market integration. By contrast, the EU lacks competence in many other domains, such as education or political participation, which are crucial for the success of integration and the overall assessment of state policies.

## PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

A holistic approach that accepts the complementary nature of the different instruments mentioned above is warranted. EU institutions could make a renewed effort to emphasise the linkage between diverse policy areas instead of only speaking about explicit integration policies. The Commission should support and supervise the application of existing rules by the member states in line with ECJ case law and consider how to reinvigorate debates about naturalisation. It is important to keep

in mind that integration combines diverse generic policies (e.g. education, housing, employment) with a broader debate about the underlying vision of what constitutes an 'integrated' society. This chapter accepts that there are different views and presents two of them: one concentrating on factual equality by fighting institutional racism; the other highlighting multiple meanings of integration, including the search for a new sense of togetherness which connects operational policies and structural reforms.

### A. Thematic scope of integration policies

In line with the CBP, integration can be understood as a two-way process of mutual accommodation, with the aim of the full participation of immigrants in economic, social, cultural and political life. On that basis, any evaluation of the EU's approach essentially depends on the thematic scope of the measures analysed. If explicit integration conditions in secondary legislation are focused upon exclusively, a one-sided focus on language courses and civic knowledge becomes apparent, emphasising the obligations of immigrants. If, by contrast, other policy areas mentioned in the CBP are included, the conclusion will be more nuanced, since the stance of both

the EU and member states on schooling, social policy and employment often embraces equality-based elements, which accentuate obligations of and support by the host society.

Against this background, the limited EU competence under Article 79.4 TFEU can appear in a different light, since it may reflect an approach which considers immigrant integration as an integral part of wider policies on diverse issues such as employment, social policy, education or political participation. Specific measures for immigrants are often appropriate at the early stages after entry (e.g. language

courses to support the integration of refugees). In the medium and long run, it is neither desirable nor possible to disentangle the integration of immigrants from the general policy approach. Immigrant integration should, in other words, be discussed as part of other policies instead, thereby mainstreaming integration. In doing so, member states and the EU should ask whether the immigrant experience requires a reconfiguration of existing policies, to take account of the specific requirements of immigrants (e.g. education).<sup>19</sup> There are different views, however, about the direction of that institutional change (see Part 2, section D).

Many policy areas mentioned above (e.g. education, employment, social policy) will remain prerogatives of member states in the foreseeable future – and may, at best, be coordinated through soft policy instruments at the EU level. As a result, the current patchwork of different instruments is here to stay and the EU institutions are invited to better emphasise the linkage between policy areas in the future, thereby countering the widespread stereotype that EU integration policies are limited to explicit integration conditions in secondary legislation, with their focus on language requirements and civic knowledge. Unfortunately, the EU institutions have not always grasped all the opportunities laid out before them over the past years.

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

- 1. Accentuating integration as a two-way process, in line with the Common Basic Principles.*
- 2. Focusing less on language requirements and civic knowledge by highlighting that other policy areas such as social policy are based on active support from host states.*
- 3. Reassessing whether sectoral policies should be reconfigured to take account of new challenges and difficulties in increasingly diverse societies.*

**Immigrant integration should, be discussed as part of other policies instead, thereby mainstreaming integration. In doing so, member states and the EU should ask whether the immigrant experience requires a reconfiguration of existing policies, to take account of the specific requirements of immigrants**

## B. Developing existing rules and policies

Research has shown that in the Family Reunion and LTR directives, the optional clauses that allow member states to introduce integration requirements have legitimised national policy change in that direction. The use of integration requirements has led to heated debates in political and academic circles; with extreme calls for either their fortification or abolition over the past years. The Commission has not proposed a revision of the directives, possibly out of pragmatism to prevent difficult political debates about immigrant integration, that might end up with a deadlock of the legislative process mirroring difficulties with the recent asylum package. Not to propose an amendment of the directives also prevents member states from lowering existing standards. The Commission should, however, support and supervise the correct application of existing rules by member states in line with their interpretation by the ECJ. The fitness-check on legal migration and the recent implementation reports<sup>20</sup> contribute to this objective, although they remain rather abstract in their restatement of the law.

Debates about MFF 2021-27 show that migration will generally receive more funds (see Part 1, section B), even though border controls and asylum policies will see a comparatively larger increase

than integration. For that reason, policy actors should preserve a substantial amount of EU funding for integration within the upcoming MFF. In doing so, it will become convincing to limit the integration component of the future asylum and migration fund to the early stages after entry for immigration-specific measures (e.g. to support beneficiaries of international protection to find employment). Mid- and long-term integration will be financed as an integral part of the ESF+ in the future, in line with the objective of mainstreaming immigrant integration policies (see Part 2, section A). Within that overall context, EU institutions should ensure that member states use ESF+ funds effectively, and for immigration-related projects and not initiatives that predominantly benefit nationals.

### INITIAL SUGGESTIONS AND IDEAS INCLUDE:

- 4. The Commission continuing to support and supervise member states' correct application of existing rules, as interpreted by the ECJ.*
- 5. Ensuring that ESF+ money is earmarked for projects that effectively benefit immigrants within the broader context of mainstreaming integration policies.*

## C. Reintegrating nationality law into the policy concept

In a recent case, the ECJ found that naturalisation means “to become more

deeply integrated in the society of that State.”<sup>21</sup> This statement reminds us of the

significance of the acquisition of nationality for the legal dimension of integration, of which the CBP recognised that it “can be an important incentive for integration.”<sup>22</sup> Against this background, it is conceptually incoherent for the EU to deal with immigration status while being unable to regulate nationality laws. While it seems unrealistic to call for an EU competence for harmonisation in the foreseeable future since that would require Treaty change,<sup>23</sup> this should not prevent the EU institutions from recognising the conceptual argument that naturalisation should be considered an integral part (or rather the endpoint) of immigration laws. It should be noted that doing so would be a return to the roots of EU immigration policy, reinvigorating the original impetus of the Tampere conclusions that “third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.”<sup>24</sup>

A new beginning in the EU’s involvement in naturalisation could be achieved by simply reintegrating the prospect of naturalisation into policy papers; from which it seems to have mostly disappeared in recent years with regard to long-term residents. It might even be appropriate to move beyond informal policy papers and to reconsider the formation of an informal coordination

framework for nationality laws, possibly on an intergovernmental basis, to take account of the absence of a corresponding EU competence.

Nationality law is not only about the acquisition of nationality by those who have lived legally in a country for several years. In the past years, the EU institutions have dealt with tendencies in some member states to set up ‘citizenship for sale’ or ‘gold passport’ programmes. These measures are problematic from a normative perspective: if membership rights become monetarised and if they grant those ‘purchasing’ an EU passport cross-border EU mobility without previous residence in the member state of nationality. It is significant, therefore, that the Commission, in particular, tries to activate indirect means to oversee these programmes.<sup>25</sup>

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

6. *Reintegrating the option of naturalisation into immigration policy and considering attempts to move towards an informal policy exchange between the member states.*
7. *Continuing indirect supervision of ‘citizenship for sale’ programmes.*

## **D. Integration between equality and social cohesion**

The coexistence of different conceptions about the theoretical foundations and the practical realisation of basic policy concepts is a regular feature of the relevant academic literature and political debates. The notion of ‘integration’ is no exception. There are different strands to the academic and political debate, which become particularly relevant when moving beyond more

operational policy areas (e.g. employment, education) towards general debates about individual and collective identities and the normative underpinnings of societal togetherness that any holistic approach to integration requires.

There are two different strands to the debate which will be expanded upon below:

the first focuses on integration as equality, which emphasises the structural disadvantages migrants are confronted with; the second highlights the need for a shared feeling of togetherness in addition to equal treatment. It should be noted that they are not mutually exclusive since they can overlap in practice. In any case, we should recognise the legitimacy of different positions, with options of manifold intermediate positions and room for compromise.

## 1: INTEGRATION AS FULL EQUALITY

The position concentrating on equality takes the CBP as a starting point to state that integration is about equal participation in the central societal fields (e.g. employment, housing). In that respect, the increasingly complex sets of indicators at the EU level mentioned above show that integration policies do not necessarily lead to more equality on the ground, on the labour market, in schools, in access to healthcare, in accessing housing, and more. Against this background, the claims of the second wave of anti-racist organisations and activists go beyond demands for equal rights and focus on effective outcomes. Instead of 'more' of the same policies, they want to do it 'differently'. The activists of the second wave have lost hope in anti-discrimination legislation and its individualistic approach.

**The Commission should, support and supervise the correct application of existing rules by member states in line with their interpretation by the ECJ.**

**Policy actors should preserve a substantial amount of EU funding for integration within the upcoming MFF.**

Instead, they want to redirect the debate to tackle 'institutional' or 'systemic' racism, which they conceive to be part of the European political culture and embedded in mainstream institutions. Similarly to the strive for gender equality, it is not just the explicitly sexist and/or racist rules and practices which maintain inequalities, but the pervasion of major institutions by often subtle racial stereotypes, ideas, images, emotions and practices. Two options for tackling institutional racism can be considered. One option is a revision or further reinforcement of the EU's anti-discrimination policies to support member states' adoption of strong and comprehensive policies to combat institutional racism, including establishing a sophisticated definition of racism that moves beyond that of the aforementioned ECJ case law. It should be recognised that changing legislation would require unanimity under Article 19.1 TFEU.

Another option is to invest in the implementation of current anti-discrimination legislation through the support of National Action Plans Against Racism (NAPARs). As recommended by the European Network Against Racism,<sup>26</sup> these NAPARs could include sophisticated definitions of racism and discrimination beyond racist crime, thus

acknowledging structural discrimination and intersectionality; they could recognize specific forms of racism and targeted measures to address these; pair up with comprehensive and quality-ensured equality data collection; and include specific policy objectives in each societal field, accompanied by positive action plans and clear and measurable indicators of progress. The quality of these NAPARs is not only guaranteed by their content but also by the process through which they are developed, with communities affected by racism – and that, from day one.

Moreover, several academics and certain policymakers argue that the term ‘integration’ should be replaced by ‘equality’, since the concept of integration refers to an unscathed whole and the need to keep the whole together, while integration becomes individualised, being turned into an individual responsibility of the migrant. Replacing ‘integration’ by ‘equality’ would entail that less emphasis is placed on the individual responsibility of migrants and integrate the obligations of society as a whole in the description of the policy objective. It is also argued that as they currently stand, integration policies structurally disperse the integration of ‘white citizens’, thereby promoting ‘white privilege’. Unlike migrants, their integration is not monitored, thus fostering social hierarchies rather than equality.<sup>27</sup>

Changes along these lines would not mean having to throw out the baby with the bathwater. Even if language courses sometimes seem inefficient, that does not mean they are not a good starting point. As long as they are not too conditioned, many programmes for new migrants are also considered helpful by immigrants themselves. However, if institutional racism is not tackled first, these policies will not lead us to equal participation for all.

## **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

8. *Focusing on effective outcomes and not only equal treatment on paper.*

9. *Recognising that full equality on the ground cannot be reached without addressing institutional discrimination and racism in the member states and at the Union level.*

10. *Taking the claims of ethnic minority citizens within the EU seriously and making policies not only ‘for’ those concerned but also ‘with’ them.*

11. *Replacing ‘integration’ by ‘equality’ to undo the impression that integration is primarily about obligations of migrants and counter underlying hierarchies of ‘white privilege.’*

12. *Implementing NAPARs, including quality-ensured equality data collection, the establishment of specific policy objectives for each societal field and positive action plans.*

13. *Fostering equality and non-discrimination in the European institutions’ own backyard and ensuring a diverse and representative workforce. Diversity of the EU staff should not only be evaluated and promoted by gender and nationality but also along ethnic and racial lines (e.g. #BrusselsSoWhite campaign).*

## **2: INTEGRATION BUILDING TOGETHERNESS**

Another strand in the academic literature on ‘integration’ highlights the theoretical and practical open-endedness of the concept. Practically, it combines explicit and implicit rules on integration in supranational legislation, as well as policy areas that go beyond the area of freedom, security and justice (e.g. employment, education, housing). Theoretically, ‘integration’ would be presented as an incomplete agreement whereby different actors agree on the need for ‘more/better’ integration without sharing

underlying ideas and concepts what it means and how it should be put into effect.<sup>28</sup>

Against this background, attention to integration as equality can be combined with an additional focus on society ‘as a whole’, in line with the CBP. There is a rich, ongoing academic debate on how to construe social togetherness in response to immigration, which can be popularised in line with the classic American distinction between the ‘melting pot’, in which different traditions and background feed into a new whole; and the ‘salad bowl’, which emphasises the continued diversity of migrant communities as sociocultural minorities. Corresponding academic debates revolve around notions of ‘liberalism versus communitarianism’ or around different versions of multiculturalism and moderate form of republicanism in the theoretical sense. While some focus on individual freedom, equal treatment and state obligations, others concentrate on a sense of commitment towards states and societies as a communal venture, which is more than the sum of the individualistic parts.

It is evident that authors subscribing to the second view would be less concerned that integration policies generally embrace elements of commitment – provided that these measures are proportionate and are complemented by other policy instruments with a more promotional character (e.g. education, employment, social policy). As a result, they would be less critical of EU policies, even though they might invite the EU institutions to adopt a more holistic outlook (see Part 2, section A).

It should be noted that such an outlook should not be confused with older visions of the nation-state as a closed and culturally homogeneous club. Instead, it would underscore that European societies change in response to migration and that such change involves host societies – both in terms of adapting their self-image and by changing existing laws and institutions to

take account of increasing diversity. Such reconfiguration would be directed towards a new sense of togetherness, which states can promote without guaranteeing the success of the venture. The framing of the policy debate on integration would be relevant in this context. Those concerned with a new feeling of togetherness would combine individual liberty and a rhetoric emphasis on diversity and equal treatment with the search for a new narrative for the society as a whole. These abstract debates would complement structural efforts to integrate the specific experience of migrants into existing institutions.

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

*14. Recognising that ‘integration’ can have multiple meanings and that it can be legitimate to focus on structural and discursive elements which promote a feeling of togetherness.*

*15. Emphasising that integration policies should be holistic instead of highlighting specific elements, such as expectations towards migrants, which could be a legitimate component if other promotional instruments complemented them.*

*16. Acknowledging that a new sense of togetherness cannot be prescribed by legislation since it should develop from within societies with the support of state policies.*

#### **EXAMPLE: RELIGIOUS SYMBOLS AT THE WORKPLACE**

A classic example in which the different strands of the theoretical and political debate identified above can lead to different outcomes are religious symbols at the workplace. In two controversial recent judgments, the ECJ decided that the prohibition of indirect discrimination on grounds of religion in the Equal Treatment Directive can justify a commercial policy

that bans religious symbols at the workplace, especially when workers interact with customers.<sup>29</sup>

Judges did not vindicate such commercial practices unconditionally but insisted on their neutral implementation. Companies must cover all religious symbols on paper and in practice, mirroring the compromise formula enshrined in the equally controversial judgments on pre-departure language requirements as a precondition for family reunification (see Part 1, section A). National courts were asked to check these conditions in practice. This caveat does not, however, unmake the principled consent of the Court to ban religious symbols at the workplace, which judges construed as a balancing exercise between the human right to equal treatment and the freedom to conduct a business (Art.17, 20 CFREU).

It is obvious that the first strand of the academic literature and the political debate on 'integration' would criticise these judicial findings as a continuation of structurally embedded inequality which disproportionately affects Muslim women and can, therefore, be described as an explication of institutional racism and white supremacy. By contrast, some authors of the second strand would highlight that societies should develop distinct patterns of the role of religion in public life, also reflecting the diversity of corresponding models within the EU (Art.17 TFEU).

Moreover, this example reminds us of the general features of integration policies: not confined to measures adopted within the area of freedom, security and justice, they include areas such as non-discrimination, employment, education, housing and social policies (see Part 1, section D). It is important to enhance cross-sectoral coherence among diverse domains through a holistic outlook, which is not limited to explicit integration conditions in immigration legislation (see Part 2, section A). Given that many of these policy fields are beyond the scope of the EU competences, there will continue to be differences between member states, which can be coordinated informally at the supranational level (see Part 1, section C).

**If institutional racism is not tackled first, these policies will not lead us to equal participation for all.**

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# The Common European Asylum System

Lyra Jakulevičienė<sup>1</sup>

7

## TAMPERE CONCLUSIONS

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

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

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

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

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

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

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

# PART 1: ASSESSMENT OF THE CURRENT SITUATION

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

While the Tampere conclusions called for “open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity”,<sup>2</sup> the EU paid insufficient attention to the human dignity of asylum seekers and refugees. In particular, the living conditions in the hotspots established on the Greek islands were in contradiction to the absolute prohibition of inhuman

or degrading treatment as cited in the EU Charter of Fundamental Rights (hereafter the Charter). The CEAS has proved its limitations to protect asylum seekers in the context of rising numbers of arrivals to the EU, especially during the peak in 2015-2016. It is important to stress, however, that the issue is not the number of arrivals, but rather the lack of solidarity between the member states, of appropriate institutional framework to provide asylum in the EU, and of values and fundamental rights approach in guiding the implementation of the asylum policy.

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

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

Notwithstanding these important achievements, a number of vital challenges remain unresolved while attempts at making the CEAS more efficient, harmonised and stable in the face of future migratory pressures have not been successful. The European Commission issued the European Agenda on Migration<sup>5</sup> in May 2015 which set out further steps towards a reform of the CEAS, and tabled proposals for said reform in 2016.<sup>4</sup> The latter suggested replacing the current directives on qualification and asylum procedures with regulations, recasting the Dublin III Regulation No.604/2013 and the Reception Conditions Directive 2013/33/EU (RCD), extending the scope of the Eurodac Regulation No.603/2013 and establishing a permanent Union resettlement framework.

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

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

- Firstly, an attempt to increase harmonisation by leaving less discretion to the member states: replacing directives with regulations, turning some optional clauses into mandatory ones by making a number of concepts obligatory (e.g. on safe third countries), replacing optional rules for more prescriptive ones (e.g. in the case of the refusal of protection).
- Secondly, a focus on the secondary movement of asylum seekers and beneficiaries of international protection. However, the root causes of such movements are not addressed enough.
- Thirdly, the absence of a mechanism of responsibility sharing that would accommodate both the preferences of

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

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

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

► Fourthly, the proliferation of various national or transnational policy responses

which involve just a few member states (e.g. the 2018 joint paper of Denmark and Austria to severely limit the right to apply for asylum in Europe; Germany’s bilateral administrative agreements with Spain, Greece and Portugal on quick transfers which bypass the rules of the Dublin system<sup>5</sup>).

## PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

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

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

migration officials and judges. This would bring a more realistic change towards convergence in decision-making. The implementation of CEAS would also benefit from more active involvement of national judges, who would bring the preliminary questions on the existing instruments to Luxembourg.

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

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

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

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

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

## **A. THE VALUE BASIS OF THE OVERALL ASYLUM POLICY REFORM**

The trends and challenges mentioned above demonstrate that the 2016 reform of the CEAS is largely guided by punitive and restrictive considerations that question the basis upon which the CEAS was initially founded, including the 1951 Refugee

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

These observations raise the following questions:

- ▶ Which fundamental values are guiding the CEAS policy reform?
- ▶ How can these values be reconciled with the attainment of an efficient and effective

asylum policy?

- ▶ Should the CEAS allow transnational responses among some member states?

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

- 1. Defining the fundamental principles/values test for any asylum policy reform proposal and transnational cooperation between member states.*
- 2. Establishing a closer link between the EU's asylum policy and the UN Global Compact on Refugees.*

## **B. EU resettlement framework and complementary pathways**

Safe and legal pathways to protection in the EU should be complementary and not substitute the CEAS outright. Less than 5% of refugees considered by the UNHCR to be in need of resettlement were provided with new homes in 2018. More progress is therefore needed. The alternative pathways are not able to meet today's demands, frequently lack protection standards and coordinating structures, and are not easily accessible for refugees. The proposal for an 'EU Resettlement Framework Regulation' envisages a mandatory resettlement scheme, but links resettlement to foreign policy objectives of the member states and third countries' cooperation on related matters.<sup>7</sup> This does not necessarily ensure a focus on countries that face the most pressing needs of the most vulnerable and in need of international protection. Regarding complementary pathways (e.g. community or private sponsorship schemes), they should be designed and implemented in such a way as to include protection safeguards.

#### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

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

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

- 3. Linking EU resettlement policy with third countries that host the most people in need of protection.*
- 4. Linking EU resettlement policy with the UNHCR's Three-Year Strategy (2019-2021) on Resettlement and Complementary Pathways.<sup>8</sup>*
- 5. Including community or private sponsorship programmes into the EU legal framework.*

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

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

### THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

➤ If the Dublin Regulation is sustained, how should protection-oriented exceptions function in the Dublin procedures?

➤ What are the risks related to the reduction of member states’ discretion concerning Dublin transfers?

➤ How can notions of “systematic deficiencies” and “extreme material poverty” be linked to reception and asylum procedure rules?

### INITIAL SUGGESTIONS AND IDEAS INCLUDE:

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

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

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

## D. Positively addressing the secondary movements of asylum seekers

In June 2018, the European Council considered that the “secondary movements of asylum seekers between member states

risk jeopardising the integrity of the Common European Asylum System and the Schengen acquis”,<sup>13</sup> thus underlining the

importance of this issue in regard to member states' trust in each other. Secondary movements should be distinguished when it concerns asylum seekers or protected persons. The proposals for the new CEAS legislation extensively incorporate aspects related to secondary movements, mostly based on a punitive approach. For instance, according to the proposal for Asylum Procedures Regulation 2013/32/EU (APR), the accelerated procedure will become mandatory in the case of non-compliance with the obligation to apply in the member state of first entry, or a subsequent application.<sup>14</sup>

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

#### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

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

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

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

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

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

Also, defining the ‘adequate standards of living’ concept.

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

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

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

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

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

### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

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

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

### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

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

## F. Introducing the “European refugee” concept

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

### THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- How could the mutual recognition of positive judgments be achieved among the member states with a view of achieving a uniform refugee status valid throughout the EU?
- What would be the positive and/or negative implications of such a recognition?

### INITIAL SUGGESTIONS AND IDEAS INCLUDE:

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

*15. Organising – as requested by the EU treaties’ clauses on the freedom of movement – beneficiaries of international protection’s entitlement to a long-term residence status earlier to facilitate self-reliance (e.g. through job opportunities).*

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

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

**Expanding notions of ‘safe country’ is unlikely to work without embracing external solidarity.**

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

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

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

### THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- ▶ Will the mandatory use of concepts of protection outside the EU not undermine the harmonisation of the asylum procedures?
- ▶ Can the concept of ‘sufficient protection’ in third countries guarantee the respect the principle of non-refoulement and, if so, under what circumstances?

### INITIAL SUGGESTIONS AND IDEAS INCLUDE:

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

*18. Defining the concept of ‘sufficient protection’ in the context of the proposed asylum instruments.*

### H. Enhancing the rights of vulnerable applicants

The rights of vulnerable applicants are not fully guaranteed by the current CEAS; especially unaccompanied minors’ freedom from detention. Meanwhile, international practice on this specific issue leans towards the absolute prohibition of their detention. Secondly, there is certain confusion surrounding the notions of ‘vulnerable persons’ and ‘persons with special needs’, and the different lists of vulnerability within the context of reception and asylum procedures – these should be clarified. This inconsistency results in ambiguity in the member states that have not taken a consistent approach to the procedural and reception guarantees required

for vulnerable applicants under EU law. The upcoming new CEAS legislation should clarify these notions and ensure that the treatment of vulnerable persons is in line with the relevant standards. The current proposals do not bring sufficient clarity by replacing notions of vulnerability with additional categories like ‘specific reception needs’ and providing the exhaustive list of categories in reception but referring to individual circumstances in asylum procedures. Also, the proposal for a new RCD no longer excludes vulnerable persons (including unaccompanied minors) from detention.<sup>21</sup>

#### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

- ▶ How can the rights of vulnerable

applicants be better mainstreamed into the new CEAS legislation and practices of member states?

- ▶ Should the determination of vulnerability and/or special needs be based on a list of categories or individual circumstances?

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

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

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

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

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

absconding”,<sup>24</sup> an action by which in order to avoid asylum procedures, an applicant does not remain available to the competent authorities. This definition remains too abstract and subject to broad interpretation, however.

#### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

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

**INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

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

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

## J. Normative gap for persons fleeing due to environmental or climate change reasons

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

These observations raise the following questions:

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

**INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

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

## K. Harmonising both statuses of protection

Disparities in benefits granted according to the protection status between member states are one of the factors impacting the secondary movements of protected persons.<sup>25</sup> Furthermore, the proposal for the Qualification Regulation increases the divergence of the two statuses with the determination of the validity of residence permits, obligatory status review and possibility to limit social assistance to core benefits for subsidiary protection beneficiaries.

**THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

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

**INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

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

*exclusive competence of the member states.*

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

## F. Further reflections

- ▶ Should a mechanism for sharing asylum seekers rescued at sea be linked to the APR?
- ▶ To strengthen the link between EU funding and integration: include integration as a priority in the upcoming Multiannual Financial Framework and earmark a specific percentage of spending for integration within the European Social Fund.
- ▶ To analyse the potential implications when postponing of the conclusion of examining an asylum seeker's uncertain situation in their country of origin, which is expected to be a temporary period of up to 15 months.<sup>26</sup> Such an open clause could leave a margin of interpretation for member states that is too wide, create legal uncertainty for asylum seekers and impact integration negatively.
- ▶ To clarify the application of Art.14 (4) and (5) of the Qualification Directive in line with the recent CJEU judgment in *M and Others*.<sup>27</sup> Also, to move these provisions to the Status Rights' section of the Directive, which would ensure that member states apply this Article strictly as a termination of "residence status" (i.e. "asylum" in the meaning of the Charter), rather than termination of refugee status or subsidiary protection.

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

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Commissioner for Refugees, and many others.

<sup>2</sup> European Council (1999), [Tampere European Council 15 and 16 October 1999: Presidency conclusions](#), Tampere.

<sup>3</sup> European Commission (2015), [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A](#)

[European Agenda on Migration](#), Brussels.

<sup>4</sup> European Commission (2016a), [Communication from the Commission to the European Parliament and the Council: Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe](#), Brussels.

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

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

<sup>7</sup> European Commission (2016b), [Proposal for a Directive of the European Parliament of the Council laying down standards for the reception of applicants for international protection \(recast\)](#), Brussels.

<sup>8</sup> See UN High Commissioner for Refugees (2019), "The Three-Year (2019-2021) Strategy on Resettlement and Complementary Pathways".

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

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

<sup>11</sup> See *Tarakhel v. Switzerland* (2014), Judgment of the European Court of Human Rights, Application no. 29217/12.

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

<sup>13</sup> European Council (2018), [European Council meeting \(28 June 2018\) – Conclusions](#), Brussels, Para. 11, p. 4.

<sup>14</sup> European Commission (2016d), [Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing](#)

[Directive 2013/32/EU](#), Brussels, Art. 40, pp. 64-65.

<sup>15</sup> See *Abubacarr Jawo v Bundesrepublik Deutschland* (2019), *op.cit.*; *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov* (2019), *op.cit.* The Court considered it immaterial for the purposes of applying Article 4 of the Charter of Fundamental Rights of the European Union, whether such a risk arises during or after the asylum procedure in the member state. As such, it is not only asylum seekers who face risks in the first host country, but also the beneficiaries of protection.

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

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

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

<sup>19</sup> European Commission (2016a), *op.cit.*, Art. 44(1), p. 67.

<sup>20</sup> See *ibid.*, Art. 44 and 45 (1), pp. 67-68.

<sup>21</sup> European Commission (2016e), [Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection \(recast\)](#), Brussels, Art. 11, p. 44-45.

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

<sup>23</sup> See *Abubacarr Jawo v Bundesrepublik Deutschland* (2019), *op.cit.*

<sup>24</sup> European Commission (2016e), *op.cit.*, Art. 2 (10), p. 34.

<sup>25</sup> See *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov* (2019), *op.cit.*

<sup>26</sup> European Commission (2016a), *op. cit.*, p.11.

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

# Responsibility allocation and solidarity

Francesco Maiani<sup>1</sup>

8

## TAMPERE CONCLUSIONS

*13. The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System (...).*

*14. This System should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application (...).*

*16. The European Council urges the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States (...).*

# PART 1: ASSESSMENT OF THE CURRENT SITUATION

The 1999 Tampere conclusions called for a “clear and workable determination of the State responsible for the examination of an asylum application”, as well as for a system of “temporary protection for displaced persons on the basis of solidarity between Member States.”<sup>2</sup>

The Lisbon Treaty has maintained and developed these elements. Art.78(2)(e) TFEU refers to the adoption of “criteria and mechanisms” for determining the member state responsible as necessary for the establishment of a Common European Asylum System (CEAS). Art.80 TFEU

enshrines the “principle of solidarity and fair sharing of responsibility” as a governing principle of all EU migration policies. Furthermore, Article 78(3) TFEU authorises the Council to adopt “provisional measures” for the benefit of the states confronted by an “emergency situation”.

However, two decades after Tampere and one after the entry into force of the Lisbon Treaty, the CEAS still lacks a truly workable system of responsibility allocation, while solidarity and the fair sharing of responsibilities remain to a large extent *Zukunftsmusik*.

## A. Has the Dublin system failed?

The Dublin system has been in force since the mid-1990s, and statistical data provides a relatively clear quantitative picture of its functioning. Over the past decade, a mere 3% of all applications made in the EU+ states (i.e. EU member states and those of the European Free Trade Association) have given rise to a Dublin transfer. Most (i.e. 60% to 80% yearly) are ‘take backs’ of persons who have left their responsible State to seek asylum or simply stay elsewhere in the EU+. ‘Take charges’ (i.e. transfers made because the Dublin criteria indicate a state other than that of application as responsible) were executed for less than 1% of all applications on average.

Thus, while Dublin helps detect multiple applications and prevent their examination, its effects in allocating responsibilities by predetermined criteria are practically nil. Indeed, the state responsible is nearly

always the one where the applicant lodges the first application.

This may or may not be regarded as a problem, but it certainly casts doubt on the usefulness of the responsibility criteria and the thousands of yearly ‘take charge’ procedures carried out in order to apply them. Furthermore, the system is notoriously inefficient: between 66% and 75% of all agreed transfers are not implemented. Therefore, the vast majority of the Dublin procedures carried out yearly – both ‘take charges’ and ‘take backs’ – achieve no tangible result even when a transfer decision is adopted.

While this certainly casts the Dublin system as extremely wasteful, the data presented above is not (yet) a sufficient basis to state that the Dublin system fails to achieve its objectives.

**No system of responsibility allocation can function correctly if reception and protection practices diverge strongly or, worse, if there are 'protection black holes' in the EU+. No system of responsibility allocation is sustainable unless member states can rely on solidarity schemes capable of offsetting distributive unbalances, both structurally and in times of crisis.**

To begin with, and quite independently from the goals formally attributed to the system, member states may have different views as to what its purposes or uses are or should be. Some member states lament the fact that the Dublin system does not correct the inherently unbalanced distribution of asylum responsibilities within the Union – a function that it is not in fact designed to perform, despite lip-service paid to solidarity in Recital 25 of Regulation No. 604/2013 (the Dublin III Regulation). Other member states, who receive few asylum claims and few Dublin transfers, are satisfied with the system precisely because it leaves them out of asylum-related migration movements. While this view may be unacceptable to the initially mentioned member states and is inherently problematic in a “common” European asylum system, it may explain why there is still support for the status quo in some quarters.

Regarding the stated objectives of the system, the statistical data quoted above clearly shows that the Dublin system does not, in fact, allocate responsibilities according to predetermined criteria as it should in theory. Still, the major functions of the system are to assign each application to the responsibility of a member state and to prevent the examination of multiple applications. Arguably, Dublin achieves both purposes: it does indicate a state responsible for every application – most often, by default, the state where the application is first lodged – and makes it practically unavoidable for multiple applications to be detected via the Eurodac database. In fact, we can measure the contribution made by the Dublin system to the functioning of the CEAS by observing the effects of its ‘disapplication’ in the wake of the 2015 crisis: as member states lost faith in Dublin and turned instead to deterrence and push-back measures of dubious legality in order to curb secondary movements,<sup>5</sup> we witnessed the reappearance of ‘orbit situations’. This is a reminder that if it is not to devolve into chaos, the CEAS needs a responsibility allocation mechanism and that, for all its shortcomings, Dublin is better than no mechanism at all.

Still, the figures given at the beginning of this section indicate without a doubt that Dublin achieves its objectives in an extremely inefficient and wasteful manner. Furthermore, it generates many ‘extra costs’ that those statistics do not capture: the direct financial and administrative cost of Dublin procedures; the significant delaying of asylum procedures proper; the hardship caused to applicants and their families; the loss of confidence and cooperation between applicants and asylum authorities; the loss of control on migration movements to and between the member states, as applicants are incentivised to avoid identification in the first state they enter and to engage in irregular secondary movements. It

is no small irony that a system born to “rationalise the treatment of asylum claims”<sup>4</sup> should hinder it to such an extent. Could an alternative system that fulfils the major functions outlined above while

minimising the costs described be devised? Before such an alternative is explored, however, the more pressing question is, why does the Dublin system perform as it does?

## B. Why does the Dublin system perform as it does?

Applicants’ “abuses and asylum shopping” are often cited as the causes of the state of affairs just described.<sup>5</sup> Things, however, are more complex. True, there is widespread resistance and evasion by the applicants, and this strongly affects the functioning of Dublin. Nevertheless, calling this an ‘abuse’ tout court is a gross simplification: the results produced by the system are widely and justifiably perceived as arbitrary by the applicants, especially in a context where adequate and convergent standards are not guaranteed in all of the member states and the Dublin system functions like a ‘protection lottery’. Moreover, the administrative (in)action of the respective member state is as big a factor as applicants’ resistance to the (mal)functioning of Dublin. Indeed, delays, inefficiency and ineffectiveness are in many instances due to the inherent complexities of the administrative procedures, bureaucratic difficulties or lack of resources.<sup>6</sup> Furthermore, in the absence of sufficient and reliable solidarity schemes at the EU level, member states tend to apply the system non-cooperatively – to maximise others’ and minimise their responsibilities – with high costs for a correct and efficient implementation.

To follow on from this, there is a deep connection between the discussion on the reform of Dublin and broader debates on the lack of solidarity and fair sharing in the CEAS, which many regard as one

of the latter’s major weaknesses. Dublin itself is part of the problem. As its pivotal responsibility criterion is the irregular crossing of an external border, the system theoretically shifts the ‘burden’ of protection on the states located at the periphery of the Union. In practice, as noted above, the distributive impact of the Dublin criteria is minimal. Still, the system tends to place responsibility on the states where the first application is lodged, and so to crystallise a profoundly unbalanced distribution of applications.

The current ‘solidarity toolbox’ falls well short of compensating for such imbalances.<sup>7</sup> While EU funding has grown considerably during the crisis, especially in favour of ‘frontline’ states such as Greece, it is still far from offering a comprehensive compensation of asylum-related costs incurred by the member states. Operational support via agencies has also been strengthened, but the question on how to transform it into a more effective solidarity tool remains (see Chapter 2).

As for the physical dispersal of protection seekers, the only significant experiences so far have been the relocation programs launched in September 2015 for the benefit of Greece and Italy under Article 78(3) TFEU. These have no doubt afforded some measure of relief to those two ‘frontline states’, allowed approximately 35,000 persons to access better protection and constituted

an important occasion for institutional learning. Still, numbers have been limited in relation to initial pledges and, most importantly, to the needs of the two beneficiary states. Indeed, the stark limits of ‘European solidarity’ have been evidenced by both the restricted scope of the schemes and the determined resistance opposed by some

member states to their implementation. The current disembarkation crisis in the Mediterranean, where ad hoc solutions are found after protracted negotiations over extremely small numbers of persons, further highlight the lack of structured and reliable solidarity in the EU.

## PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

Any system of solidarity and responsibility allocation, present or future, must take account of the following points:

- Respect for fundamental rights and a ‘full and inclusive application’ of the 1951 Convention must be guaranteed.
- No system of responsibility allocation can function correctly if reception and protection practices diverge strongly or, worse, if there are ‘protection black holes’ in the EU+. Such divergences and gaps turn responsibility allocation into an arbitrary ‘protection lottery’, undermine trust in the integrity of the CEAS, and fuel irregular onward movements. It is unacceptable that practices which openly disregard core EU and international standards are tolerated. The standards are in place, and implementation gaps must be closed as a matter of priority.<sup>8</sup>
- No system of responsibility allocation is sustainable unless member states can rely on solidarity schemes capable of offsetting distributive unbalances, both structurally and in times of crisis. As experience shows, without these schemes, the incentives to defect (e.g. to stop taking fingerprints, to ‘wave through’, to engage in push-back practices) may simply be too strong for states that experience or anticipate

increased pressure, or believe that they are on the losing side of the bargain.

Regarding reform options for responsibility allocation and solidarity, there is hardly any other area of EU politics where perceptions, interests and ideas on how to go forward diverge as strongly. Discussions surrounding the reform of Dublin have intersected discussions on how to operationalise the principle of solidarity and fair sharing of responsibility enshrined in Art.80 TFEU, adding further complexity.

In the last few years, at least three divergent approaches have emerged. The Commission approach, expressed in its 2016 Dublin IV Proposal,<sup>9</sup> is to maintain the Dublin system, accentuate its coercive aspects in order to curb secondary movements, preface it with a ‘pre-procedure’ to filter out ‘safe country’ and ‘security cases’, and complement it with a ‘corrective’ allocation mechanism to be activated when necessary. The approach taken by the European Parliament differs substantially. It is based on incentivising compliance by applicants and member states (i.a. through an in-depth revision of the criteria, whereby ‘irregular entry’ would no longer be relevant and only ‘real links’ would matter), and the establishment of a permanent quota-based allocation system. A third approach, advocated in academia

and civil society, partially coincides with the European Parliament's approach (i.e. the emphasis on 'real link' criteria) but is also based on the idea that in order to ensure swift and economical responsibility allocation, coercive elements must be

abandoned to the extent possible.

Rather than discussing these three approaches as 'closed packages', they will be unpacked, and their most salient issues to be addressed in the coming debates identified.

## A. Carefully choosing the function(s) and criteria of responsibility allocation

The three approaches described above all differ in the functions that they assign to responsibility allocation. The traditional Dublin approach, reinforced in the Dublin IV proposal, places responsibility allocation at the service of migration control in the Schengen area. In this perspective, subject to exceptions designed to protect family life, applicants should ask for protection from and have their application examined by the member state of first entry, while secondary movements should be discouraged or sanctioned. This concept is still strongly supported by some member states and is typically justified with the argument that since the EU is a single area of protection, 'true' refugees must ask protection as soon as they enter it.

However, as intimated above, the EU is not yet a single area of protection in any real sense: protection costs are borne to a large extent by national budgets, national implementation practices diverge, and beneficiaries of protection do not enjoy free movement rights. It is therefore extremely difficult to justify the idea that a handful of states located at the Union's external borders should process the vast majority of the applications lodged in the EU and bear the related costs. From the standpoint of Art.80 TFEU, such a system could only be accepted if costs were entirely offset via structural 'fair sharing' measures (see Part 2, sections D and E). Ersatz 'corrective

mechanisms', such as the one proposed by the Commission, provide only partial compensation and fail to make the concept equitable or sustainable in addition to being unworkable (see Part 2, section C).

Quite apart from such considerations, experience shows that without a fully level playing field nor any extensive consideration provided to the 'real links' and aspirations of the applicants, a system of this kind invites widespread resistance from the applicants, requires a considerable amount of coercion, and is inherently prone to cause all the problems observed in the past two decades under Dublin. This is especially true in an area without internal borders: constraining free movement coercively in a common travel area is per se an uphill struggle.

There is, therefore, a very real trade-off between concentrating responsibilities at the Union's borders and pursuing efficiency in responsibility allocation. Increased sanctions, while questionable from a human rights standpoint, are unlikely to constitute a solution (see Part 2, section B). More than just constituting a losing choice from an efficiency standpoint, maintaining Dublin amounts to locking member states and the CEAS in a wholly unproductive zero-sum game, whereby thousands of persons are shuttled back and forth and kept in limbo over prolonged periods, instead of having their claim determined and integration

or return, as the case may be, swiftly organised. From the standpoint of our common European interest (as opposed to conflicting national interests), the whole system makes little sense.

Different from the Dublin model, the Parliament's model aims to enhance applicants' integration prospects ('real links' approach), but most of all attempts to fully realise 'solidarity and fair sharing' in the CEAS via a permanent and mandatory allocation to the least burdened state(s). There are many laudable elements in the model proposed, not least the fact that it aspires to transcend the above-mentioned zero-sum game among competing national interests and serve interests that are relatable to the CEAS as a whole.

**Loading responsibility allocation with further functions (i.e. solidarity, externalisation, migration management) comes at a high cost in terms of efficiency, swiftness and cost-effectiveness.**

**One of the central themes of any future reform debate should be: how do we incite applicants to enter the formal reception system and abide by its rules, instead of evading identification, evading transfers and such?**

However, there is one immediately apparent problem: 'real links' allocations and transfers would still likely be a minority, and nearly all the other cases would require a transfer to a destination that is not of the applicant's choosing. As such, one can anticipate that compared to the current system, the number of yearly involuntary transfers would skyrocket. Nevertheless, if there is one thing that the Dublin experience shows, it is that systems whose functioning is premised on the execution of a large number of involuntary transfers are not workable. For all of its theoretical appeal, therefore, such a model would risk raising the same difficulties that are observed now but multiplied tenfold: low compliance rates, large-scale use of coercion, equally large-scale evasion and absconding, irregular secondary movements en masse and more. Not to mention the fact that sending applicants, against their will, to states to which they have no connection whatsoever would be problematic in light of the UNHCR guidance related to the 'safe third countries' concept, which postulates the existence of just such a connection.

Other models, currently not on the table, are focused on the idea that responsibility allocation must, above all, place the applicant in status determination procedures as swiftly and as economically as possible. As Elspeth Guild *et al.* aptly put it: "Before identifying ways to share the burden, it is [...] desirable to reduce it by avoiding unnecessary coercion and complexity."<sup>10</sup> At least two 'light models' inspired by this idea are imaginable.

The first one is 'free choice': allocating responsibility based on a preference expressed by the applicant upon lodging the first application in the EU. This model would entail very substantial advantages in terms of incentives for applicants to 'play by the rules', integration prospects, preventing secondary movement and ease of implementation – statistics indicate that voluntary

transfers are incomparably more efficient and economical than coercive transfers. However, such a model is usually not even discussed by the EU institutions.

One objection that is routinely raised is that applicants should not, as a matter of principle, have the right to choose their destination country. This, however, cannot be an article of faith. Since the Treaty is silent on the issue, it is, in fact, a policy question, and not one of law or principle: should the legislator, in light of the involved advantages and disadvantages, grant such a right, and if so to what extent or subject to what conditions?

A second objection is that such a system would be too attractive and generate a pull factor towards Europe. There is, however, not a shred of evidence to support this view. Available research rather indicates the opposite: “Most asylum seekers do not have a clear picture of the asylum policy in EU Member States when they leave their country of origin, have no specific country of destination in mind, and do not have any detailed knowledge of how the Dublin system works upon arrival in the EU.”<sup>11</sup>

Lastly, fears have been expressed that a ‘free choice’ system would concentrate responsibilities in only a handful of ‘desirable’ states, and likely trigger a race to the bottom among all member states to not become ‘desirable’. There is merit to both observations. Still, as noted above, the current system also concentrates responsibilities in only a few states, is much more inefficient and provokes a host of undesirable secondary effects – not the least, paradoxically, ‘secondary movements’. Furthermore, just like the current system, a ‘free choice’ system could and should be accompanied by robust solidarity and fair sharing mechanisms.

As for the ‘race to the bottom’ argument, empirical observations appear to validate it. However, the common standards that the

EU has adopted in the field of asylum should precisely have the effect of making such a race to the bottom impossible. If we start from the premise that the EU is inherently incapable of enforcing said standards, then perhaps the idea of establishing a CEAS should be reconsidered. Indeed, as noted above, the top priority on the agenda should be to close the (already existing) implementation gap, whatever the chosen allocation model may be.

The second ‘light model’ was advocated by the UNHCR at the start of the 2000s, and more recently in this author’s work under the moniker ‘Dublin minus’.<sup>12</sup> It is a pragmatic model based on the idea that each application should be examined where it is first lodged unless a ‘real link’ criterion is applicable and the applicant’s consents to the transfer. While clearly very different from a model based on free choice – applicants do not always choose where they apply for the first time, otherwise current statistics would only show applications in ‘popular’ destination states; nor would they have full control as responsibility criteria would still be objective –, this would similarly ensure a swift and economical passage from the first application to the asylum procedure proper. Indeed, a transfer would usually not be necessary and, as noted above, voluntary transfers are at any rate incomparably less resource-intensive than coercive ones. Transitioning from the current Dublin system to ‘Dublin minus’ would also be relatively uncomplicated for both the legislator and the implementing authorities: it would be enough to eliminate the criteria that do not reflect a real link (e.g. irregular entry) and make transfers under the remaining criteria subject to the applicant’s consent, as is currently the case under the family criteria.

The chief objection usually raised against this model is that it would leave us in the same situation as the current Dublin system. This is true to an extent: the distribution of responsibilities would be largely

unchanged, and the incentives to avoid early identification and move irregularly to the preferred destinations would remain.

Critics of this model lose sight of an important aspect, however: ‘Dublin minus’ would produce results comparable to Dublin while at the same time being incomparably less time- and resource-consuming. Asylum processes would be quicker and more efficient. The resources currently wasted on shuttling applicants back and forth between member states could be freed up and put to better use (e.g. providing decent reception conditions, making asylum processes fair and efficient). This would, in turn, bring a real contribution to reducing secondary movements.<sup>13</sup> The remaining problems – unbalanced distribution, incentives to evade the system, ‘mismatches’ between applicants and the responsible states in an integration perspective – could be solved through complementary reforms and mechanisms. Indeed, that is also the case of the ‘free choice’ model, or of the traditional Dublin model (see Part 2, sections B, D and E).

### THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

– What should the function(s) of the instrument to be adopted under Art.78(2) (e) TFEU be? Should it primarily aim to confine applicants in the first state of entry?

Should it aim to realise a ‘fair distribution’ of applicants across the member states? Should the mechanism rather aim to place applicants as quickly and economically as possible in the status determination procedure?

– Accordingly, what criteria should be chosen as its ‘core’ criteria?

### INITIAL SUGGESTIONS AND IDEAS INCLUDE:

1. Fully considering the trade-offs implicit in the choice of responsibility allocation model based on available evidence. In particular, recognising that loading responsibility allocation with further functions (i.e. solidarity, externalisation, migration management) comes at a high cost in terms of efficiency, swiftness and cost-effectiveness.

2. Considering responsibility allocation as part and parcel of the CEAS rather than a self-standing system, so that desirable results (e.g. fair sharing of responsibilities) may be pursued in responsibility allocation itself, as well as in complementary instruments.

3. Exiting the pattern of path dependency that has characterised the successive Dublin reforms so far, and openly discuss the virtues and potential shortcomings of all available models, including those that have traditionally been regarded as taboo (e.g. ‘free choice’).

## B. Taking applicants’ agency and ‘real links’ seriously

While positions may vary widely on the issue of how to allocate responsibility, two facts are beyond dispute. First, no system may work unless it elicits cooperation from applicants. Second, as things currently

stand and contrary to the mantra that “[a]pplicants should not have a free choice”,<sup>14</sup> the latter do exercise a high degree of agency in responsibility determination. This comes, however, at a high personal cost, and

fuels avoidance of identification, irregular movements, destruction of evidence and more.

Based on this premise, one of the central themes of any future reform debate should be: how do we incite applicants to enter the formal reception system and abide by its rules, instead of evading identification, evading transfers and such? The language spoken by the Commission is that of sanctions. However, draconian sanctions have been applied for years by member states without any tangible results. The European Parliament's position relies more on positive incentives: 'real link' criteria and a (very limited) choice in selecting among the least-burdened states. It is a start, but it is doubtful that it will help in the cases where 'real link' criteria are not applicable, and the choices among less burdened states all equally unattractive. More could and should be done, whatever the model of responsibility allocation chosen.

A 'free choice' system would provide sufficient incentives per se for applicants to lodge their claim at the first opportunity, 'enter the game' as soon as possible and provide their consent and cooperation to any transfers that might be necessary. It is important to stress, again, that coercive transfers and consensual transfers are simply not the same ball game: consensual transfers have an incomparably higher success rate, do not require coercion and therefore cost less and involve much simpler legal processes.

Under any other system, incentives could be provided by expanding 'real links' criteria to encompass extended family ties, for example. Furthermore, short of offering full free choice, the applicants could be presented with a "reasonable range of options".<sup>15</sup> For instance, in the absence of a 'real link' to a particular member state, they could be given a choice between all of the states that are 'below quota'. This would be conducive to a fairer distribution and –

because of the element of choice involved – possibly attract applicants into the system and prevent, at a later stage, secondary movements.

Finally, the credible promise of fully-fledged free movement rights post-recognition – whether immediately or after a reasonable waiting period – might convince applicants to accept a less-than-ideal allocation under the Dublin system or its successor. Of course, cooperation cannot be expected, and irregular onward movements are unavoidable whenever responsibility allocation risks condemning the applicant to sub-standard reception and protection.<sup>16</sup> To reiterate, tolerating 'black holes' in the CEAS comes at a high cost, including for the integrity and efficiency of responsibility allocation.

### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

- ▶ Short of 'full free choice' as evoked above, how could applicants be incentivised to enter the formal reception and allocation system, cooperate with it, and remain into it until the end of the asylum process?
- ▶ Would it be possible to expand 'real link' criteria (e.g. encompassing extended family ties) to incentivise compliance and improve integration prospects?
- ▶ Would it be possible to grant a 'reasonable range of options' to the applicants to the same effect?

### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

4. *Selecting responsibility criteria that correspond to the real links and legitimate aspirations of applicants while avoiding any responsibility criteria that may incite applicants to circumvent identification or controls (e.g. 'irregular entry').*

5. Exploring to what extent an element of ‘choice’ might be embedded into responsibility allocation, or at later stages (e.g. a credible promise of free movement once recognised as beneficiaries of protection).

6. As a matter of priority, identifying and eradicating ‘implementation gaps’ that, intentionally or unintentionally, make certain member states unattractive to applicants.

## C. Extricating responsibility determination from state-to-state request-and-reply procedures

As noted in the first part of this paper, national administrations also contribute through action and omissions to the inefficiency of the system. On the one hand, recent reports highlight how far bureaucratic difficulties and a lack of resources impact the Dublin system’s operation.<sup>17</sup> On the other hand, the very fact that Dublin procedures require agreement between ‘Dublin units’ that represent (conflicting) national interests has the effect of hindering and distorting the process.

The first lesson to be drawn from this is that, if anything, the complexity of the current process should not be increased further. The ‘corrective mechanism’ foreseen in the Dublin IV proposal provides a textbook example of such heightened complexity. While it purports to offer a swift solution to situations of crisis and overburden, it multiplies administrative stages and transfers instead of streamlining and reducing them: registration, a ‘pre-procedure’ to screen out ‘safe country’ and security cases, a first partial Dublin procedure, automatic allocation, a first transfer, then another fully-fledged Dublin procedure and possibly a second transfer. In other words, it is an “administratively unworkable” mechanism incapable of solving the problem it purports to tackle.<sup>18</sup>

Instead of multiplying administrative

procedures, new avenues should be explored. The Wikström Report suggests a radical simplification for the residual cases where the ‘real link’ criteria do not apply: automatic ‘allocation’, to be implemented by the European Asylum Support Office or the future EU agency for asylum.<sup>19</sup> Further along this line, one could imagine that responsibility allocation is entrusted squarely to an EU agency.

Both avenues are interesting but raise a number of questions. First, it is doubtful that fully ‘automatic’ allocation would be permissible in light of human rights standards that require an individualised assessment of personal circumstances (e.g. family circumstances). Second, any arrangement involving EU agencies would entail the need to endow such agencies with new resources and legal powers (e.g. the power to order the detention of recalcitrant transferees). Third, and concerning the previous point, full appeal rights against the actions and omissions of the competent EU agency should be granted. As these are EU bodies, the competence to decide on those appeals would, in principle, need to be entrusted to an EU court. However, it is unlikely that the judicial system of the EU as it currently stands could cope with the foreseeable amount of litigation. Thus, reforms would probably be required, such as setting up a specialised court or, better still,

a network of specialised EU ‘circuit courts’.

Let it be noted that the choice-based systems outlined above (see sections A and B) – ‘full free choice’ or ‘limited range of options’ – would also constitute an alternative to the current system based on state-to-state requests and replies, while at the same time obviating the need for novel appeal mechanisms. The applicant would choose the responsible state, and as such, no form of appeal would need to be granted.

### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

- ▶ In order to improve the efficiency of responsibility allocation, should alternatives to the current ‘state-to-state’ procedures be considered?
- ▶ If so, should a greater role be reserved for EU agencies? How would legal protection be organised, and what additional material and legal resources would need to be entrusted to the agencies?
- ▶ Could other options be considered, such as ‘automated’ decision-making, or choice-based systems?

### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

*7. Extracting responsibility determination from state-to-state request-and-reply procedures has the potential to improve its efficiency and integrity significantly.*

*8. Full respect for fundamental rights must be ensured. This might rule out certain solutions (e.g. ‘automatic’ allocation that does not take personal circumstances and risks into account).*

*9. EU agencies could be assigned a significant role to play. However, entrusting them with full decision-making power and with the task of carrying out the transfers would require potentially far-reaching reforms of their functioning and the EU judiciary.*

*10. Choice-based processes could constitute a (technically) simpler alternative.*

**Past experience should have made it abundantly clear that ‘sharing persons’ via coercive allocation systems is the most inefficient, polarising and wasteful method imaginable. Relocation schemes based on the consent of the applicant (see Part 2, section B) hold more promise. Most of all, there appears to be much untapped potential both in operational support and/or centralising services, and in decisive increases to EU funding,**

**A good reform of the Dublin system might simply be out of reach for the time being, and no reform would be better than a bad reform, including reforms that look good on paper but are unworkable on the ground.**

# D. A new debate on the ‘how’ and ‘how much’ solidarity in the Common European Asylum System

In order to ensure that EU standards are respected permanently and suppress member states’ incentives to defect, the CEAS requires more robust solidarity mechanisms. As the Treaty indicates, this is not only about ‘emergency’ measures but also about structural ‘fair sharing’ (i.e. correcting the asymmetrical distribution of costs among the member states).

The political debate surrounding the relocation mechanism and the reform of the Dublin system has generated more heat than light. The false dichotomy of ‘solidarity’ and ‘responsibility’ has also been detrimental: fear of moral hazard has de facto stifled decisive steps forward in risk- and burden-sharing. While “millions” have been disbursed in solidarity efforts and “thousands” have been relocated,<sup>20</sup> these figures are never presented in relation to the needs they supposedly address. The praxis of solidarity of the EU is still limited and, most importantly, it lacks a theory to support it. A foundational debate must still take place.

As to the required *quantum* of solidarity, the phrase ‘full support’ is gaining currency,<sup>21</sup> but for the time being, it seems no more than a catchphrase. Literally speaking, ‘full support’ would mean that all the costs associated to asylum are shared among all of the member states or are compensated by the EU – via the EU budget or service provisions, or by sharing out asylum applicants proportionally. Under the principle of fiscal equivalence, this would seem fully justified or even required: whenever a member state receives an applicant, examines the claim and provides protection or ensures return, it is providing a service to all of the other states – or at

least to those belonging to the same travel area. Anything less would result in under-provision of the service, externalities and free riding. So, with this in mind, should the EU tool up to provide ‘full support’ in asylum matters? Can this even be done?

As to the ‘how’ of solidarity, past experience should have made it abundantly clear that ‘sharing persons’ via coercive allocation systems is the most inefficient, polarising and wasteful method imaginable. Relocation schemes based on the consent of the applicant (see Part 2, section B) hold more promise. Most of all, there appears to be much untapped potential both in operational support and/or centralising services, on the one hand; and in decisive increases to EU funding, changing its function from project co-financing to ‘full financing’, on the other hand. In all likelihood, a mix of measures is what is called for. ‘Sharing money’ may still be the preferred – and most efficient – form of solidarity for many actors, but it is also perceived as insufficient per se.

## **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

- ▶ What kind and what level of solidarity is needed for the CEAS of the future? What would the underlying principle be – project-financing, ‘full support’, or some middle way?
- ▶ To the extent that the physical redistribution of applicants is concerned, could consensual schemes be boosted in such a way as to contribute more significantly to fair sharing?

**INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

11. *Gathering and publishing information on not only the absolute numbers of EU solidarity measures (e.g. millions disbursed to member state X in year Y) but also on their importance relative to the needs addressed (e.g. total costs incurred by member state X in year Y in the field of asylum).*

12. *Holding a principled discussion on how much solidarity is needed for the good functioning of the CEAS and, more broadly, migration policies. What costs should be entirely mutualised, and be left to individual member states?*

13. *Making physical dispersal measures consensual on the part of protection applicants while considering decisive advances in operational support and/or centralisation of services, on the one hand, and in the increase of EU funds, on the other hand.*

## E. Going forward without reforming the Dublin III Regulation?

What if decisive progress could be achieved without reforming the Dublin III Regulation? This may seem like a provocative proposition, but a reflection on this point seems necessary for at least two reasons. First, a good reform of the Dublin system might simply be out of reach for the time being, and no reform would be better than a bad reform, including reforms that look good on paper but are unworkable on the ground. Second, many of the woes of the Dublin system derive from elements that are extraneous to it. These include, to reiterate, the absence of a ‘level playing field of protection’, adequate solidarity and fair sharing, and free movement rules post-recognition. A resolute effort to address these historical weaknesses of the CEAS – as well as the sometimes blatantly inadequate implementation of the existing acquis – would certainly yield better results on the ground than a legislative patch-up.

**THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:**

► What are the available strategies to improve the functioning of the CEAS and of responsibility allocation if a good reform of the Dublin system is beyond reach?

**INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

14. *Taking resolute action to ensure better implementation of the existing CEAS legislation (including the Dublin III Regulation itself), whatever the progress (or lack thereof) in reforming the Dublin system.*

15. *Placing a reinforcement of solidarity (see Part 2, section D) and the long-overdue introduction of a ‘status valid throughout the Union’ firmly on the agenda, and contributing decisively to resolving some of the problems and rigidities observed in the operation of Dublin, even if reform is not to happen.*

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- <sup>2</sup> European Council (1999), [Tampere European Council 15 and 16 October 1999: Presidency conclusions](#), Tampere, para.14 and 16.
- <sup>3</sup> Mouzourakis, Minos (2018), “[Access to protection in Europe – Borders and entry into the territory](#)”, Brussels: European Council on Refugees and Exiles.
- <sup>4</sup> [N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform](#) (2011), Judgment of the Court of Justice of the European Union, C-411/10, para.79.
- <sup>5</sup> See e.g. European Commission (2016), [Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person \(recast\)](#), Brussels, p.3.
- <sup>6</sup> Cravesana, Silvia and Maria Hennessy (2017), “[Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation](#)”, United Nations High Commissioner for Refugees.
- <sup>7</sup> See e.g. Tsourdi, Evangelia (Lilian) (2017), “[Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System](#)”, *Maastricht Journal of European and Comparative Law*, Volume 24, Issue 5, pp.667-686.
- <sup>8</sup> Adviescommissie voor Vreemdelingenzaken (2019), “[Secondary Movements of Asylum Seekers in the EU: Advisory Report](#)”, The Hague, pp.29 and 34.
- <sup>9</sup> European Commission (2016), *op.cit.*
- <sup>10</sup> Guild, Elspeth; Cathryn Costello; Madeline Garlick; Violeta Moreno-Lax; Minos Mouzourakis and Sergio Carrera (2014), [New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection](#), Brussels: European Parliament, p.9.
- <sup>11</sup> Adviescommissie voor Vreemdelingenzaken (2019), *op.cit.*, p.26. See also Amaral, Philip (2013, ed.), “[Protection Interrupted. The Dublin Regulation’s Impact on Asylum Seekers’ Protection](#)”, Brussels: Jesuit Refugee Service, pp.28 ff.
- <sup>12</sup> Maiani, Francesco (2016), [The Reform of the Dublin III Regulation](#), Brussels: European Parliament.
- <sup>13</sup> Adviescommissie voor Vreemdelingenzaken (2019), *op.cit.*, p.12.
- <sup>14</sup> European Commission (2018), [Communication from the Commission to the European Parliament, the European Council and the Council. Managing migration in all its aspects: progress under the European Agenda on Migration](#), Brussels, p.16.
- <sup>15</sup> Guild, Elspeth; Cathryn Costello; Madeline Garlick; Violeta Moreno-Lax and Sergio Carrera (2015), [Enhancing the Common European Asylum System and Alternatives to Dublin](#), Brussels: European Parliament, p.56.
- <sup>16</sup> Adviescommissie voor Vreemdelingenzaken (2019), *op.cit.*, p.21.
- <sup>17</sup> See e.g. Cravesana and Hennessy (2017), *op.cit.*, pp. 35ff, 98ff, 155ff.
- <sup>18</sup> Hruschka, Constantin, “[Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission](#)”, *EU Immigration and Asylum Law and Policy Blog*, 17 May 2016.
- <sup>19</sup> European Parliament (2017), [Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person \(recast\)](#).
- <sup>20</sup> See e.g. European Commission (2019), [Communication from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation of the European Agenda on Migration](#), Brussels, p.1.
- <sup>21</sup> See e.g. European Council (2018), [European Council meeting \(28 June 2018\) – Conclusions](#), para.6.

# The Schengen free movement area and internal border controls

Marie De Somer<sup>1</sup>

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# PART 1: ASSESSMENT OF THE CURRENT SITUATION

While Schengen received little mention in the 1999 Tampere European Council conclusions, it is generally understood that the functioning of the Schengen Area was part and parcel of the motivations underpinning these conclusions. As such, an assessment of the current state of affairs of the Schengen zone and reflections on the way forward were considered important to add to this publication.

The migrant arrival numbers witnessed in 2015 and 2016 led to a governance crisis in the EU's Dublin system, which has spilled over into the Schengen Area. At the moment of writing, the Schengen free movement zone has not been border control-free for over four years. The first reintroduction of internal border controls dates back to September 2015 when Germany re-established checks at its land border with Austria, following large arrival numbers of asylum seekers via that route. Austria, in turn, reintroduced checks at its land borders as well, amongst others, to avoid becoming a 'cul-de-sac' where migrants could get stranded.<sup>2</sup> This marked the start of a larger chain reaction in which the following states, and in that respective order, reintroduced border checks as well: Slovenia, France, Hungary, Sweden, Norway, Denmark and Belgium. Six states – Germany, France, Austria, Norway, Sweden and Denmark – have since continued to re-extend controls.<sup>3</sup>

Crises in the Schengen Area are not new. Infamously, the lifting of the original border checks in 1995 went hand in hand with a severe political conflict that lasted several years, as France refused to lift controls at its internal border until, by and large, 1998.<sup>4</sup> More recently, the Schengen free movement zone was the source of political tensions in the context of the so-called 2011 'Franco-

Italian affair' when, following the onward movement of Tunisians from Italy to France, border checks were introduced along the French border with Italy at Ventimiglia. This latter conflict spurred a rethinking of the Schengen rules on temporary internal border checks and a correspondent reform to the Schengen Borders Code (SBC), which was concluded in 2013.

The current crisis is unprecedented, however. Never before since the lifting of the original checks in 1995 have internal border controls been upheld for so long, and by so many states in parallel. Most recently, in November 2019, the six states referred to above sent in a renewed notification highlighting their intention to, again, extend border checks for a new six-month period running up to May 2020.<sup>5</sup>

These controls have been the subject of much controversy. Criticism relates first to states' practices of accumulating different legal bases for introducing what are intended to be 'temporary' controls, and second to the limited justifications adduced for doing so.

➤ Concerning the first point, what has been particularly contentious is the constant shifting from one legal basis to another to justify the extension of internal border controls, once the temporal limits of a certain legal basis have been exhausted. The European Parliament<sup>6</sup> and certain member states – as appears from internal documents – have called this out as constituting unlawful behaviour.

➤ As regards the second point, the justifications provided for reinstating internal controls are generally regarded as weak, and it is questionable whether

they meet the necessity and proportionality requirements prescribed by the SBC.<sup>7</sup> Since 2015, the states concerned have predominantly cited ‘threats’ – resulting from the so-called ‘secondary movements’ of asylum seekers from Greece and other states at the EU external border into Northwestern Europe – to justify these controls. Arrival rates of asylum seekers have, however, dropped significantly since mid-2016. At current, arrival numbers have, by and large, returned to pre-2015 levels. Numbers on subsequent secondary movements are more difficult to come by. The European Commission nevertheless reported, already in the fall of 2017, that such movements had become “limited” as evidenced by the “downward trend observed in asylum applications received at the internal borders of the Member States concerned”.<sup>8</sup>

Nevertheless, in the most recent notifications, Austria, Germany and France continue to refer to secondary movements, and Sweden, Austria and Germany mention concerns around a “situation at the external borders”.<sup>9</sup> As appears from internal documents and cursory media comments, those member states are concerned about the numbers that are still arriving, even if they are more limited than before, as well as about the possibility of these numbers rising again in the future. In respect of the latter concern, they highlight that large numbers of asylum seekers remain present in Greece and Italy and that there is continued potential for renewed conflicts in Northern Africa which could lead to new increases in arrival numbers at the EU’s external borders. In this context, they also repeatedly raise concerns around the insufficient functioning of the Dublin system. These include, amongst others, concerns about the frontline states’ insufficient registration of fingerprints in the Eurodac database and continued difficulties in reception condition standards which preclude Dublin returns. Finally, the continuation of internal border checks is also increasingly linked to the problems and frustration surrounding the gridlock in the debates around a new responsibility-sharing mechanism within the context of the Dublin reform (see also Part 2, Section C).

In the meantime, as the controls continue, they risk becoming the ‘new normal’ in the Schengen area of the late 2010s. From there, arguing for much more fortified and widened controls, as witnessed for example in the calls of German Minister of the Interior Horst Seehofer in spring 2018 becomes ever less problematic.

The situation urgently requires answers. A ‘Europe without Schengen’ – or with a hollowed-out version of Schengen – would come at a high cost.

**Never before since the lifting of the original checks in 1995 have internal border controls been upheld for so long, and by so many states in parallel.**

**As the controls continue, they risk becoming the ‘new normal’ in the Schengen area of the late 2010s.**

**What was lacking was not the legal possibility to challenge the sustained border checks but, rather, the political will to do so.**

**The reform effort should also be used as an opportunity to tackle a series of further outstanding questions.**

**What role to give to police checks in the Schengen zone of the future?**

**Conditionality links between Schengen and the CEAS – more specifically the Dublin system – are not new.**

**The question of whether and how to give these links practical effect when faced with problems in the CEAS is a more difficult one.**

► To begin with, the economic consequences would be severe. A study commissioned by the European Parliament on the set-up and operationalisation of the border checks to date estimates that the annual operating expenses already range between €1 to €3 billion and may potentially run up to €19 billion in one-off costs. The broader costs connected to obstacles in the road transportation of goods (which accounts for more than 70% of goods transportation) are much larger.<sup>10</sup> Some of the Eastern European member states in particular (e.g. Poland, Hungary, Slovenia) are already feeling these effects on their goods transportation sectors and have repeatedly voiced complaints.

► Second, the sustained controls are a source of political tension between certain member states. To provide an example, increased controls in German airports that targeted Greek airlines led to a fierce political row between German and Greek authorities in the summer and fall of 2017.<sup>11</sup>

► Third, the reintroduced border checks and immigration control context in which they are applied are leading to increasing observations of practices of racial profiling, which are prohibited under EU law. Amongst others, a report from the *Financial Times* in August 2018 has highlighted how some of the border checks along the German-Austrian border in Bavaria were increasingly becoming subject to racialised practices.<sup>12</sup> Such observations have been echoed by non-governmental organisations and are repeatedly shared on social media as well.<sup>13</sup>

► Finally, of a less direct but potentially highly problematic nature are the larger, long-term negative effects on public opinion in relation to the European project. A Eurobarometer survey on European’s perceptions on Schengen, published in December 2018, documented that seven in ten respondents consider the Schengen Area as one of the EU’s main achievements.<sup>14</sup> This confirms trends in broader polls of the past few years, which have repeatedly shown that a majority of European citizens consider the “free movement of people, goods and services” to be the Union’s most important achievement, even surpassing that of bringing about “[p]eace among the Member States”.<sup>15</sup> Accordingly, a Europe without Schengen would entail fundamental legitimacy risks for the European project as a whole.

In what follows, this Chapter highlights a number of scenarios on the way forward for the Schengen area. Section A considers policy scenarios that seek to provide remedies within the context of the SBC. Section B examines questions related to the use of police checks as alternatives for internal

border controls. Section C reviews ideas on making membership to the Schengen area conditional on cooperation and good

governance in the Common European Asylum System (CEAS), which are gaining ground in certain political and policy circles.

## PART 2: IDEAS & SUGGESTIONS FOR THE FUTURE

### A. Improving rules on internal border controls in the Schengen Borders Code

In September 2017, the European Commission advanced a proposal to amend the SBC.<sup>16</sup> This proposal envisages the possibility of reintroducing internal border controls for one year, plus an additional maximum period of two years if threats to public policy or internal security persist. This would result in a new maximum period of three years. This possibility would go hand in hand with stricter reporting requirements. In addition, an extension after one year up to the three-year maximum would need to be accompanied by a Commission opinion and a Council recommendation.

The proposal initially met with heated debates in the Council. A common position was nevertheless reached in June 2018.<sup>17</sup> This position endorses the new timeframe envisaged but seeks to delete, amongst others, the requirement of a Council recommendation for a continuation of border checks after the first one-year period. The European Parliament, in turn, adopted its report in late November 2018.<sup>18</sup> Its proposed amendments include limiting the time period for reintroduced border controls to a first period of six months (instead of one year), with a further extension only possible for an additional one year

maximum (instead of two years). The Parliament also endorsed the requirement of a Council recommendation for prolongations beyond the first period. Given the divergent positions between the Council and Parliament, it soon became clear that a compromise would not be reached before the European Parliament elections of May 2019.

Several pressing questions about the proposal's future now emerge: can negotiations be continued? Should they be? Beyond the difficulties arising from the strongly diverging positions of the European Parliament and Council, it can also be questioned whether extended periods for internal border checks, coupled with strengthened proportionality and necessity checks, do in fact provide the right way forward at this stage?

In that respect, it is noteworthy that strengthened necessity and proportionality safeguards were also included in the preceding 2013 reform of the SBC. Arguably, and as has been advanced by some Eastern member states, the Commission could have already raised stronger concerns around the limited justifications adduced for the

**Any scenario that seeks to strengthen functional links between Schengen and the CEAS also risks worsening the already apparent spillover of problems in the Dublin system into the Schengen zone, at the expense of the latter.**

**The exclusion of a state from the Schengen Area cannot be accomplished without a Treaty change, which would require unanimity. As the states targeted would not vote in favour of such a change, this option can immediately be discarded.**

**could, in various formats, provide for stronger links, including conditionality and connected safeguards between Schengen and Dublin through new rules which move beyond those currently in place.**

controls under the current rules. What was lacking was not the legal possibility to challenge the sustained border checks but, rather, the political will to do so. In this same light, some have also argued that the 2017 proposal amounts to a Commission attempt to draw up an ex-post legal framework to accommodate the practices of those member states maintaining internal border controls against the currently applicable rules. The way forward, from this point of view, would not necessarily be a reform of the current rules but rather the prioritisation of their correct implementation.

A counterargument raised by the participants of the “From Tampere 20 to Tampere 2.0” roundtables and conference<sup>18</sup> holds, however, that the first priority at this stage should be to reduce the strong emotions and politicisation that currently surround the internal border checks. Infringement actions risk having precisely the opposite effect. In relation, other participants highlighted that in a more generally emotionalised EU migration policy context, it would be highly counterproductive if the European Commission became seen by the general public, through such infringement actions, as prohibiting member states from setting up border checks.

In addition, and as a separate line of discussion, some participants argued that in case a reform of the SBC is on the table (despite the caveats mentioned above), it should not be limited to the rules on timeframes and necessity requirements. Instead, the reform effort should also be used as an opportunity to tackle a series of further outstanding questions. These include, notably, questions on the grounds for reintroducing border controls (see Part 2, section C), on coordination among member states with regard to the moment at which controls are introduced or lifted, and on processes to be applied at internal border checks.

This latter question has been a source of particular political attention lately. As noted by experts, it was one of the issues that had not been sufficiently clarified in past SBC reforms.<sup>19</sup> More specifically, Article 32 of the SBC provides that where internal border checks are reintroduced, the SBC rules on external border controls (Title II) apply *mutatis mutandis*.<sup>20</sup> What that implies in practice, however, has not always enjoyed consensus. The Commission noted in a 2010 report on the implementation of the SBC that when border control is temporarily reintroduced, such “internal borders do not become external borders”.<sup>21</sup> This reading was recently confirmed by the Court of Justice of the European Union (CJEU) in its *Arrib* ruling from March 2019.<sup>22</sup> The Court ruled that France was wrongfully applying an exception clause from the Return Directive (Article 2.2 of said Directive) at its internal border checks.

This exception clause allows member states to limit some of the Directive’s protection safeguards on the use of detention in relation to “third-country nationals who [...] are intercepted by the competent authorities in connection with the irregular crossing [...] of the external border of a Member State” (emphasis added).<sup>23</sup> The Court held, however, that an internal border at which controls have been reintroduced is not tantamount to an external border. Accordingly, the exception clause could not be applied to such situations. Essentially, the ruling has been interpreted as putting a check on member states’ discretion with respect to the detention of third-country nationals intercepted at internal border checks. Reportedly, it has spurred consternation in the Council and is the source of calls by some member states for legislative changes to the respective SBC rules, with the intention of annulling the judgment’s effects.

## THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- ▶ Should the implementation of the current SBC rules on internal border checks be prioritised?
- ▶ Or, should we change these rules and, if so, how?

## INITIAL SUGGESTIONS AND IDEAS INCLUDE:

1. *Improving and strengthening the implementation of the current rules, including a stronger position-taking by the European Commission when necessity and proportionality requirements are not met.*
2. *Alternatively, continuing negotiations on the Commission’s 2017 proposal, or starting over on the basis of a new proposal that simultaneously tackles further outstanding issues.*

## B. The use of police checks in border regions

An additional dynamic observed in the Schengen area after 2015 is the increased use of police checks by certain states in the border regions. This appears to be increasingly considered as a policy alternative to – or compensation for the absence of – internal border checks. Article 23 of the SBC establishes that police checks are allowed, provided that: (i) border control is not their objective, (ii) they are based on general police information and aim in particular to combat cross-border crime, (iii) they are devised in a manner clearly distinct from systematic checks at the external borders and (iv) they are carried out on the basis of spot-checks.<sup>24</sup>

In a number of judgments, the CJEU highlighted the need for precise legal rules when carrying out police checks in border zones. This was considered necessary in order to ensure that the controls do not run the risk of “having an effect equivalent to border checks”, which is precluded under the SBC.<sup>25</sup> Most recently, in December 2018, the Court concluded that German rules requiring coach transport companies to check passengers’ passports and residence permits before crossing internal borders, at the risk of fines, fell within the scope of the SBC rules on police checks. In its subsequent examination of whether these rules were sufficiently precise in terms of the intensity, frequency and selectivity of the checks,

the Court arrived at a negative conclusion. The German rules were found to amount to measures having an “effect equivalent to border checks” and hence were not allowed under the SBC.<sup>25</sup>

At the same time, however, the European Commission has been calling on the states that still uphold border controls to lift them, while maintaining the same level of security by using other tools (e.g. reinforced police checks). Several member states reportedly support this call and are keen to explore how the use of police checks can be strengthened in future. Most recently, in a leaked document on priorities for the new Commission prepared by the Directorate-Generals (DGs), Commission officials highlighted that “further alternatives to internal border controls” had to be reviewed. As also stated in the document, such alternatives could be the subject of a targeted legislative proposal that would set out “the possibility for enhanced

police checks within the territory including in the internal border area and on the measures that can be taken on the basis of such police checks”.<sup>26</sup>

### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:**

- ▶ What role to give to police checks in the Schengen zone of the future?
- ▶ What are the risks, if any, connected to using police checks as an alternative measure to border controls?

### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

3. *Starting a series of renewed reflections on the relationship between internal border controls and police checks.*

## **C. Making Schengen conditional on cooperation and good governance in the Common European Asylum System**

On 4 March 2019, French President Emmanuel Macron called for a rethinking of the Schengen area. He stated in this respect that “all those who want to be part of [Schengen] should comply with obligations of responsibility (stringent border controls) and solidarity (one asylum policy with the same acceptance and refusal rules).”<sup>29</sup> These statements were echoed and further detailed by Dutch Prime Minister Mark Rutte who, in a media interview on 16 May 2019, declared that “if Eastern European countries continued to refuse solidarity, they needed to start feeling the consequences”.<sup>30</sup> More specifically, these states had to be made aware that membership to the Schengen border-free zone came hand

in hand with solidarity in the context of the EU’s asylum policy. If they would not live up to this, Western European countries could, in the future, respond by reinstating controls in such a way that they would cut off Eastern Europe from Schengen.

Conditionality links between Schengen and the CEAS – more specifically the Dublin system – are not new. They can, in fact, be traced back to 1990 when the Dublin Convention was adopted as a measure to compensate for control losses that were feared to emanate from the abolishment of internal border controls. Such links have since reappeared, for instance, in the context

of association agreements.

The question of whether and how to give these links practical effect when faced with problems in the CEAS is a more difficult one. The current SBC already provides for the reintroduction of internal border controls in the event of “serious deficiencies in the carrying out of external border control”,<sup>31</sup> which was triggered in 2016. However, it does not make an explicit link to deficiencies in the CEAS generally, or the Dublin system more specifically.

Ideas on how to further link Schengen and the CEAS appear to be increasingly gaining ground. At least three scenarios on how this can be accomplished can be identified, but none of them are problem-free. In what follows, each scenario is considered in turn, highlighting specific options as well as limitations. In an overarching sense – and an opinion expressed by several participants at the roundtables and conference – any scenario that seeks to strengthen functional links between Schengen and the CEAS also risks worsening the already apparent spillover of problems in the Dublin system into the Schengen zone, at the expense of the latter (see Part 1).

1. To begin with, a first, more cautious scenario consists of a series of legislative changes that would bring the governance of both systems closer together. This could, to begin with, include stronger information-sharing and monitoring mechanisms as well as stronger cooperation and operational support structures. To provide some examples, stronger cooperation could be achieved by establishing a specific ‘Schengen Council’ within the Council’s structures that would meet regularly in order to detect and address potential problems (e.g. those identified by the Schengen evaluation mechanism reports) and provide joint remedies as early as possible. Further centralisation of operational support could be accomplished by enhancing the mandate of EU agencies. Options would be provided

to escalate the process – should problems persist despite the closer governance – with, as a final step, the reintroduction of internal border controls. This would require adding a new, more explicit ground for introducing border checks in the case of continued problems in the CEAS to the SBC (see Part 1, section A). Scenarios along these lines appear to be under consideration within the Council structures, particularly by representatives of the north-western member states.

Similarly, the document of the DGs’ proposed priorities makes mention of the possibility of “[c]reating legal links between a new system of determining and sharing responsibility (in the area of asylum) and the Schengen acquis”. As the document continues, the new rules on determining and sharing responsibility could become part of the Schengen acquis so that, “on the one hand, the new rules would become subject of the Schengen evaluations”, and “on the other hand, persistent deficiencies in the implementation of those rules would become a new reason for recommending the reintroduction of internal border controls.”<sup>32</sup>

It remains to be seen whether such proposals and particularly the idea of safeguards in the format of reintroduced internal border controls would be able to garner sufficient political support from the Southern and Eastern European states. It is noteworthy in this respect that the European Parliament already tried to provide for a stronger monitoring role of that agency within the context of the recent negotiations on a European Union Agency for Asylum, with an explicit reference to the triggering of Article 29 of the SBC.<sup>33</sup> This proposal – reportedly – was not accepted in Council, precisely due to opposition from those member states that are most often linked to a problematic implementation of the CEAS acquis.

2. A second scenario appears from the statements of President Macron and, particularly, Prime Minister Rutte, and is

bolder in that it would entail a full-fledged separation of Western and Eastern Europe. Neither of the statements provide much detail on how exactly, or on the basis of which grounds, such controls would be instated. It is in any case clear that the exclusion of a state from the Schengen Area cannot be accomplished without a Treaty change, which would require unanimity. As the states targeted would not vote in favour of such a change, this option can immediately be discarded. The most probable course of action seems, instead, to be a continuation as well as a reinforcement of the controls that are currently already in place. However, as highlighted at the beginning of this note, these checks are already subject to charges of constituting unlawful behaviour. Their further expansion, both in time as well as in scope, would entail a (more) obvious violation of EU law. It then becomes unclear how they could be justified as a reaction to other states not upholding their EU law commitments.

3. This leads to a third scenario that has repeatedly been suggested in the past and appears to be making a comeback in response to calls along the lines of those made by President Macron and Prime Minister Rutte; i.e. to move towards a 'Europe at different speeds'. This could be achieved by making use of the enhanced cooperation mechanism provided under Article 20 of the Treaty on European Union. Article 20 TEU provides that at least nine member states are necessary to launch an enhanced cooperation which must also be authorised by the Council through a qualified majority vote. Such an enhanced cooperation would need to be adopted as a 'last resort', meaning that its objectives cannot be attained within a reasonable period by the Union as a whole. This scenario could, in various formats, provide for stronger links, including conditionality and connected safeguards between Schengen and Dublin through new rules which move beyond those currently in place. Again, the political feasibility of such

mechanisms would need to be examined. Amongst others, as highlighted by some member state representatives – to the extent that such systems would also likely need to entail a stronger commitment from the part of Western member states to refugee responsibility-sharing without the full cooperation of all member states – it may be a sensitive sell to domestic electorates.

#### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:**

- ▶ Should membership to the Schengen Area be made conditional on good governance in the context of the CEAS, and, in particular, the Dublin system? If so, how?

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

- 4. Carefully considering the three scenarios listed above, including their respective limitations and the overarching risk that they may worsen the spillover of the Dublin crisis into the Schengen system.*

- <sup>1</sup> Head of the Migration and Diversity Programme, European Policy Centre; and Visiting Professor, Katholieke Universiteit Leuven.
- <sup>2</sup> Pastore, Ferruccio and Giulia Henry (2016), “[Explaining the crisis of the European migration and asylum regime](#)”, *The International Spectator*, Volume 51, Number 1, p.54.
- <sup>3</sup> European Commission (2019), “[Full list of Member States’ notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 et seq. of the Schengen Borders Code](#)”.
- <sup>4</sup> Groenendijk, Kees (2004), “[Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?](#)”, *European Law Journal*, Volume 10, Number 2, pp.150-170.
- <sup>5</sup> *Ibid.*, footnote 4.
- <sup>6</sup> Committee on Civil Liberties, Justice and Home Affairs (2018), [Report on the annual report on the functioning of the Schengen area](#), European Parliament.
- <sup>7</sup> Carrera, Sergio; Marco Stefan; Ngo Chun Luk and Lina Vosyliūtė (2018), [The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016](#), Brussels: Policy Department for Citizen’s Rights and Constitutional Affairs.
- <sup>8</sup> European Commission (2017a), [Communication from the Commission to the European Parliament and the Council on preserving and strengthening Schengen](#), Brussels, p.4.
- <sup>9</sup> *Ibid.*, footnote 4.
- <sup>10</sup> Neville, Darren; Dirk Verbeke; Mariusz Maciejewski; Dario Paternoster; Louis Dancourt; Pierre Goudin; Risto Nieminen; Tim Breemersch; Filip Vanhove and Matthias Luecke (2016), [Cost of non-Schengen: the impact of border controls within Schengen on the Single Market](#), European Parliament Research Service.
- <sup>11</sup> Carassava, Anthee, “[Greeks condemn controversial German airport checks](#)”, *Die Welt*, 28 November 2017.
- <sup>12</sup> Khan, Mehreen, “[Anti-immigration mood drives fears of racist profiling on EU borders](#)”, *Financial Times*, 26 August 2018.
- <sup>13</sup> See e.g. La Cimade (2018), “[Dedans, dehors: Une Europe qui s’enferme](#)”, Paris.
- <sup>14</sup> Kantar Public Brussels (2018), “[Special Eurobarometer 474. Summary: Europeans’ perceptions of the Schengen Area](#)”, Brussels: European Commission.
- <sup>15</sup> European Commission (2017b), [Standard Eurobarometer 88: Public opinion in the European Union](#).
- <sup>16</sup> European Commission (2017c). [Proposal for a regulation of the European Parliament and of the Council amending Regulation \(EU\) 2016/399](#) as regards the rules applicable to the temporary reintroduction of border control at internal borders, Brussels.
- <sup>17</sup> Council of the European Union (2018), [Proposal for a regulation of the European Parliament and of the Council amending Regulation \(EU\) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders: Outcome of proceedings](#), Brussels.
- <sup>18</sup> European Parliament (2018), [Amendments adopted by the European Parliament on 29 November 2018 on the proposal for a regulation of the European Parliament and of the Council amending Regulation \(EU\) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders](#).
- <sup>19</sup> See Peers, Steve (2013), “[The Future of the Schengen System](#)”, Stockholm: Swedish Institute for European Policy Studies, p.47.
- <sup>20</sup> European Parliament and the Council of the European Union (2016), [Regulation \(EU\) 2016/399 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders \(Schengen Borders Code\) \(codification\)](#), Art.32, p.24.
- <sup>21</sup> European Commission (2010), [Report from the Commission to the European Parliament and the Council on the application of Title III \(Internal Borders\) of Regulation \(EC\) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders \(Schengen Borders Code\)](#), Brussels, p.9.
- <sup>22</sup> Judgement of the Court of 19 March 2019, [Préfet des Pyrénées-Orientales v Abdelaziz Arib and Others](#), C-444/17.
- <sup>23</sup> European Parliament and the Council of the European Union (2008), [DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals](#), Art.2(2), p.101.
- <sup>24</sup> European Parliament and the Council of the European Union (2016), *op.cit.*, Art.23.
- <sup>25</sup> Judgement of the Court of 22 June 2010, [Melki and Abdeli](#), C-188/10 and C-189/10; Judgement of the Court of 19 July 2012, [Atiullah Adil v Minister voor Immigratie, Integratie en Asiel](#), C-278/12; Judgement of the Court of 21 June 2017, [Criminal proceedings against A.](#), C-9/16.
- <sup>26</sup> Judgement of the Court of 13 December 2018, [Bundesrepublik Deutschland v Touring Tours und Travel GmbH and Sociedad de Transportes SA](#), C-412/17 and C-474/17, Art.21.
- <sup>27</sup> Avramopoulos, Dimitris, “Remarks by

Commissioner Avramopoulos at the EP Plenary Session on the Annual Report on the functioning of the Schengen area”, European Parliament, 31 May 2018.

<sup>28</sup>. Anonymous (leaked), (2019), “[DGx Proposed Priorities](#)”, Brussels, p.99.

<sup>29</sup>. Macron, Emmanuel, “[Dear Europe, Brexit is a lesson for us all: it's time for renewal](#)”, *The Guardian*, 04 March 2019.

<sup>30</sup>. NOS, “[Rutte: grenscontrols als Oost-Europese landen geen asielzoekers opnemen](#)”, 16 May 2019.

<sup>31</sup>. European Parliament and the Council of the European Union (2016), *op.cit.*, Art.29, p.4.

<sup>32</sup>. European Commission (2019), *op.cit.*, p.101.

<sup>33</sup>. European Parliament (2016), [Report on the proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and Repealing Regulation \(EU\) No 439/2010](#).

# Return and readmission<sup>1</sup>

10

## TAMPERE CONCLUSIONS

*26. The European Council calls for assistance to countries of origin and transit to be developed in order to promote voluntary return as well as to help the authorities of those countries to strengthen their ability to combat effectively trafficking in human beings and to cope with their readmission obligations towards the Union and the Member States.*

*27. The Amsterdam Treaty conferred powers on the Community in the field of readmission. The European Council invites the Council to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries. Consideration should also be given to rules on internal readmission.*

# PART 1: ASSESSMENT OF THE CURRENT SITUATION

## A. Return

Returning those third-country nationals (TCNs) who do not fulfil the conditions for entry, stay or residence in the EU is an element of crucial importance of the EU common migration and asylum policy. The Return Directive (2008/115/EC) was adopted to provide common standards and procedures to be applied by member states to return migrants in an irregular situation, including the issuing of return decisions and enforcement of removals, the use of pre-removal detention as well as procedural safeguards. It integrates a set of principles stemming from international law<sup>2</sup> and EU law into the EU return policy, including the case-law of the European Court of Human Rights (ECtHR)<sup>3</sup> and the EU Charter of Fundamental Rights (the Charter).

In the initial evaluation report on the application of the Return Directive, the European Commission observed that the flexibility of the Directive and the member states' implementation of its provisions had positively influenced the situation regarding voluntary departure and effective forced return monitoring. They also contributed to achieving more convergence on detention practices, including the overall reduction of pre-removal detention periods with wider implementation of alternatives to detention across the EU.<sup>4</sup>

As per the effectiveness of returns, the number of implemented returns in 2017 decreased by almost 20% compared to the previous year: from 226,150 in 2016 to 188,920 in 2017. Throughout the EU, this

translates into a drop in the total number of return decisions issued per year from 45.8% in 2016 to merely 36.6% in 2017.<sup>5</sup> According to the Commission, low return rates undermine the credibility of the EU return system for the public and increase incentives for irregular migration and secondary movements. Challenges to effective returns include difficulties in identification and obtaining travel documents, the absconding of returnees, non-cooperation of returnees and countries of origin, improper national implementation of the EU return acquis, and more.<sup>6</sup>

Since the adoption of the European Agenda on Migration in May 2015,<sup>7</sup> the objective of increasing the EU return policy's effectiveness, measured primarily by the enforcement rate of return decisions, has been gradually gaining prominence. In March 2017, the European Commission adopted a renewed Action Plan on returns<sup>8</sup> accompanied by a Recommendation,<sup>9</sup> which included a set of measures for member states to make returns more effective. A number of these recommendations are based on the findings of the Schengen evaluation mechanism, which assesses the conformity of the return systems and practices of the member states with the EU return acquis.

The European Council conclusions of 28 June 2018 highlighted the need to step up effective returns and welcomed the Commission's intention to make legislative proposals for a more effective and coherent

**Since the adoption of the European Agenda on Migration in May 2015, the objective of increasing the EU return policy's effectiveness, measured primarily by the enforcement rate of return decisions, has been gradually gaining prominence.**

**The Court of Justice of the EU (CJEU) has delivered 27 rulings which interpret the Return Directive. This shows the need for a careful balance between competing interests: member states' legitimate interests to return migrants in an irregular situation, on the one hand, and the fundamental rights of the persons concerned, on the other.**

European return policy.<sup>10</sup> In May 2018, the European Parliament called on member states to ensure swift and effective return procedures. At the same time, it emphasised the requirement of full respect for fundamental rights, and humane and dignified conditions when carrying out returns.<sup>11</sup> In September 2018, the Commission proposed a targeted recast of the Return Directive.<sup>12</sup> As of December 2019, negotiations are ongoing in both the Council and the Parliament. A partial general agreement was reached at the Justice and Home Affairs Council of 7 June 2019, except for the border procedure.<sup>13</sup>

The Court of Justice of the EU (CJEU) has delivered 27 rulings which interpret the Return Directive.<sup>14</sup> This shows the need for a careful balance between competing interests: member states' legitimate interests to return migrants in an irregular situation, on the one hand, and the fundamental rights of the persons concerned, on the other. In its rulings, the CJEU draws on from a large body of ECtHR jurisprudence relevant to the subject matter of the Directive, thereby reflecting Art.52(3) of the Charter.

Other secondary EU legal instruments related to return, which are not discussed here due to length constraints, include the directive on mutual recognition of expulsion decisions (2001/40/EC), the decision on the compensation of financial imbalances resulting from the mutual recognition of expulsion decisions (2004/191/EC), the directive for transit operations in removals by air (2003/110/EC), the decision on removals by joint flights (2004/573/EC), the recast regulation on the creation of a European network of immigration liaison officers (2019/1240), Annex 39 of the Schengen Handbook, the regulation establishing the European Border and Coast Guard (2016/1624), the regulation establishing a European travel document for return (2016/1953), the revised Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex, and the regulation on the use of the second-generation Schengen Information System (SIS II) for the return of irregular migrants (2018/1860).

An increasingly important EU actor in the area of return is the European Border and Coast Guard Agency (Frontex), which has been supporting member states in the field of return since its creation. Return is one component of European integrated border management. Over the years, Frontex activities in the field of return have expanded,<sup>15</sup> leading to the creation of the European Centre for Returns (ECRET). The number of people removed with the support of Frontex surpassed 13,000 in 2017.<sup>16</sup> The new 2019 regulation revamping and strengthening Frontex expands its return-related mandate and tools at its disposal. Frontex may provide technical and operational assistance to support member states' return systems. This may include

support on consular cooperation for the identification of TCNs; the acquisition of travel documents; providing return monitors, escorts and specialists; and organising joint and collecting return operations.

Funds for EU return policy were first allocated within the ARGO programme (2002-2006) before being replaced by the European Return Fund (2008-2013), allocating €676 million for the second cycle.<sup>17</sup> This EU fund, together with two other migration solidarity funds, were then merged into the Asylum, Migration and Integration Fund (AMIF, 2014-2020). AMIF allocated €3.137 billion altogether, and one of its objectives is to enhance return strategies in the member states with an emphasis on the sustainability of return and effective readmission in the countries of origin<sup>18</sup> (€800 million were devoted to return until 2020 via national programmes).<sup>19</sup>

Different projects of practical or operational cooperation between member states and

with third countries have been launched to make returns more effective. These include the AMIF-funded deployment of EU Return Liaison Officers, besides member states' immigration liaison officers, in a number of strategically key third countries; the European Integrated Return Management Initiative (EURINT) which aims to develop and share best practices in the field of forced return; and the European Return and Reintegration Network (ERRIN), established to facilitate return-related cooperation between migration authorities in the member states and countries of return.

IT tools have also been developed to enhance cooperation and coordination between national return-enforcing authorities, such as the Irregular Migration Management Application (IRMA) for return-related operational data collection; and RECAMAS, an EU-wide return case management IT system which is managed by Frontex and still under construction.

## B. Readmission

Carrying out successful returns is impossible without the close cooperation of countries of origin and transit. Central instruments of this external dimension are EU Readmission Agreements (EURAs) concluded with third countries, which provide for the readmission of own nationals and TCNs coming to the EU irregularly through their territory.

Between 1999 and 2019, EURAs have been concluded with 18 countries – 17 of those have entered into force, with Turkey and Cape Verde being the latest.<sup>20</sup> 'Readmission clauses' have also been incorporated into a series of broader agreements concluded by the EU with third countries (e.g. EU partnership, association and cooperation agreements). New types of agreements that help to implement

return policy goals are equally appearing on the horizon (e.g. with Albania, Serbia). In addition, informal arrangements on return and readmission are also in place with five countries of origin (i.e. Afghanistan, Ethiopia, Ghana, Niger, Nigeria).<sup>21</sup> These are becoming the Commission's preferred option as of late to achieve fast and operational returns when the swift conclusion of a EURA is not possible. These informal arrangements are not under the scrutiny of the European Parliament and face less scrutiny from the Council, hence tilting the EU institutional balance as well as raising questions of accountability and transparency.

In 2011, the Commission evaluated the functioning of the common readmission

policy.<sup>22</sup> As a result, the Council adopted conclusions defining the Union's renewed and coherent strategy on readmission. These, among others, defined guidelines for the future as follows:<sup>23</sup>

1. The EU readmission policy should be more embedded in the EU's overall external relations policy.

2. Member states should take necessary measures to improve the rate of approved readmission requests and effective returns further.

3. With regard to the future mandates on readmission, the migration pressure from a third country concerned on a particular member state or on the EU as a whole, the cooperation on return by the third country concerned, and the geographical position of the third country concerned situated at a migration route towards Europe should be considered to be the most important criteria.

4. Clauses on the readmission of TCNs and rules on accelerated procedure and transit operations should be incorporated in future agreements.

Typically, the practical implementation of the agreements creates imbalances: the formal reciprocity covers an asymmetric distribution of responsibilities, since the rate of irregular migration from EU member states to the partner countries is negligible, while the third country concerned is usually a significant source of irregular migration as a country of origin or transit. Hence, EURAs can place a sizable political and economic burden on the countries of origin or of transit (e.g. due to the volume of remittances). A set of administrative and practical obstacles have also hindered the successful implementation of EURAs.<sup>24</sup>

Negotiations for a EURA with Belarus have recently been finalised, whereas readmission negotiations are still ongoing – or stalled – with Morocco, Algeria, Tunisia, Nigeria and Jordan. Talks with China have not yet even started since the mandate given in 2002.

**Carrying out successful returns is impossible without the close cooperation of countries of origin and transit.**

**The two major challenges of the EU return policy are:**  
- **internal difficulties and obstacles encountered by the member states within their own countries in successfully enforcing return decisions (internal dimension);**  
and  
- **cooperating with countries of origin to enable actual removals (e.g. in identifying, re-documenting and readmitting their own nationals) (external dimension).**

# PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

## A. Legislative measures

According to the Commission, the two major challenges of the EU return policy are:<sup>25</sup>

- ▶ internal difficulties and obstacles encountered by the member states within their own countries in successfully enforcing return decisions (internal dimension); and
- ▶ cooperating with countries of origin to enable actual removals (e.g. in identifying, re-documenting and readmitting their own nationals) (external dimension).

Internally, it is vital to carefully balance between ensuring swift and effective return procedures on the one hand; and fully respecting fundamental rights as well as humane and dignified conditions when carrying out returns, with adequate built-in safeguards, on the other hand. Ensuring respect for fundamental rights in return procedures not only safeguards the rights of the returnees but also serves the interests of national authorities as well as the effectiveness and overall credibility of the EU return policy. It prevents situations where fundamental rights violations during the return procedure lead to challenges at a later stage, resulting in delays in removal operations, prolonged detention and interventions of (inter)national courts, as well as reputational damage to the member states.

### 1. STRENGTHENING FUNDAMENTAL RIGHTS SAFEGUARDS

A number of changes envisaged in the recast Return Directive proposal of 2018<sup>26</sup> raise fundamental rights concerns. The EU Agency for Fundamental Rights' Opinion to the European Parliament<sup>27</sup> and the European Parliamentary Research Service's Substitute Impact Assessment<sup>28</sup> highlighted a number of issues and problematic provisions.

#### **INITIAL SUGGESTIONS AND IDEAS INCLUDE:**

- 1. Upholding the primacy of voluntary departure over forced returns, which is an underlying, horizontal principle under the Return Directive. The CJEU has also stressed their preference for voluntary departure numerous times. From a practical perspective, it is also easier to manage with third countries.*
- 2. Limiting undesirable consequences of combining decisions on the end of legal stay and returns. This approach is not unlawful per se but does require clear safeguards to protect the right to asylum, the principle of non-refoulement and the right to an effective remedy. Contrary to the principle of individual assessment of every case, there seem to be practices of automatically delivering a return decision after the rejection of an asylum claim, even if this entails fundamental rights violations. A precise checklist should be established on the basis of a study done by experts in order to help the officials in charge*

of return to individualise the cases they have to deal with.

3. *Inserting adequate safeguards concerning returnees' duty to cooperate. For instance, the duty to request a travel document from the authorities of the country of origin, if implemented against persons who sought asylum and whose application is not yet decided in the final instance, creates a risk of violating the right to asylum and the principle of non-refoulement.*

4. *Avoiding entry bans without a return decision. The 2018 proposal indicates that issuing entry bans without a return decision would allow issuing entry bans in a more expedited manner. This could foreseeably lead to decisions on entry bans that are issued swiftly, without adhering to procedural requirements stemming from the right to good administration. Any measure issued under the Return Directive that negatively affects individuals must comply with the formal requirements and procedural safeguards (Arts.12-13) and the right to good administration.*

5. *Dropping the open-ended list of criteria to establish the existence of a 'risk of absconding' while assessing all circumstances of the individual case, including counter-indicators; and doing away with the rebuttable presumption of a risk of absconding to not shift the burden of proof to the TCN, nor to absolve the national authorities from conducting an individual assessment of the circumstances of the case.*

6. *Ensuring that pre-removal detention remains a measure of last resort. The proposal unduly broadens the scope of interpretation of what constitutes the lawful, proportionate and necessary use of pre-removal detention. It thus moves away from the principle of detention as a measure of last resort (i.e. ultima ratio).*

7. *Avoiding the inappropriate use of public policy, public security or national security concepts as additional grounds for detention*

*of TCNs in the return procedures. As a limitation to the right to liberty, detention on these grounds must meet the requirements of the Charter, including the principle of proportionality. The CJEU ruled that such concepts, necessarily constituting an exception from the general rule, had to be interpreted in EU immigration and asylum legislation restrictively, similarly to their narrow interpretation in EU free movement legislation.*

8. *Refraining from setting a bottom limit to maximum detention periods (i.e. three months). The length of the maximum period of detention included in national law does not seem to impact on the effectiveness of returns. Among the member states with the lowest return rate, some apply shorter detention periods as well as those taking advantage of the maximum detention periods permitted under the Return Directive. Some of the member states with the shortest maximum permitted detention periods actually show an above-average return rate. To gather more evidence, a study based on statistics should be prepared to evaluate the success of removal in comparison with the length of detention in order to see if this minimum period is necessary. Also, setting such a bottom limit could be wrongly perceived in practice, suggesting that three months of detention is automatically allowed.*

9. *Establishing reasonable time limits for seeking a remedy against a return decision in line with CJEU and ECtHR case law. The proposed deadline of maximum five days would be the lowest in place in EU law for a comparable type of proceedings in the field of migration and asylum, and would undermine the right to an effective remedy which must be available and accessible in practice. It would also severely affect the effective access to legal assistance, as well as interpretation and translation – particularly when the individual is deprived of liberty for removal.*

10. *Avoiding undue restriction of the suspensive effect of appeals. Limiting the availability of the suspensive effect of appeals*

is at odds with the right to an effective remedy and interferes with member states' procedural autonomy.

11. The framing of national return management systems must be in full compliance with European data protection law and the EU asylum acquis. According to the proposal, the national return systems –, which need to be interconnected and automatically communicate data to a central system operated by Frontex – would store the personal data of returnees. The objective of increasing synergies between the asylum and return procedures should not result in undermining the confidentiality of asylum information (e.g. information collected during personal interviews as part of the Asylum Procedures Directive 2013/32/EU should under no circumstances be used for return purposes).

12. Better reflecting the duty to protect stateless persons in the context of returns (e.g. avoid arbitrary and prolonged immigration detention), especially by injecting such provisions into the Return Directive.

13. Allocating sufficient funds under the new Asylum and Migration Fund (2021-2027) to finance return-related actions that are essential to ensure the practical implementation of fundamental rights safeguards, as required by the Return Directive (e.g. effective alternatives to detention; measures targeting vulnerable persons with special needs; effective forced return monitoring; provision of legal aid, interpretation and translation).

14. Postponing the discussion on the border return procedure given the interdependence between the proposed border procedure and the asylum procedure, until a final agreement on the Asylum Procedures Regulation is reached.

Ensuring respect for fundamental rights in return procedures not only safeguards the rights of the returnees but also serves the interests of national authorities as well as the effectiveness and overall credibility of the EU return policy.

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## 2. STRENGTHENING THE EU-WIDE DIMENSION OF RETURN-RELATED MEASURES FURTHER

15. Submitting a proposal for EU legislation on the EU-wide recognition of return decisions, accompanied by all the necessary safeguards to enable access to effective remedies in the implementing member states as well.

16. Strengthening the EU and domestic legal frameworks applicable to non-removable returnees – those who fall under Art.14 of the Return Directive (e.g. by properly implementing and applying all safeguards set out in Art.14) –, including the written confirmation on the postponement of removal. New policies should also be carefully assessed so as not to have the unintended effect of increasing the group of people who are non-removable and simultaneously remain in legal limbo.

## B. Policy actions

17. *Moving towards a broader assessment of the effectiveness of the EU return policy,<sup>29</sup> not only through the lenses of return rate but also considering the impact of returns on individuals, communities and the countries of return; and given the longer-term sustainability of return policies. The latter also requires building real ownership of countries of origin in reintegration.*

18. *Comprehensively addressing low return rates,<sup>30</sup> including convincing some third countries unwilling to cooperate by offering incentives (e.g. legal migration channels, trade, investment, energy) and envisaging sanctions (i.e. ‘stick and carrot’ approach). In this spirit, the existing EU Partnership Framework<sup>31</sup> should be extended to further strategic third countries. All of this should culminate in the development of a true EU return diplomacy.*

19. *Harmonising, with more EU funding involved, the Assisted Voluntary Return and Reintegration (AVRR) packages across the EU (e.g. approximating the scope of beneficiaries, the amount of support, the preconditions to benefit from reintegration support etc.) while not making access to AVRR programmes conditional on the cooperation of returnees with authorities during the return process.*

*More attractive and widely used AVRR schemes can provide an incentive to returnees and help overcome the reluctance of third countries to cooperate on return.*

20. *Improving the use of EU visa policy to facilitate negotiations on readmission (e.g. adopt restrictive visa measures against non-cooperative third countries on readmission) and using the visa suspension mechanism to monitor readmission obligations closely.*

21. *Based on conditionality, improving the enforcement of the existing multilateral agreements with third countries which contain a ‘readmission clause’ (e.g. the Cotonou Agreement with African, Caribbean and Pacific Group countries).<sup>32</sup>*

22. *Developing new EU readmission agreements with other third countries, with the mobilisation of a wider range of levers from all EU relevant policy areas (more-for-more principle) – except for development aid –, and in close coordination with leverage at the member state level. Rethinking their current model (e.g. embedding them in a larger cooperation scheme) can help strengthen their legitimacy in the eyes of third countries.*

## C. Practical measures

23. *Applying, as relevant, standards developed by Frontex for joint and collecting return operations to national operations it is financing.*

24. *Frontex ensuring adequate training for all members of the pool of forced return escorts, all staff to be deployed to antenna offices, cultural mediators and all other participants*

*(potentially) involved in its return operations (e.g. medical staff, interpreters).*

25. *Frontex assessing how to strengthen the effectiveness and independence of the pool of forced return monitors (e.g. by involving the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in the monitoring of Frontex-*

coordinated joint return operations).

26. Adhering the processing of personal data through the RECAMAS – to be set up and operated by Frontex when communicating with member states' return management systems – to strict data protection safeguards at all times, in line with Regulation (EU) 2018/1725 and the Charter. Additionally, consulting the European Data Protection Supervisor in the process of setting up this new information exchange mechanism.

27. Improving the use of existing EU large-scale IT systems (e.g. SIS II, which will contain return decisions in future; the revised Visa Information System and Eurodac which will be both used for return purposes), to create an enabling environment for returns. This will include better information gathering, sharing and coordination among member states for return purposes.

28. Using the voluntary scheme under Annex 39 of the Schengen Handbook,<sup>33</sup> regarding the transit by land of returnees and the mutual recognition of return decisions, more widely in this scenario of voluntary departure through more than one member state. A similar scheme could be developed for the transit of returnees who leave the EU voluntarily by air.

29. Systematically collecting data on the duration of return procedures; the time spent in pre-removal detention; the number of non-removable returnees; and backlogs (including different stages of appeals), which will facilitate policymaking and performance evaluation. One way to proceed is by amending the Commission's proposal to revise the regulation on Community statistics on migration and international protection.<sup>34</sup>

30. Strengthening the fundamental rights component of the Schengen evaluation mechanism in the field of return and readmission by adjusting the Schengen Evaluation questionnaire and checklist accordingly. Performing more unannounced visits with the EU Agency for Fundamental

Rights as an observer, with the Council and Commission monitoring more closely the effective implementation of the National Action Plans concerning return and readmission.

31. All member states operating an independent and effective forced return monitoring system which publishes reports regularly. The Forced-Return Monitoring III project, coordinated by the International Centre for Migration and Development with the participation of 22 member states, can help exploit synergies and increase convergences between the forced return monitoring mechanisms via training and exchange of best practices. Similarly, a systematic and effective oversight of the implementation of EURAs should be put in place.

32. Putting in place post-return monitoring mechanisms, which can significantly contribute to sustainable return and reintegration. To be effective, such mechanisms should cover both the conditions and circumstances of the return process as well as the situation and individual circumstances after arrival.

33. Mapping and regular monitoring of national authorities' operational capacities and capabilities in the field of return, to better determine the operational support Frontex should deliver to member states.

34. Providing sufficient funding to support cooperation on readmission and reintegration of returnees between member states and third countries, notably under the Emergency Trust Fund for Africa and other EU financial programmes.

35. Creating an 'EU Coordination Mechanism for Returns',<sup>35</sup> which would allow member states facing difficulties in cooperating with third countries on readmission to channel their concerns to the Commission and the European External Action Service via an EU-wide coordination platform.

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- <sup>2</sup> European Council (1999), [Tampere European Council 15 and 16 October 1999: Presidency conclusions](#), Tampere.
- <sup>3</sup> European Commission (2015), [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration](#), Brussels.
- <sup>4</sup> European Commission (2016a), [Communication from the Commission to the European Parliament and the Council: Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe](#), Brussels.
- <sup>5</sup> See European Council on Refugees and Exiles (2018), [Bilateral agreements: Implementing or bypassing the Dublin Regulation? ECRE's assessment of recent administrative arrangements on transfer of asylum-seekers and their impact on the CEAS](#), Brussels.
- <sup>6</sup> E.g. The trend of different recognition rates continued in 2018, with the largest variations observed for Afghanistan (between 6% and 98%) and Iraq (between 8% and 98%). See European Asylum Support Office, ["Latest asylum trends – 2018 overview"](#) (accessed 06 June 2019).
- <sup>7</sup> European Commission (2016b), [Proposal for a Directive of the European Parliament of the Council laying down standards for the reception of applicants for international protection \(recast\)](#), Brussels.
- <sup>8</sup> See UN High Commissioner for Refugees (2019), ["The Three-Year \(2019-2021\) Strategy on Resettlement and Complementary Pathways"](#).
- <sup>9</sup> [N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform](#) (2011), Judgment of the Court of Justice of the European Union, C-411/10 and C-493/10.
- <sup>10</sup> [Case of M.S.S. v. Greece and Belgium](#) (2011), Judgment of the European Court of Human Rights, Application no. 30696/09; [Abubacarr Jawo v Bundesrepublik Deutschland](#) (2019), Judgment of the Court of Justice of the European Union, C-163/17; [Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov](#) (2019), Judgment of the Court of Justice of the European Union, C-297/17.
- <sup>11</sup> See [Tarakhel v. Switzerland](#) (2014), Judgment of the European Court of Human Rights, Application no. 29217/12.
- <sup>12</sup> See e.g. the elimination of cultural considerations in the humanitarian clause, Art. 19. European Commission (2016c), [Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person \(recast\)](#), Brussels.
- <sup>13</sup> European Council (2018), [European Council meeting \(28 June 2018\) – Conclusions](#), Brussels, Para. 11, p. 4.
- <sup>14</sup> European Commission (2016d), [Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU](#), Brussels, Art. 40, pp. 64-65.
- <sup>15</sup> See [Abubacarr Jawo v Bundesrepublik Deutschland](#) (2019), *op.cit.*; [Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov](#) (2019), *op.cit.* The Court considered it immaterial for the purposes of applying Article 4 of the Charter of Fundamental Rights of the European Union, whether such a risk arises during or after the asylum procedure in the member state. As such, it is not only asylum seekers who face risks in the first host country, but also the beneficiaries of protection.
- <sup>16</sup> European Parliament and the Council of the European Union (2011), [Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted \(recast\)](#), Art.15(c), p.18.
- <sup>17</sup> This concept has been narrowly interpreted in Germany to mean the danger to life and limb, whereas the UK Courts have adopted a broader interpretation, encompassing mental trauma as well.
- <sup>18</sup> [Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie](#) (2009), Judgment of the Court of Justice of the European Union, C-465/07.
- <sup>19</sup> European Commission (2016a), *op.cit.*, Art. 44(1), p. 67.
- <sup>20</sup> See *ibid.*, Art. 44 and 45 (1), pp. 67-68.
- <sup>21</sup> European Commission (2016e), [Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection \(recast\)](#), Brussels, Art. 11, p. 44-45.

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

<sup>23</sup>. See *Abubacarr Jawo v Bundesrepublik Deutschland* (2019), *op.cit.*

<sup>24</sup>. European Commission (2016e), *op.cit.*, Art. 2 (10), p. 34.

<sup>25</sup>. See *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov* (2019), *op.cit.*

<sup>26</sup>. European Commission (2016a), *op. cit.*, p.11.

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



# Elements for a New European Consensus on Migration and Asylum

Philippe De Bruycker<sup>1</sup>

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In July 2019, the then President-elect of the European Commission Ursula von der Leyen announced her willingness to propose the conclusion of a “New Pact on Migration and Asylum”.<sup>2</sup> This Pact could be a new solemn agreement – or consensus – between the member states and the EU institutions to continue to build, if not rebuild migration and asylum policies. After a brief assessment of the implementation of the conclusions of Tampere and the impact of the 2015-16 crisis (Part 1), this concluding chapter presents the two building blocks upon which

this new consensus could be established (Part 2, A). It also lists the most significant, interesting and promising ideas and suggestions (Part 2, B) that have been made and discussed throughout the ten thematic sessions and workshops organised in the framework of the Tampere 2.0 conference, held in Helsinki on 24 and 25 October as a side event of Finland’s Presidency of the Council of the European Union. Finally, a method for transforming the new consensus on migration and asylum into reality in the current political context is proposed (Part 3).

## PART 1: ASSESSING THE TAMPERE CONCLUSIONS

When they were agreed in 1999, the Tampere conclusions placed human rights, democratic institutions and the rule of law at the centre of the area of freedom, security and justice (AFSJ), while stressing that these common values and the freedom they entail should not be regarded as the exclusive preserve of European citizens. The leaders of the EU insisted that completing such an AFSJ is indispensable to the consolidation of the shared area of prosperity and peace the Union aims to achieve. **On the occasion of their 20<sup>th</sup> anniversary, the criticality of these**

**fundamental principles must be strongly** advocated, given that formal procedures are launched against member states in breach of the rule of law, free movement is put into question and a genuine rights-based migration and asylum policy seems to be problematic for the EU and its member states.

The Tampere conclusions launched policies on visas, borders, migration and asylum based on the Amsterdam Treaty. A lot has been achieved since their adoption in 1999 in the framework of the four main pillars.

### A. Partnership with third countries

Relations with third countries of origin or of transit are crucial for the management of migration flows. Migration and asylum-related priorities are now fully integrated into the Union’s external relations priorities as evidenced by the EU Global Strategy,<sup>3</sup> in line with the Tampere message. A Global Approach to Migration and

Mobility (GAMM) has been progressively elaborated with the aim of developing an agenda that takes the interests of all stakeholders into consideration.<sup>4</sup> **Even if the GAMM is in itself an achievement, its implementation is still a work in progress.** Instead of creating genuine partnerships, relations with third countries

are more about managing tensions fueled by how the EU systematically puts return and readmission at the top of the agenda. The nexus between migration and development is also still in the making.

The 2016 EU-Turkey statement left its mark on the Union's policy towards third countries. To some, this agreement appeared to be a potential new management scheme based on transit countries blocking migration flows in return for financial support from the EU. **However, this policy is detrimental to the right to seek asylum**, which the European Council has considered so important in December 1999 that it had reaffirmed the attachment of the EU and its member states to its absolute respect in the Tampere conclusions.

Simultaneously, several new Trust Funds have been created to channel more money to better address the root causes of migration in countries of origin. New initiatives promoting job-creating investments are promising, and careful attention should be given to the programming of the external relations instruments included in the upcoming Multiannual Financial Framework (MFF) for 2021-2027. These instruments offer the opportunity to set up more transparent and predictable funding vehicles. Promotion of good governance, the defence of human rights and preventive diplomacy in countries of origin should be part of the EU toolbox now more than ever in an attempt to limit the impact of the so-called push factors. Finally, the EU and its member states must now engage in the implementation of the UN global compacts on asylum and migration, regardless of how controversial this may be.

## B. A Common European Asylum System

**The establishment of a Common European Asylum System (CEAS) was no doubt one of the Tampere conclusions' more ambitious milestones.** Even if the CEAS has not yet been fully accomplished, the EU now boasts the world's most advanced regional framework of asylum. Its establishment has been a long, difficult and technical process. The persisting blockade on the reform of the Dublin system should not obliterate the progress achieved in terms of legislative harmonisation, administrative cooperation with the creation of the European Asylum Support Office (EASO), financial solidarity throughout the EU, and the inclusion of asylum into the GAMM.

**The free movement of all legally residing third-country nationals (TCNs) as requested by the Treaties should be implemented comprehensively, in relation to the internal market, and replace the adoption of variable provisions scattered among several directives.**

**Important and symbolic failures are illustrated by the dysfunctional hotspots and potential 'external platforms'.**

**Moreover, some EU member states have begun to pool their resettlement efforts since 2008, to the point where the Union is now one of the major global players in this area when previously it was lagging behind traditional resettling countries.**

Despite being more modest than envisaged, the relocation process of asylum seekers from Greece and Italy to other member states launched in reaction to the crisis is not the failure it is too often pegged as, but rather an initial experience implemented under extremely difficult circumstances.

**A solution must be found to the Dublin conundrum by exploring other forms of solidarity besides relocation.**

The time has come to conclude the negotiations on the last set of the Commission's 2016 proposals<sup>6</sup> and to move a gear up to achieve the objectives set in Article 78, §2, a) TFEU by giving the asylum status a validity throughout the Union based on the principle of mutual recognition. Moreover, as crises are always on the horizon, the reason why the temporary protection scheme requested by the Treaties has never been activated since its adoption should be seriously considered.

## C. Fair treatment of third-country nationals

**Clearly, legal migration is the least advanced policy, with the adoption of only minimum and partial rules, particularly regarding labour migration.** The parameters set by the Tampere conclusions (economic, demographic, historical, and cultural) remain valid. Existing instruments and the need to harmonise rules for new categories of labour migrants should continue to be evaluated, given that the EU should offer a framework for legal migration, which is required for Europe's future economic development.

This is particularly true for highly skilled migration, which consequently requires a rapid adoption of the reform of the Blue Card Directive 2009/50/EC.<sup>7</sup> However, it is also necessary for less skilled migration in liaison with the illegal employment of migrants on the labour market. New approaches that are more in line with the interconnected world of the 21<sup>st</sup> century and new patterns of work should be tested and encouraged. The free movement of all legally residing third-country nationals (TCNs) as requested by the Treaties should be implemented comprehensively, in relation to the internal market, and replace

the adoption of variable provisions scattered among several directives.

In terms of methodology, the Commission's initial approach of combining common legal standards for the conditions of entry and residence with a coordination mechanism that applies to flows and profiles, all while respecting member states prerogatives, should be revisited. In particular, close coordination must be secured between immigration and employment policies. There is no need to invent a new platform to that end, as putting the migration-related items on the agenda of the existing Social Dialogue structures would suffice.

Regarding integration, **the EU has developed a real philosophy of migration that respects the human being behind every migrant.** Even if there is room for improvement, the long-term resident directive 2003/109/EC does not allow for migrants to be treated as adjustment variables without limits. Due to this directive, migrants should in principle not remain in a temporary status in the EU and acquire a permanent right of residence after five years of legal stay.

Some like to state that integration policies have failed – but such a statement is just another springboard for xenophobia-tainted populism. The success of some integration policies should be highlighted, and the Common Basic Principles promulgated in 2004 by the Council of Ministers<sup>8</sup> still reflect a common understanding, even if no ‘one size fits all’ approach exists for integration challenges. Despite being limited in scope, the introduction of a specific legal basis in the Lisbon Treaty is a signal in itself that should not remain symbolic. The consolidation of significant funding included in the EU budget, coupled with improved coordination with other budgetary instruments, offer an opportunity to anchor this policy into a broader anti-discrimination and anti-racism agenda.

The issue of undocumented migrants should not be ignored, as is seemingly illustrated in the United Nations Development Programme report “Scaling Fences: Voices of irregular African Migrants to Europe”,<sup>9</sup> presented during the Helsinki conference. **The ban of collective regularisations decreed by the European Council’s pact on immigration and asylum<sup>10</sup> should not prevent member states from using individual regularisations innovatively as a new tool which can contribute to the management of migration flows.**

## D. The management of migration flows

The fight against irregular migration, as emphasised by the Tampere conclusions, has become the EU’s top priority. Border policy is nowadays the most advanced of its policies, with the impressive development of the European Border and Coast Guard Agency (Frontex) paving the way towards a truly common European Border Guard.

**Conversely, the framework for orderly migration has degenerated into a control-oriented approach that is inspired too often by the assimilation of migration to a security challenge.** Coming after many others, the 2015-16 crisis merely accelerated this policy shift. The existing databases (i.e. Schengen Information System, Visa Information System, Eurodac) allowing better control of migration flows will be completed by three new ones (i.e. Entry/Exit System, European Travel Information and Authorisation System, European Criminal Records System) which will become operational in the next years, including the

**Due to the existential character of this crisis, rather than a new impetus, a new European consensus is needed and should be concluded between the member states and the EU institutions.**

**The AFSJ is therefore affected by a fundamental ‘birth defect’, rendering it dysfunctional.**

**Moreover, the logic behind the distribution of funding must evolve from a system based on burdens (e.g. number of asylum seekers, length of the external border) to one built upon the capacities of member states, measured on the basis of their wealth (e.g. GDP).**

interoperability between those databases. Finally, the increase of financial support for the EU's action in third countries has been spectacular and exceeds the funds devoted to internal policies.

However, the return policy of irregular migrants has not progressed sufficiently, with a persistently low rate of effective implementation of decisions (below 40%) contradicting one of the main objectives of the EU and its member states.

**Important and symbolic failures are illustrated by the dysfunctional hotspots and potential 'external platforms'.** The migrants who are forced to continue living on the Greek islands, despite the EU-Turkey statement, are obliged to survive in appalling conditions that might violate Article 4 of the Charter of Fundamental Rights (the Charter). Red lines were crossed when certain member states prevented NGO boats from conducting maritime search and rescue operations on the basis of false reasons, while the EU pretends that its priority is to save lives at sea.

## PART 2: THE WAY FORWARD

The crisis of 2015-16 challenged the entire migration and asylum policies of the EU and its member states. The rules patiently built over 15 years tumbled down like a house of cards. Despite the European Commission's 2015 Agenda on Migration<sup>11</sup> launched in reaction, **the EU plunged into a multi-dimensional – political, moral, legal, institutional, financial – crisis:**

- ▶ Some member states openly refused to apply some of the solidarity measures, like the relocation of asylum seekers, despite it being adopted as a legally binding decision, thereby violating the rule of law upon which the EU is built.
- ▶ Member states re-established internal border controls, without consideration of the limitations imposed by the Schengen Borders Code, within the Schengen area, one of the foundations of the EU.
- ▶ The EU and member states' support to third countries of transit for migrants led to violations of their basic human rights much too often, involving inhuman or degrading treatments and arbitrary detention.

Nonetheless, the 2015-16 crisis is now over, and the issue of the disembarkation of some hundreds of persons rescued at sea should not be instrumentalised to convince the public that it is still ongoing. Despite its negative effect on the political climate surrounding the issue of migration and asylum, this crisis acted as a catalyst and can be transformed into an opportunity as it has often been the case for the EU with many crises in the past. **Due to the existential character of this crisis, rather than a new impetus, a new European consensus is needed and should be concluded between the member states and the EU institutions.** The two overarching building blocks upon which this consensus could be established are presented below: it is firstly about solidarity (A) and secondly common policies (B), with a particular focus on common implementation and common funding. It is on the basis of these foundations that specific ideas and suggestions (C) could be implemented.

# A. Overarching Building Blocks

## BUILDING BLOCK 1: SOLIDARITY

Visas, borders, migration and asylum are policies that generated asymmetric burdens between the member states in the AFSJ, particularly in the Schengen area. The problematic configuration of such a common area requires a very high level of solidarity to compensate these imbalances. This has not been the case, and largely explains the 2015-16 crisis. The Dublin Convention allocated the responsibility for asylum claims between member states primarily on the basis of the criteria of the country of first entry, placing the burden mainly on member states located at the EU's external borders.

The Tampere conclusions did not consider solidarity a major challenge. **The AFSJ is therefore affected by a fundamental 'birth defect', rendering it dysfunctional.** Tailormade to solve this problem, Article 80 TFEU has not been paid sufficient attention in the last decade, with scattered and insufficient measures that never addressed the issue of solidarity coherently. On the contrary, the unfair Dublin system has been considered as the 'cornerstone' of asylum policy, even though it creates a divorce between the legal rules and the reality on the ground. The result is an EU so profoundly divided on the matter that its reform has, up to date, been impossible.

The wording of Article 80 TFEU requires a very high level of EU solidarity leading to a fair sharing of responsibilities between member states. All of the dimensions of this solidarity – and not only the physical regarding the relocation of refugees – must be taken into consideration.

- **normative solidarity**, through the adoption of common rules to prevent a race to the bottom;

- **financial solidarity**, through the allocation of sufficient resources to compensate overburdened member states;

- **operational solidarity**, through the EU agencies' support to member states in need.

**To provide an objective basis for a sound political debate that never took place, an in-depth study is therefore necessary:**

- **to measure the fair share of responsibility that each member state should bear** in the area of visas, borders, migration and asylum, based on a calculation which reflects the capacity (and not only the burden) of each member state;

- **to make proposals for the different types of solidarity** (particularly financial and operational) **that should be implemented** in view of fair sharing of responsibility between member states, including a complete reform of Dublin which would put in place a realistic and fair system.

## BUILDING BLOCK 2: COMMON POLICIES

The notion of 'common policy' regarding visas, borders, migration and asylum policies is not used by accident in Article 77-79 TFEU. It has been elaborated and given precise content by the legal doctrine.<sup>12</sup> The traditional answer to 'what is a common policy?' is 'common legislation'. This explains why the CEAS was considered as accomplished when the second generation of rules on asylum was adopted in 2013. **Common legislation** is indeed the first necessary but insufficient element of true common policies – much more is required.

**Secondly, common objectives.** The legislative process tends to focus too quickly on the details of the proposed provisions rather than the overarching objectives of the proposal. Compromises inside and between the Council and Parliament are evidently a necessity, but they should not be concluded at the detriment of the primary objectives of policy instruments. More political rather than technical debates must take place in the Council and Parliament, in order to provide the technical groups or committees that will negotiate the details of the legislation with precise indications.

**Thirdly,** the crisis showed that common policies require a certain level of **common implementation** through EU agencies, contrary to the classical principle of indirect administration under EU law. Some progress has already been made in this direction and is best observed in the progressive transformation of Frontex from a European Agency for the Management of Operational Cooperation into a European Border and Coast Guard Agency, particularly the 2019 reform allowing the Agency to recruit its own border guards. The EASO's conversion into an EU Agency for Asylum will take place once the pending asylum package is unblocked. Finally, the EU Agency for the Operational Management of Large-Scale IT Systems in the AFSJ (eu-LISA) is in charge of the migration and asylum databases. As such, the implementation of borders and asylum policies at the EU level emerged and progresses bit by bit, but the speed of this evolution is questionable since the reform of the EASO could go further than what is currently envisaged in the text agreed by the Council and Parliament on the basis of the Commission proposal of 2016.<sup>15</sup>

**Fourthly,** the unequal distribution of burdens between member states calls for **common funding**. One cannot expect some member states to produce regional public goods like border control or asylum alone, for the benefit of the others. Further progress must be made. The goals of EU funding are

unclear for the time being, as made evident by the rise of emergency EU funds to cover some member states' basic needs. Financial solidarity that is currently circumstantial must become structural. A fundamental evolution towards funding much more those policies at the EU level instead of the national must be engaged. The new MFF will remain substantially insufficient, despite the increase of the budget allocated to visas, borders, migration and asylum policies. **Moreover, the logic behind the distribution of funding must evolve from a system based on burdens (e.g. number of asylum seekers, length of the external border) to one built upon the capacities of member states, measured on the basis of their wealth (e.g. GDP).** It is hard to understand why the future Asylum and Migration Fund (AMF) will allocate more money than before to Germany during the 2021-27 period because of the very high number of asylum seekers it received during the crisis than to Greece and Italy<sup>14</sup> despite their current insufficient means to implement the EU policy and their geographical position at the frontline of the EU.

**Fifthly,** a common policy requires a **common positioning towards third countries**. The EU has integrated this necessity and successfully implemented this element towards Turkey and Libya – if success is measured by only considering the decrease of the migrant arrivals to the EU. However, this policy has fundamental flaws that have already been described, including the effect of delaying internal reforms due to the respite offered by the external solution.

These five constituent elements must all be taken into consideration simultaneously to build truly common policies.

## B. Specific Ideas and Suggestions

This part outlines important and interesting ideas and suggestions raised by the contributors to the Helsinki conference, as well as by external contributors before the conference. They have been selected with ongoing debates within EU institutions and member states, as well as their political or operational relevance, born in mind. The preceding chapters of this publication provide more details on these ideas and suggestions.

### 1. INSTITUTIONAL FRAMEWORK

1. One of the dimensions of the crisis that has rarely been underlined is institutional. Border and asylum are policies that member states cannot implement anymore, but that the EU cannot yet implement. The result is an implementation gap leaving space for the disorder that we have observed. The time has come to think about the **common implementation** of borders and asylum policies. With the increased role of agencies, the EU has already created the tools which allow their implementation at the EU level. There is still a long way to go, but the revamped Frontex and EASO should be seen as the **new vehicles of implementation** of the borders and asylum policies. All future reforms of those agencies should be conceived of in a way that enables them to progress in this direction as much as possible.

2. This new model of ‘European implementation through agencies’ must remain **flexible and be capable of differentiating** between the member states able and willing to keep the primary responsibility for borders and/or asylum policies, and those willing to rely upon EU agencies to implement parts or the entirety of borders and/or asylum policies on their territory on the other hand.

### 2. FINANCIAL FRAMEWORK

1. New forms of financial solidarity between member states are needed, as EU borders and asylum policies should progressively be **funded more at the EU rather than the national level**.

2. Current EU financial contributions to member states should be calculated to better implement solidarity and fair sharing of responsibility. They should **reflect the capacities of member states** rather than their burdens. Relative figures based on the wealth of member states (e.g. GDP) rather than absolute figures should, therefore, be used.

3. The **involvement of civil society actors** and local authorities in all phases of the funded projects – from planning to implementation – should be enhanced. The partnership principle should be included in the new AMF to ensure the inclusive participation of NGOs, including migrant- and refugee-led organisations.

4. The Commission should **monitor member states’ use of EU funds more effectively** to ensure that they are in fact serving the purpose of implementing common policies.

### 3. GLOBAL APPROACH AND PARTNERSHIP FRAMEWORK

1. Future funding in this area should take account of the following considerations highlighted in the 2018 Commission report on the Charter: *“Funding instruments in the areas of migration, border management and security for the next Multiannual Financial Framework (MFF) highlight the need to use funds in full compliance with Charter rights and principles. Actions implemented with the support of EU funds should take particular*

**Border and asylum are policies that member states cannot implement anymore, but that the EU cannot yet implement.**

**Implementing the intra-EU free residence of all legally residing TCNs as requested by the Treaties comprehensively, particularly to allow the EU and its member states to participate in the global race for talents.**

**Assigning the EASO/EUAA with the power to issue member states mandatory guidelines on the existence of persecutions or serious harm in third countries, in order to harmonise recognition rates among the Member states, unless they provide a specific motivation in their decision to justify a derogation.**

*account of the fundamental rights of children, migrants, refugees and asylum seekers and ensure the full respect of the right to human dignity, the right to asylum, and the rights of those in need of international protection and protection in the event of removal.”<sup>15</sup>*

2. Article 2 TEU regarding EU values justifies a call for a **stop of judicial actions against NGOs and their personnel involved in maritime search and rescue activities** that are in line with international and maritime law.

3. **Ensuring that EU external policies are not detrimental to free movement regimes** of persons in other regions of the world, particularly Africa.

4. **Calibrating EU and member states projects** to ensure that they will be effectively delivered, to preserve the EU’s international reputation.

5. **Weighing migration-related priorities carefully alongside other priorities** (e.g. economic, geopolitical), as part of international affairs in the framework of a comprehensive approach.

6. **Maintaining the promotion of democracy, good governance and defence of human rights** in countries of origin as well as preventive diplomacy as part of the EU toolbox now more than ever, to try to limit the impact of the so-called push factors of migration, if at all possible.

7. **Establishing and carrying out a compatibility test** with Article 208 TFEU systematically in the field of migration and development before adopting any new instrument, and during the implementation phase.

8. Linking EU resettlement to third countries with the **highest concentration of persons in need of protection**.

9. Launching a **study on the consequences and options** of protection in the EU **for environmental and climate-induced displacement**.

#### **4. LEGAL MIGRATION**

1. Clarifying whether the notion of a common policy in Article 79 TFEU implies that an **EU policy on legal migration should only be complementary to member states policies**. Also clarifying whether future labour market and demographic needs are better addressed at the national rather than EU level.

2. **Revisiting the Commission's initial approach**,<sup>16</sup> which combines common legal standards for the conditions of entry and residence with a coordination mechanism that applies to flows and profiles, while respecting member states' prerogatives.

3. Adopting the reform of the **Blue Card Directive for highly skilled employment** quickly. Compensating the prohibition of national schemes parallel to the Blue Card with the possibility for member states to adopt more favourable provisions than EU law at the national level.

4. Implementing the **intra-EU free residence of all legally residing TCNs** as requested by the Treaties comprehensively, particularly to allow the EU and its member states to participate in the global race for talents.

## 5. INTEGRATION AND VALUES

1. Ensuring **better coordination between the different EU funds** concerned.

2. Emphasising that **integration policies should be holistic**, instead of highlighting specific elements (e.g. expectations towards migrants) that can be a legitimate component if other promotional instruments complement them.

3. **Focusing on effective outcomes and not only equal treatment 'on paper'**. Recognising that equality on the ground cannot be reached without addressing the institutional discrimination and racism at the EU and national levels.

4. Including the issue of **naturalisation** into the integration policy and moving towards **policy exchange** between the member states and the EU institutions in that area.

## 6. COMMON EUROPEAN ASYLUM SYSTEM

1. Not only is the increased harmonisation

of national legislations coupled with more solidarity between member states necessary, but also a **better implementation of EU rules by member states**, including Dublin III Regulation 604/2013, whatever the progress or lack thereof of the Dublin reform.

2. Assigning the EASO/EUAA with the **power to issue member states mandatory guidelines on the existence of persecutions or serious harm in third countries**, in order to harmonise recognition rates among the Member states, unless they provide a specific motivation in their decision to justify a derogation.

3. Should the mandatory application of the **concept of safe countries be introduced**, then the EASO/EUAA should have the power to introduce mandatory guidelines for determining such countries.

4. In view of integration objectives, providing for the **same duration of residence permits** under the statuses of refugee and subsidiary protection.

5. **Giving refugee status and subsidiary protection a European validity** as requested by the Treaties, including the freedom of residence before access to the long-term residence status, to facilitate self-reliance (e.g. through job opportunities).

6. Addressing better the issue of **stateless persons** who deserve protection but whose status under EU law remains unclear, while policies on migration and asylum ignore them too often. Introducing statelessness procedures in member states that lack them. Creating a specific legal pathway out of irregularity for stateless people who are not eligible for refugee or subsidiary protection, but are unable to return to a previous country of origin/residence, and providing to those persons access to a status guaranteeing the rights of the 1954 Convention relating to the status of stateless persons, including a right to reside.

## 7. DUBLIN AND SOLIDARITY

1. Exiting the pattern of path-dependency that has characterised the successive Dublin reforms so far and **discussing the virtues and potential shortcomings of all the available models openly**, including those that have traditionally been regarded as taboo (e.g. ‘free choice of the asylum seeker’).

2. Selecting **responsibility criteria that correspond to the real links and legitimate aspirations** of applicants, while avoiding responsibility criteria that may incite applicants to circumvent identification or controls (e.g. ‘irregular entry’).

3. Exploring to what extent an **element of ‘choice’ might be embedded into responsibility allocation**, or at later stages (e.g. a credible promise of free movement, once an asylum seeker is recognised as a beneficiary of protection). Keeping in mind that extracting responsibility determination from state-to-state request and reply procedures has the potential of improving its efficiency significantly.

4. Holding a **principled discussion on the necessary amount of solidarity** for the good functioning of the CEAS and, more broadly, migration policies. What costs should be entirely mutualised? What costs should instead be left to individual member states?

5. **Making physical dispersal measures** like relocation **consensual on the part of protection applicants**, while considering decisive advances in operational support/centralisation of services and the increase of EU funds.

6. Placing the **reinforcement of solidarity and the long-overdue introduction of a ‘status valid throughout the Union’ firmly on the agenda** as it could contribute decisively to resolving some of the problems and rigidities observed in the system’s operation.

## 8. BORDER CONTROL AND RETURN

1. Examining if and **to what extent police checks can constitute an alternative to internal border controls**.

2. **Preventing further linkages between the functioning of the Dublin system of responsibility determination and the Schengen area of free movement**.

3. Moving towards an **assessment of the EU return policy’s effectiveness** not only through return rates but also **in terms of the impact of returns on individuals, communities and countries of return** in view of the sustainability of return policies. The latter requires building real ownership of countries of origin in reintegration.

4. **Sufficient funds** should be allocated **under the new AMF to return-related actions** essential to ensure the practical implementation of fundamental rights safeguards as required by the Return Directive 2008/115/EC (e.g. effective alternatives to detention, measures targeting vulnerable persons with special needs, effective forced return monitoring, provision of legal aid and interpretation/translation).

5. Systematically **collecting data on the duration of return procedures**, the time spent in pre-removal detention, the number of non-removable returnees, and backlogs (including different stages of appeals) to facilitate performance evaluation and policymaking. The latter can be achieved by amending the Commission’s proposal revising the regulation on Community statistics on migration and international protection.<sup>17</sup>

6. **Strengthening the fundamental rights component of the Schengen evaluation mechanism** in the field of return and readmission by adjusting the Schengen Evaluation Working Party’s questionnaire and checklist accordingly and including the EU Agency for Fundamental Rights as an observer in the process.

7. Putting in place **post-return monitoring mechanisms** that can contribute to sustainable return and reintegration significantly. To be effective, such mechanisms should cover both the conditions and circumstances of the return process as well as the situation and individual circumstances after arrival in the country of destination.

8. Regarding the proliferation of migration databases, **strengthening privacy and data protection** (e.g. enhancing the right to information and access to personal data, a stronger role for the European Data Protection Supervisor, the better monitoring of data protection authorities at the national level, the creation of a Fundamental Rights Officer in the eu-LISA), and evaluating whether member states entrust the verification of access conditions to a judicial or independent administrative authority, or not.

## PART 3: WHAT NEXT?

The main purpose of the Tampere 2.0 conference was to formulate ideas and suggestions for the future on the basis of an assessment of the Tampere conclusions adopted twenty years ago. There was a risk that such an ambitious agenda would be completely hijacked by controversies of how EU institutions and member states reacted to tentatively bring under control the crisis which unfolded on the eastern flank of the Union between 2015 and 2016. Although this crisis served no doubt as a powerful accelerator, triggering numerous diversely appreciated initiatives, the debates in Helsinki remained largely in line with the purpose of the event. This was essentially thanks to the accuracy of the background notes, the quality of the panels and the relevance of the questions and remarks courtesy of the audience.

Yet, some might ask how pertinent the reference to Tampere still is today. In his opening statement, former Prime Minister of Finland Paavo Lipponen reminded us that the drafters of the conclusions “did not expect the surge of terrorism 9/11, nor the mass inflow of asylum seekers in 2015”. They did not foresee “the multiple conflicts and the disruption of international relations we have witnessed in the past few years”.

So, what is the point? Perhaps to consider the Tampere European Council Presidency conclusions for what they are: a set of milestones. They remain incredibly valid and solid – as firmly confirmed throughout in-depth discussions – and should

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**Perhaps what is needed more than the pact on immigration and asylum proposed by the then European Commission President-elect von der Leyen is a consensus uniting the Commission, Parliament and Council and representing the member states under the auspices of the European Council.**

keep guiding the EU's progress towards common goals, with a view of migration as a common feature of humanity in the new millennium. And yet, just like a horizon, the more one walks into its direction, the further away it seems.

Where are we now? At a turning point in terms of EU institutional scenery, most certainly. But what does this mean for our purpose?

**Some cherish the hope that political energy will be applied to other priorities** – a green deal, digitalisation, equitable transition – so that migration issues could be dealt with somewhat less emotionally and priorities not be dictated by emergency. Absolute priority should, therefore, be given to the implementation, the thorough assessment of the impact and probably the amendment of a series of hastily decided measures meant to confront migration challenges. The mantra would be 'no new initiatives'.

**Others are of the view that the EU has absolutely no breathing space.** That all of the ingredients of 'the' crisis persist and that, whatever it takes, the Schengen area is still as fragile as the eurozone, both having gone through testing moments which were quite similar on many counts. Moreover, emotions have led to a breeding ground for anger and, within the Council, positions seem to be more entrenched than ever. However, one thing is for sure: **people in Europe expect the EU to show leadership and to deliver. Any failure to do so could dramatically expose the 'acquis' of an unprecedented historical endeavour.**

Expectations are also high abroad. Let us call a spade a spade: the manner in which the EU and its member states have been handling migration issues has exposed Europe to a major reputational risk regarding our relations with third countries. What was supposed to be a partnership has become a way to manage (more or less

effectively) mistrust. **There is only one way to convince third countries that we are serious interlocutors in the migration business: to put our own house in order and to treat migrants – who happen to be citizens of these third countries – decently and non-violently.**

Where does this lead us to now? To state the obvious, the EU of 2019 is somewhat different from what it was two decades ago. Nonetheless, realising what the extraordinary Tampere meeting actually was can lead to inspiration: a day and a half of EU heads of states and governments diving deep into a set of issues which were, at that time, completely new to the EU institutions.

Perhaps what is needed more than the pact on immigration and asylum proposed by the then European Commission President-elect von der Leyen is a **consensus uniting the Commission, Parliament and Council and representing the member states under the auspices of the European Council.** Its building blocks have been spelt out above: solidarity and common policies implemented genuinely and coherently.

Such an *aggiornamento* should, of course, be duly prepared, and this might take time. The vehicle for this purpose could be a **'task team' composed of the Finnish, Croatian and German presidencies, the President of the European Council, the Commission and delegates of the European Parliament.** The team would visit all of the member state capitals to measure and balance expectations. In-depth conversations would indeed be needed to restore mutual understanding, build confidence and hopefully facilitate innovative thinking. Patience and determination will be key in securing the successful completion of such a process that cannot be indefinite. Nevertheless, this would be a small price to pay in order to agree on a pact and/or consensus that would still appear as solid and relevant twenty years from now.

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