Initiative

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FALLING SHORT:

REVIEW OF THE COMMON EUROPEAN ASYLUM SYSTEM REFORM PROPOSALS

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PREAMBLE

The 89 Initiative was originally founded in 2016 as the "1989 Generation Initiative" by a group of post-graduate students at the London School of Economics and Political Science (LSE). The Initiative is driven by the vision of a connected Europe, underpinned by principles of solidarity and equality of opportunity. It aims to harness the passions and skills of the Millennial generation of young Europeans, the '89ers', to revitalise the European project so that it can meet the defining challenges of the 21st century.

Initially conceived as an inter-generational platform for policy debates, the Initiative soon expanded its geographical scope to become a pan-European organisation, with regional chapters across the continent, including in Brussels, Athens, Aberdeen, and Maastricht.

In 2018, the 89 Initiative adopted a new structure dedicated to knowledge production and project implementation, becoming the first pan-European 'think-do-tank'. Today, the Initiative boasts in-house expertise on a variety of EU policy issues, with six research programmes that conduct research into Europe's most serious problems and produce policy recommendations.

One of the initiative's main areas of research is Immigration, perhaps the hottest topic in European politics today. After years of refugee crisis and anti-immigrant populist backlash, it has become a key area of academic research, which, on the whole, is mostly concerned with the interface between immigration and populism. This is certainly a valuable agenda and one which debate can and still should build upon. However, the 89 Initiative seeks to explore how decision making dynamics shape policy and the effects of this on young people.
Our research project revolves around current EU legislation on asylum policies, especially in the areas of status determination and content of status (Qualification Regulation), asylum procedures (Asylum Procedures Regulation) and reception conditions for asylum-seekers (Reception Conditions Directive).

EXECUTIVE SUMMARY

This report provides an analysis of three of the current proposals for the reform of the Common European Asylum System (CEAS), namely, the Reception Conditions Directive, the Qualifications Regulation, and the Asylum Procedures Regulation. In addition, the discussion below reflects on the CEAS reform more generally. In response to the 2015/16 European Refugee 'crisis', the Commission decided to reform CEAS to render it more efficient, fair, secure, and humane. This led to new legislation being proposed regarding asylum procedures, reception conditions, asylum qualifications, and the Dublin system. These proposals have sparked debate across the Union as well as attracted criticism, especially from refugee rights organisations. At the time of this report's publication, negotiations regarding the Dublin IV Regulation have come to standstill. The following sections therefore focus on the other three contested proposals, only one of which is slowly progressing. The report provides an analysis of the proposed legislations along with recommendations on how to ensure the CEAS reform fulfils its objective, while upholding the fundamental and human rights of refugees enshrined in international and national law.

The first part of the report provides the context of the legislative reform of the Common European Asylum system as proposed by the Commission in May and July 2016. It lays out the five aims of the reform as establishing: a sustainable and fair asylum system, a stronger Eurodac, more harmonised asylum systems across the EU, prevention of secondary movements, and a new mandate for the EU asylum agency.

The second part provides a more detailed analysis of the Reception Conditions Directive, Asylum Procedures Regulation and Qualifications Regulation by outlining the current state of the proposals, key contested areas of the reform, and policy recommendations on these contested areas.

Reception Conditions Directive

The Reception Conditions Directive's (RCD) purpose is to further harmonise Member States' reception conditions, reduce incentives for secondary movements and in doing so preventing 'asylum shopping', where asylum-seekers choose the Member State with the highest protection standards for their application, and to augment the applicant's self-reliance and integration prospects. The most contested issues of this proposal are the possibility to **withdraw and reduce material reception conditions, more intensive restrictions on the applicant's freedom of movement and additional grounds for detention**.

Recommendations

- We recommend that the final text of the RCD includes the **comprehensive healthcare package** as stated in the Commission's proposal, which provides special attention to applicants who have experienced gender-based harm. [Recital 32]

- We recommend **removing such stringent restrictions** on freedom of movement, which would give the applicant more access to the labour market and thus the opportunity to become fully integrated in the host society. Research has proven that restrictions on freedom of movement and general barriers for asylum-seekers to the labour market are not only detrimental to the mental health of the applicant but extremely costly for the host country.[1] [Article 7(2)]

1 Marbach, M., Hainmueller, J. and Hangartner, D. (2017). The Long-Term Impact of Employment Bans on the Economic Integration of Refugees. SSRN Electronic Journal. p 11.

- We are concerned by the **punitive approach to reducing secondary movements**, as it doesn't take into consideration the fact that much of intra-EU mobility of asylum-seekers is motivated by familial, diasporic and linguistic links.[2] Welfare benefits as push factors have been widely discredited, and the true incentives for secondary movements cannot be eradicated by withdrawing or reducing material reception conditions. [Article 19]

- We recommend that **under no circumstances can the material reception conditions of applicants with special reception needs be withdrawn or reduced**, as they must have uninterrupted access to their special needs. [Article 19]

- We recommend that an **impartial and transparent system be put in place to ascertain whether if applicant's have 'sufficient means' to refund their material reception conditions or medical treatment**. [Article 16]

- We recommend it is ensured that an **applicant with special reception needs is detained only as a matter of absolute last resort and that they would receive treatment in line with their special needs**. Periods of confinement without the appropriate access to specialised care may worsen their condition [Article 11]

- We are concerned that, despite a general commitment to make detention an absolute last resort, the **addition in Recital 21 of a ground for detention** of applicant at risk of 'absconding' demonstrates a move in the opposite direction which we recommend to reverse.

2 Mayblin, L. (2016). Complexity reduction and policy consensus: Asylum seekers, the right to work, and the 'pull factor' thesis in the UK context. The British Journal of Politics and International Relations, 18(4), p 818.

Asylum Procedures Regulation

The proposed Asylum Procedures Regulation (APR) (2016/0224 (COD)) aims to make asylum procedures more uniform, efficient, and effective. Like the Reception Conditions Directive, it hopes to prevent secondary movement and "asylum shopping" by harmonising standards. In the spirit of uniformity, the proposal most notably changes the text's legislative instrument from a directive into a regulation. Contested issues include the application of safe country concepts, how to deal with "implicitly withdrawn" applications, admissibility assessments, procedural timelines, and the provision of free legal assistance and representation.

Recommendations

- We recommend **free legal assistance and representation** to be provided to all applicants regardless of the expected success of their application, since this would guarantee asylum seekers' access to justice and fair trails. [Article 15]

- We recommend that **"implicitly withdrawn"** applications should not be rejected as abandoned without an examination of their contents. [Article 39]

- We advise to reconsider mandatory **admissibility assessments** currently called for in the proposal. Meant to determine whether an application should then be assessed on its merits, this procedure increases the strain on the administrations involved and risks not honouring individual applications' merits. [Art. 36]

- We advise against the mandatory application of the **"safe country" concepts** throughout the text and for a deletion of the **common list of safe countries of origin** in Annex I. These concepts shift the focus away from applicants' need for international protection and lack legal

basis. Indeed, the concepts' use could even be in conflict with the Geneva Convention. [Articles 44-50, 55-62 and others; Annex I]

- While we welcome a **streamlining of asylum procedures**, we recommend that timelines for applicants should be extended and the penalisation of non-compliance with them should be removed from the text. Furthermore, to account for current procedural and systemic differences, we recommend that a 'sunset' clause should be introduced and administrative timelines should not be enforced until 2027. [Art. 27(1), 28(1), 32(2), 34, 40, 41(2), 55]

Qualification Regulation

Similarly to the Asylum Procedures Regulation, the Commission has proposed to replace the current Directive with a Regulation. The underlying logic of the new proposed Regulation is that it has "directive applicability" unlike a directive which allows for some leeway in its transposition. The proposal is an active attempt to develop further harmonisation amongst member states both in terms of recognition rates and type of protection status granted in order to disincentive secondary movement.

Recommendations

- We strongly believe that the **duration of residence should be equal amongst the two statuses**. However, in order for this new Regulation to gain consensus amongst member states, this report supports the proposal for setting the **minimum period of residence permits** of at least 3 years for refugees and at least 2 year for subsidiary protection standard. This will enable Member states that grant the same duration for the two statues the possibility of continuing to do so.

- We are concerned by the proposal to change the length of time that it takes to receive a residence permit once international protection has been granted. We strongly believe that the **90 day option is not an adequate solution** to the status quo. As such, we **support the original proposal of 30 days** but **with the inclusion of "as soon as possible"** as proposed by the Committee on Civil Liberties, Justice and Home Affairs in 2016.

- We welcome the original proposal made in 2016 by the Commission that includes in Article 28(1) the beneficiary's "right to choose their place of residence in the territory". However, we are concerned by the **Presidency's proposed adjustment of removing this line as it has the potential to directly contravene the CJEU** and create a situation where restriction of movement could become the rule rather than the exception.

In its conclusion, the report takes a step back from the specific proposals included in the 2016 CEAS reform, and considers the reform package as a whole. We call for an equal commitment to solidarity among members and responsibility towards refugee rights and procedural standards. Both are necessary not only for passing the reform package, but also for its successful application once adopted.

We would urge the newly elected European Parliament and the European Commission president to make the finalisation of the CEAS a key priority. The European Union will otherwise remain unprepared in the event of any new high inflows of migrants. This is highly problematic, given that crises in the Middle East and Africa, in particular, are still on-going and new crises (e.g. such as in the Sahel region) are emerging. As migrants are also changing their routes, current policies such as the EU-Turkey deal and the cooperation with Libya are not preventing migratory movements. At the same time, especially the dire situation in Libya has sparked criticism towards the EU.

A reform of the CEAS is therefore a vital part of

preparing the EU for any future situations of mass inflow, and of fostering stability, coherence and trust between Member States. The European Commission and the European Parliament should help strike a balance between responsibility (i.e. the reform of the European Asylum Agency, Eurodac as well as the Asylum Procedures Regulation, the Qualification Regulation and the Reception Conditions Directive) and solidarity (especially Dublin), while not creating further divisions between Member States, especially regarding those Member States that are more critical towards the reform. This will require leadership and honest brokerage from the European Commission.

COMMON EUROPEAN ASYLUM SYSTEM REFORM

The unprecedented influx of migrants in 2015/2016 exposed the inherent weaknesses of the current Common European Asylum System. In response, in 2016 the European commission proposed two comprehensive reform packages that have sought to move the EU towards a more "robust and effective system for sustainable migration management" (European Commission 2016). The Commission[3] has outlined in its communication "Towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe" five priority areas where the Common European Asylum System should be structurally improved:

1) Establishing a sustainable and fair system for determining the Member State responsible for asylum seekers

2) Reinforcing the Eurodac system

3) Achieving greater convergence in the EU asylum system

4) Preventing secondary movements within the EU

5) A new mandate for the EU's Asylum Agency

As part of the reform package to achieve these aims, the Commission has made the following proposals:

1) To replace the Asylum Procedures Directive with a Regulation in order to harmonise the current disparate procedural arrangements in all Member States and create a genuine common procedure.

2) To replace the Qualification Directive with a Regulation in order to create uniform standards for the recognition of persons in need of protection and the rights granted to beneficiaries of international protection.

3) To revise the Reception Conditions Directive to further harmonise reception conditions in the EU, increase applicants' integration prospects and decrease secondary movements.

Current status of reforms

We are now nearly into the third year of negotiations of these reform packages and nearing the end of this Commission's term, with each proposal at a very different stage of the legislative procedure. Both the Receptions Regulation and the Qualifications Regulation are still being negotiated at the technical level following the first reading by the European Parliament in 2018. However, the Asylums Procedures Directive has, to date, neither achieved a joint Council or Parliament position, and still awaits a first reading in the Parliament.

3 European Commission (2016). Towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe. Available online https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0197&from=EN. Last accessed 29 March 2019.

ANALYSIS AND POLICY RECOMMENDATIONS

1. Reform of the reception conditions directive

1.1 Background

The proposed 2016 recast directive of the European Parliament and of the Council laying down the standards for the reception of applicants for international protection (RCD) aims to prompt a greater harmonisation on reception standards across Member States. The proposed directive will replace the 2013 Reception Conditions Directive.

The proposal has three aims:

1. To further harmonise reception conditions

2. To reduce incentives for secondary movements to avoid 'asylum-shopping', whereby asylum-seekers choose the Member State with the highest protection standards for their application

3. To increase applicants' self-reliance and possible integration prospects

1.2 Current status

On 14 June 2018, at the eighth trialogue, the European Parliament and the Bulgarian Presidency reached a political agreement on the directive, which is yet to be published. On 23 January 2019 COREPER agreed on compromise amendments to the directive and to continue negotiations at the technical level with the European Parliament. However, it seems the European Parliament would like to stand by the provisional agreement, and does not wish to re-open negotiations.[4]

1.3 Key contested areas

Firstly, the **withdrawal and/or reduction of material reception conditions** if an applicant is to 'abscond' is a highly controversial issue. This directive saw a significant change in discourse, by referring to applicants who leave the first Member State they arrived to as an act of 'absconding', a term usually used to describe criminals escaping punishment. Article 19 presents the scenarios in which an applicant who has absconded, breached the rules of the accommodation centre, behaved violently, or failed to attend compulsory meetings or integration measures may have their material reception conditions reduced or withdrawn. These cannot be completely withdrawn, financial allowances and vouchers can be replaced with material reception conditions in kind. The linguistic shift, placing moral and criminal blame on the applicant, and the punitive measures to disincentivise secondary movements remain a severely contentious issue, both in their debatable ability to achieve their objective and in their more restrictive nature.

Moreover, Article 7(2) implements **targeted restrictions on freedom of movement, which, coupled with stricter consequences**, aim to lead to more effective monitoring of applicants' location in an effort to diminish secondary movements. This consists in assigning applicants a specific place of residence and imposing reporting obligations. This is complemented by Recital 12, which specifies that Member States can only provide applicants with a travel document when serious humanitarian reasons arise, or other imperative reasons. This issue is contested due to its infringement on the applicant's rights of freedom of movement as enshrined in Article 13 of the Universal Declaration of Human Rights and the significant barriers it places on the applicant's potential self-reliance.[5]

4 Presidency. (2019). Note to the Permanent Representatives Committee/ Council [Online]. Available at: https://data.consilium.europa.eu/doc/document/ST-6600-2019-INIT/en/pdf, p. 4.

5 UN General Assembly (1948) Universal Declaration of Human Rights, 217 A (III), Available at: https://www.refworld.org/docid/3ae6b3712c.html [accessed 23 March 2019]

Furthermore, ***detention*** remains a contentious issue. One additional detention ground has been added, again with a view of reducing secondary movements, which would make it possible to detain applicants who may be at risk of absconding. This 'risk' is established according to whether they have 'absconded' before and whether they are not complying with their restrictions on freedom of movement. Moreover, Article 11 still allows for the detention of applicants with special reception needs. In the case of children, this would prove particularly problematic as it would risk enforcing family separations when a minor's guardians are detained. Of note, Article 11 still allows the detention of applicants with special reception needs such as victims of torture or applicants with psychosocial or mental health disorders. Here, the debate is whether their needs will be met in detention centres and the impact of these centres on their condition.

1.4 Key takeaways and policy recommendations

The RCD contains significant improvements on the provision of healthcare in Recital 32, which now includes specific attention to the needs of female applicants who have experienced gender-based harm, such as medical care, legal support, trauma counselling and appropriate psychosocial care. We recommend that these provisions are also in the final revised text, despite reservations expressed by the Council. Indeed, a UNHCR, UNFPA and Women's Refuge Commission report found that that such health provisions are of imperative importance, due to the elevated risk that women that are exposed to such violence on their journey to Europe.[6]

We welcome the proposed reduction in the time limit for accessing the labour market from 9 to 6 months (Article 15). However, we are concerned by the restrictions on freedom of movement as outlined in Article 7(2) which risk to undermine the applicant's ability to become self-reliant. As demonstrated in a study by Moritz Marbach, Jens Hainmueller and Dominik Hangartner, late labour market access and restrictions to employment not only significantly slow down the economic integration of refugees but are also extremely costly for the host country.[7] This same study found that an employment ban cost German taxpayers about 40 million Euros per year on average, in terms of welfare expenditures and forgone tax revenues from unemployed refugees.[8] Therefore, these restrictions impinge on the applicant's potential to become an economic actor and contribute to the economic activity of the host country.

We are concerned by the punitive approach to reducing secondary movements through the reduction or withdrawal of material reception conditions as laid out in Article 19, as it not only continues to perpetrate a premature handling of applicants as having breached the law, but also doesn't take into consideration major push factors for secondary movements, such as familial, diasporic and linguistic links to a country beyond that of arrival. Lucy Mayblin has demonstrated that countless research projects over the past 20 years have widely discredited the theory that economic factors are a pull factor for intra-EU secondary movements.[9]

6 UNHCR, UNFPA, Women's Refugee Commission (2016). Protection Risks for Women and Girls in the European Refugee and Migrant Crisis. [online] Available at: https://www.unhcr.org/news/press/2016/1/569f99ae60/report-warns-refugee-women-move-europe-risk-sexual-gender-based-violence.html [Accessed 23 Mar. 2019].

7 Marbach, M., Hainmueller, J. and Hangartner, D. (2017). The Long-Term Impact of Employment Bans on the Economic Integration of Refugees. SSRN Electronic Journal. p 11.

8 Ibid, p 11.

9 Mayblin, L. (2016). Complexity reduction and policy consensus: Asylum seekers, the right to work, and the 'pull factor' thesis in the UK context. The British Journal of Politics and International Relations, 18(4), p 818.

An additional study by Mayblin and Poppy James found that even if the UK were to align its welfare package and access to the labour market in accordance with this RCD, it would have no impact on the amount of applications received.[10] Push factors such as familial, diasporic and linguistic links, which have been found to be prevalent, are not weakened through punitive measures. In addition to this, the withdrawal or reduction of material reception conditions impinges on the applicant's safety, dignity and welfare.

As it stands, Article 19 still allows Member States to withdraw or reduce the material reception conditions for applicants with special reception needs. We recommend that under no circumstances should these applicants have their needs reduced or withdrawn, such as the guardianship scheme for minors and mental health and psychosocial support.

We are concerned by Article 16's suggestion that Member States may ask applicants to pay for their medical treatment or refund their material reception conditions if they have sufficient means. We recommend a transparent and impartial process be put in place to establish what qualifies as "sufficient means".

The fact that Article 11 still allows the detention of applicants with special reception needs, albeit as an absolute last case scenario, is extremely concerning. Applicants with special reception needs, whether victims of torture, people with mental health disorders or psychosocial needs, could not see their specific needs unmet in detention centres, and have no access to care during a period of confinement that could further worsen their conditions. As demonstrated by Migration Policy Institute's Rocío Naranjo Sandalio, people with mental health problems are particularly susceptible to stresses and pressures when in isolated confinement, with the potential to deteriorate their conditions.[11] Therefore, we recommend that applicants with special reception needs have unimpeded access to necessary care and that detention be an absolute last resort.

Whilst the addition that detention must be ordered in writing by judicial or administrative authorities to ensure detention is the absolute last resort is a welcome improvement, the inclusion of Recital 21, which adds a ground for detention to prevent 'absconding', is a concerning move in the opposite direction.

10 Mayblin, L. and James, P. (2016). Is Access to the Labour Market a Pull Factor for Asylum Seekers?. [online] Sheffield: Asylum Welfare Network. Available at: https://asylumwelfarework.files.wordpress.com/2015/03/labour-market-access-for-asylum-seekers_short1.pdf [Accessed 23 Mar. 2019].

11 Naranjo Sandalio, R. (2019). Life After Trauma: The Mental-Health Needs of Asylum Seekers in Europe. [online] migrationpolicy.org. Available at: https://www.migrationpolicy.org/article/life-after-trauma-mental-health-needs-asylum-seekers-europe [Accessed 23 Mar. 2019].

2. Reform of the asylum procedures regulation

2.1 Background

As part of the CEAS reform, the European Commission introduced a proposal to establish a common procedure for international protection in the Union or, in short, the Asylum Procedures Regulation (APR) (2016/0224 (COD)). The proposed text is set to replace the current Asylum Procedures Directive (2013/32/EU) and make the existing system more uniform, efficient, and effectual in order to discourage "asylum shopping" and secondary movement. This is achieved by harmonising standards such as those regarding admissibility and acceleration of asylum claims. However, the common procedural denominator as proposed by the Commission, some worry, might indeed be the lowest one, as the regulation does not allow for member states to retain their own - possibly more liberal – standards (e.g. regarding safe country concepts).[12]

2.2 Current status

Unlike several other legislations in the CEAS reform package, neither a joint Council position nor a parliament position have been reached on the APR to date. In Parliament, a first reading has not yet taken place, although the Civil Liberties, Justice and Home Affairs (LIBE) committee passed a report on the proposal and tabled it for plenary May 2018. Meanwhile, an amended proposal was planned to be passed on to COREPER by the JHA Counsellors by March 2019.[13]

2.3 Key contested areas

The APR not only reforms the text's content, but changes its legislative instrument from a directive to a regulation. This underlines the key objective of the proposed change: harmonization of procedural standards. One can assume that this change in legislative instrument has led to a much closer reading of the text. While a directive allows for leeway in its transposition, a regulation demands immediate and full implementation. Indeed, the proposal's move to "regulation" was challenged by several member states.[14] Given that asylum procedures are steeped in national traditions, systems, and legal practices, this area has emerged as very difficult to harmonise. Indeed, several members missed the transposition deadline for the current directive, indicating how challenging the harmonization of asylum procedures is.[15]

The proposal sets out a mandatory and uniform ground for ruling asylum applications (in-) admissible. These rules were either optional or up to member state translation under the current system, including the **admissibility assessments**, the use of **safe country concepts** and the principle of rejecting "**implicitly withdrawn applications**".

The APR imposes several **procedural timelines** for asylum administrations and applicants (e.g. Art. Art. 25(1), Art. 28(1), Art. 34) that were not present or were more vague/liberal in the existing Directive. However, several member states already cited "shorter time limits" (and, assumedly, greater administrative burden) as grounds for concern regarding the APR.[16]

12 E. g. Amnesty International. (2017). Position Paper: The Proposed Asylum Procedures Regulation. Available from: https://amnestyeu.azureedge.net/wp-content/uploads/2018/10/AI_position_paper_on_APR_proposal.pdf [Accessed 24 March 2019]; ECRE. (2016) ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation. Available from: https://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf [Accessed 19 February 2019]

13 Presidency, 2019, p. 6

14 Presidency. (2018). Note to the Delegations. Available from: http://www.statewatch.org/news/2018/feb/eu-council-int-prot-revised-text-5296-18.pdf [Accessed 21 February 2019]

15 ECRE, 2016, p. 5

16 Presidency, 2016, p. 5

Civil society organisations', furthermore, worry about the timelines placing undue burden on the applicants.

The APR aims to render procedural safeguards and services uniform. This includes the provision of "**free legal assistance and representation**" in the initial application and appeal procedure. This extends the services provided for under the Directive, which only called for free legal aid on request for the appeals procedure (Art. 20). However, this liberalisation appears to be opposed by several member states in the Council.[17]

2.4 Key takeaways and policy recommendations

It is regrettable that the proposed legislation not only perpetuates the use of the "**safe country concepts**" but makes their use mandatory. Under the 1951 Refugee Convention, applicants should be considered without discrimination as to their country of origin (Art. 3) and cannot be returned to a country where they might be in danger (*non-refoulement*, Art. 33).[18] Additionally, following Art. 19(2) of the European Convention Human Rights, "no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment"[19] and UNHCR EXCOM conclusions argue that application's admissibility should not be determined by whether applicants could have applied for protection elsewhere.[20]

We are concerned by the fact that applications rejected as inadmissible on the basis of the safe third country or first country of asylum concepts, rather than their merits, can violate these safeguards and contribute to a further externalisation of the EU's protection responsibilities.

Additionally, we recommend the deletion of the **list of safe countries of origin** at Union level (Annex I). In additions to the points raised in the discussion above, such a list can become politicised and fail to reflect important developments in the countries it includes. The case of Turkey, which LIBE excluded from the list, *a fortiori* highlights this issue. A similar list, part of the 2005 Asylum Procedures Directive, has already been annulled by the Court of Justice of the European Union on procedural grounds.[21] Annex I of the proposal therefore exposes the legislation to potential legal challenges.

We are concerned by the rejection of "**implicitly withdrawn**" applications without an examination of their contents (Art. 39). Given that implicit withdrawal spans an array of issues such as "not providing the necessary details for the applications to be examined" or not showing up for a personal interview (Art. 39(1)), this procedure might affect a significant number of applicants. Applicants, who have a right to file for asylum under international and EU law,[22] lead to the rejection of their applications without due examination of their claims, and their return to a country where they are not safe (*refoulement*).[23]

17 Presidency, 2018

18 UN General Assembly. (1951). Convention Relating to the Status of Refugees. Available from: https://www.refworld.org/docid/3be01b964.html [Accessed 19 March 2019]

19 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. Available from: https://www.refworld.org/docid/3ae6b3b04.html [accessed 25 March 2019]

20 UNHCR, EXCOM Conclusion No. 15 (XXX), Identifying the Country Responsible for Examining an Asylum Request. Available from: http://www.unhcr.org/53b26db69.pdf [accessed 02.04.2019]

21 'European Parliament v Council' (2008) Case no. C-133/06. InfoCuria, 2008, 257.

22 Cf. Art. 18 Charter of Fundamental Rights of the European Union (European Union, 2012); UN General Assembly, 1951.

23 Amnesty, 2017; ECRE, 2016.

We advise against mandatory **admissibility assessments** if applicants come from a safe third country, first country of asylum, are filing subsequent applications, or were already part of an application lodged on their behalf e.g. as a spouse or minor (Art. 36). These assessments determine if an application will then be passed on to be assessed on its merits. This procedure adds an additional administrative burden and is not commonly used throughout the Union.[24] National law of member states such as France indeed renders such assessments absurd, since it allows the country to assess asylum applications on its merits - regardless of its admissibility according to the APR.[25]

We welcome the provision of "**free legal assistance and representation**" for applicants under Art. 15. However, the limitations placed on this provision should be reconsidered. The APR states that legal aid does not have to be provided if an application is deemed as "not having any tangible prospect of success" (Art. 15(3)). However, Art. 47 of the Charter of Fundamental Rights of the European Union stipulates one's right to legal aid if "necessary to ensure effective access to justice" and Art. 13 of the European Convention on Human Rights guarantees "everyone" the right to an effective remedy.[26] Given that the provision of legal representation and its quality have been shown to impact application outcomes for refugees, they impact refugees' access to justice.[27] Without legal aid, this access cannot be guaranteed.

While we generally welcome a **streamlining of the asylum process** and thereby reducing time applicants spent in legal limbo, we believe that this should not come at the expense of the quality of decision-making or applicants' rights. Therefore, we recommend that procedural deadlines for applicants should be extended and the penalisation of non-compliance with them should be removed from the text. Secondly, we believe that a 'sunset' clause should be introduced so that administrative timelines do not have to be implemented until 2027. This accounts for the widely different asylum procedures, systems and bureaucracies in the different member states - currently a significant roadblock for passing the APR.

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24 ECRE, 2016, p. 44

25 French Constitution, Art. 53(1)

26 European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02. Available from: https://www.refworld.org/docid/3a-e6b3b70.html [accessed 25 March 2019]; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; also see M.S.S. v. Belgium and Greece, Application No. 30696/09, judgment of 21 January 2011, par. 319.

27 Kagan, M. (2006) Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt. Journal of Refugee Studies. 19(1), 45-68. Available from: doi: 10. 1093/jrs/fej002; Schoenholtz, A. I., Ramji-Nogales, J. & Schrag, P. G. (2007) Refugee Roulette: Disparities in Asylum Adjudication. Stanford Law Review. 60, 295-412.

3. Reform of the qualification directive

3.1 Background

The Qualification Regulation [28] (Commission 2016) is part of the package of reforms put forth by the Commission in order to reform the Common European Asylum System.

The proposal has four aims[29]:

2. Greater convergence of recognition rates and forms of protection,
3. Stricter rules sanctioning secondary movements,
4. Protection granted only for as long as it is needed,
5. Strengthened integration incentives.

Similarly to the Asylum Procedures Regulation, the Commission has proposed to replace the current Directive with a Regulation. The underlying logic of the new proposed Regulation is that it has "directive applicability"[30] unlike a directive which allows for some leeway in its transposition. The proposal is an active attempt at fostering harmonisation amongst member states both in terms of recognition rates and type of protection status granted in order to disincentives secondary movement.

3.2 Current status

The Bulgarian Presidency successfully reached a provisional agreement with the European Parliament (EP) at the eighth trialogue on 14th June 2018. The text of the provisional agreement was presented to COREPER on 19th June 2018 but it did not achieve the necessary support from delegations.
On 23rd January 2019, COREPER confirmed support for the proposed amendments with a view to continuing negotiations with the EP at technical level. However, through informal contacts with the EP, the Presidency has noted that the Parliament stands by the provisional agreement that was reached back in June 2018, thus there are currently no intentions to reopen negotiations.[31]

3.3 Key contested areas

The proposal to introduce **systematic review of international protection status (Article 14 and 20)** has proven to be a key area of contestation amongst member states (such as Belgium and Germany) and the European Parliament.[32] Member states have raised concerns over both the new administrative burdens that would result from having to carry out systematic review of status and the binding nature of EASO guidelines.[33]

28 Commission (2016). Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. Available online http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0466/COM_COM(2016)0466_EN.pdf.
29 Commission, 2016, p.4-5
30 Commission, 2016, p.4
31 Presidency, 2019, p.5
32 European Parliament (2017), p.80. Report by the Committee on Civil Liberties, Justice and Home Affairs on on the proposal for a regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long term residents. 28 June. Available online http://www.europarl.europa.eu/doceo/document/A-8-2017-0245_EN.pdf. Last accessed 23 March 2019.
33 Council of Ministers (2017), p.53. Note from the Presidency to Delegations on the "Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents". 5th April. Available online http://www.statewatch.org/news/2017/apr/eu-council-qualifications-7827-17.pdf. Last accessed 23 March 2019.

Furthermore, concerns were raised by ECRE[34] that an obligation of systematic review has the potential to create a perception of temporary residence which could undermine integration prospects.

The proposal to **harmonise the validity period and format of the residence permit (Article 26)** as proposed by the Commission has faced contestation both in the EP and amongst member states. Following bilateral meetings carried out by the Austrian Presidency, it is proposed that the validity of residence permits is to be set out in national law, taking into account the limits set by the Qualification Regulation; period of at least 3 years for refugees and at least 1 year for subsidiary protection beneficiaries. Residence permits shall be renewed on expiry for at least 3 years for refugees and the residence permits for beneficiaries of subsidiary protection can be renewed for longer than 2 years. As such, Member States which already grant the same duration for the two statuses (such as the Netherlands) can continue to do so.[35]

There is also disagreement over **Article 26** on the ***proposed maximum time a beneficiary who has been granted international protection should wait in order to receive a residence permit***. In the original proposal, the Commission stated "no later than 30 days"[36] which the EP proposed to amend with "as soon as possible and in any event no later than 15 days".[37] The Presidency[38] taking into account member states positions proposed "within 90 days from the notification of the decision".

The proposal by the Commission under ***Article 8(1) of obligating member states to employ the internal protection provision*** had faced opposition amongst member states (such as France, Ireland, Italy, Portugal, Slovakia) and the European Union.[39] In the explanatory statement, the rapporteur[40] denounced the obligation element of the article as "going one step too far". However, it is not referred to as a contested area in the Presidency's note in November 2018, which suggests that the issue has been resolved through negotiations.

There is a current contention over ***Article 28(1) Freedom of movement*** between the Council and European Parliament. The Presidency[41] has proposed to remove the line that grants "the right to choose the place of residence in that territory". Whilst this gained wide support at the meeting of JHA Counsellors on 17th July 2018, the Parliament informed the Presidency that it stands by the original agreement reached in the June 2018

34 ECRE (2016), p.15. Comments on the Commission Proposal for a Qualification Regulation COM(2016) 466. Available online https://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-QR.pdf. Last accessed 23 March 2019.

35 Presidency (2018), p.3. Note from Presidency to Permanent Representatives Committee on the Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (First reading) - State of play and guidance for further work. Available online http://www.statewatch.org/news/2018/nov/eu-council-int-prot-sop-14355-REV-1-18.pdf. Last accessed 23 March 2019.

36 Commission 2016, p.45

37 European Parliament (2017), p.63. Report by the Committee on Civil Liberties, Justice and Home Affairs on on the proposal for a regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long term residents. 28 June. Available online http://www.europarl.europa.eu/doceo/document/A-8-2017-0245_EN.pdf. Last accessed 23 March 2019.

38 Council of Ministers (2017), p.69. Note from the Presidency to Delegations on the "Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents". 5th April. Available online http://www.statewatch.org/news/2017/apr/eu-council-qualifications-7827-17.pdf. Last accessed 23 March 2019.

39 Council of Ministers 2017, p.38

40 European Parliament 2017, p.81

41 Presidency 2018, p.10

trialogue meeting and does not intend to continue the negotiations for the time being.[42]

3.4 Key takeaways and policy recommendations

It is regrettable that a distinction continues to be made between the duration of residence permits awarded to refugees and subsidiary protection beneficiaries, as it continues to promote the assumption that subsidiary protection is both less valid than refugee status but also more temporal,[43] which is not necessarily the case. We strongly believe that the duration of residence should be equal amongst the two statuses. However, in order for this new Regulation to gain consensus amongst member states, this report supports the proposal for setting the minimum period of residence permits of at least 3 years for refugees and at least 2 year for subsidiary protection standard. This will enable Member states which grant the same duration for the two statues the possibility of continuing to do so.

We are concerned by the proposal to change the length of time that it takes to receive a residence permit once international protection has been granted. We strongly believe that the 90 day option is not an adequate solution to the status quo. Already there are delays according to an ECRE report[44] of at least a month (e.g. Bulgaria, Sweden, Italy and Hungary) and often more (e.g. reportedly up to a year in France) before the issuing of a residence permit and concerns have been raised as to whether this may result in beneficiaries of international protection being deprived of certain social security benefits whilst they await their permit.[45] As such, we support the original proposal of 30 days but with the inclusion of "as soon as possible" as proposed by the Committee on Civil Liberties, Justice and Home Affairs in 2016.[46]

We welcome the original proposal made in 2016 by the Commission that includes in Article 28(1) the beneficiary's "right to choose their place of residence in the territory". This is in line with the CJEU's ruling in the joint cases of Alo and Osso versus the region of Hanover in 2016[47] that stated that the "right to freedom of movement for beneficiaries of international protection must be exercised under the same conditions and restrictions as those for refugees and other legally resident third country nationals."[48] (CJEU 2016). However, we are concerned by the Presidency's proposed adjustment of removing this line as it has the potential to directly contravene with the CJEU ruling. Moreover, in line with the Meijers Committee[49] (2016), we are concerned that the ambiguity of the language within the proposed Article creates a situation where restriction of movement could become the rule rather than the exception.

42 Presidency 2018, p.3
43 ECRE 2016a
44 ECRE (2016b). Asylum on the Clock? Duration and review of international protection status in Europe. Available online https://www.ecre.org/wp-content/uploads/2016/07/AIDA-Briefing-Asylum-on-the-Clock-duration-and-review-of-international-protection-status-in-Europe_-June-2016.pdf. Last accessed 24 March 2019.
45 ECRE 2016a, p.15
46 European Parliament 2017, p.63
47 ECRE 2016a, p.18
48 European Database of Asylum Law (2016). Joint Cases C-443/14 & C-444/14, Kreis Warendorf v Ibrahim Alo & Amira Osso v Region Hannover. Accessed online https://www.asylumlawdatabase.eu/en/content/cjeu-joint-cases-c-44314-c-44414-kreis-warendorf-v-ibrahim-alo-amira-osso-v-region-hannover. Last accessed 25 March 2019
49 Meijers Committee (2016). Comments on the proposals for a Qualification Regulation (COM(2016) 466 final), Procedures Regulation (COM(2016) 467 final), and a revised Reception Conditions Directive (COM(2016) 465 final). Available online at https://www.commissie-meijers.nl/sites/all/files/cm1614_comments_.pdf. Last accessed 23 March 2019.

Conclusion

The difficulty in reaching political agreement for the Reception Conditions Directive, Qualifications Regulation and the stalled negotiations of the Asylum Procedure Regulation and Dublin IV Regulation shed significant light on how contested asylum and immigration issues have become at the EU level. The 2016 push for reform of the Common European Asylum System in response to the unprecedented waves of migration in 2015/16 set out to shape asylum policy so that it is efficient, fair and humane - whether in times of calm or crisis. To what extent these reforms would achieve their aims, if all successfully passed, is a question for much debate.

Whilst there have been some welcomed improvements, especially with the transition of two of the Directives into Regulations, the continued issues surrounding Dublin IV negotiations significantly undermine overall progress of the CEAS. The fact that these negotiations are stalled on the solidarity component of the proposal is indicative of member states' approach to CEAS reform in general. Another overarching trend noticeable in the proposed texts is the inclusion of vague terminology, made ever vaguer with each round of amendments, to ensure that Member States can implement them as they so wish - undermining the true harmonisation of asylum systems across the EU. More explicit recommendations need to put in place for Member States to truly harmonise and effectively manage migration flows.

Furthermore, due to the stalled negotiations of the Dublin IV Regulation, there has been a fundamental failure to tackle the topic of resettlement and redistribution. This system of responsibility-sharing seems to have been removed from the political agenda, whilst focus has increased on how to reduce secondary movements. As such, the EU seems to find itself in the same position as before 2015, and the lesson (yet) to be learned remains the same: When European migration and asylum policy is under fire, ensuring a harmonised EU asylum policy that places human rights at its core is of vital importance. This does not only require solidarity amongst the member states, it demands prioritising refugees' rights over achieving efficiency and harmonisation.

It is evident that the package of reforms will not be passed under the current Commission and Parliament. As such there is real opportunity under the new Presidency to advocate for change in areas that have been either undermined through compromise or abandoned entirely over the last two to three years of negotiations. In the short-term with certain member states still developing their capacity and capability to align their systems and structures with the current Directives, immediate resources should be directed both into supporting compliance through EURODAC and EASO to reduce the current compliance gap that exists within the CEAS. However, in the long-term whilst it is important to achieve harmonisation and compliance on reception conditions and qualification procedures, this has to be supported by a genuine reform in responsibility-sharing, not abandoning the role of migration management to those least able to manage.

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APPENDICES

Appendix 1: Note on research methodology

The first part of each of the main sections (1, 2, 3) discusses the key contested areas of each proposal. These areas have been selected based on disagreements highlighted through the main findings and conclusions and policy recommendations. Our research is mainly based on desk research, assessing the positions of the Council and the European Parliament in light of the Commission proposal and the current state of the debate. Additionally, we drew on academic research as well as legal studies on some of the aspects of the reform proposals to provide evidence-based proposals. Finally, our findings are put to a 'reality check', based on expert interviews that Nicholas Millet has conducted in Greece and Natascha Zaun has conducted in Brussels.

NOTES

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