

NEW PACT ON MIGRATION AND ASYLUM: RISKS AND OPPORTUNITIES

CEA(R)

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The Spanish Commission for Refugees (CEAR) is a non-profit organisation founded in 1979 and engaged in voluntary, humanitarian, independent and plural action. Our aim is to work with citizens to defend the right to asylum. Our mission is to defend and promote human rights and the comprehensive development of asylum applicants, refugees, stateless persons and migrants in vulnerable situations and/or at risk of social exclusion. Our work approach is comprehensive, including temporary shelter, legal care, psychological and social care, training and employment, and advocacy and social participation.

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1. Background

The response of EU Member States to the increase in arrivals in 2015 revealed once again the need for an effective and guarantee-based Common Asylum System in Europe. It also showed that we are far from having one. Our regulations and guarantees are not harmonized, causing asylum seekers and refugees to receive different treatments across the states. Moreover, we have witnessed the lack of solidarity and shared responsibility between States in situations of crisis.

Several attempts have been made at reforming the Common European Asylum System (CEAS). None of the documents that the European Commission proposed in 2015 and 2016 to advance this issue was approved under the mandate of Jean-Claude Juncker, which ended on 30 November 2019. Although some of these proposals reached a political agreement between the Parliament and the Council¹, no agreement was concluded regarding the reform of the Dublin System and the Regulation on Procedure. In addition, in 2018, the Commission proposed the recast of the Return Directive, achieving partial acceptance by the Council in 2019.

In September 2020, the European Commission presented a New Pact on Migration and Asylum². This Pact revisits some of the previous proposals, urging agreement on the negotiations that are underway and introducing new elements to resolve urgent issues that have become apparent in recent years in European migration and asylum policy.

The proposals in this New Pact on Migration and Asylum have been under discussion in the European Parliament and Council since its publication, but no substantial agreement has been reached, with the exception of the European Union Agency for Asylum and the Blue Card for highly-qualified workers. This all reflects the lack of momentum and progress in more relevant matters, and it is coupled with equidistant positions among various countries on procedural and solidarity issues. In this context, Spain and other southern border countries of the European Union have opposed several of the proposed measures as they fail to resolve the issues that were raised in the 2015 crisis (responsibility sharing and the principle of solidarity) to reflect the interests of the Southern countries³.

The French Presidency of the Council has expressed its intention to advance negotiations to reform the Schengen Border Code and the New Pact on Migration and Asylum⁴. Macron proposed a 'gradual' or 'step-by-step' approach to unblock the New Pact. The idea is to start by adopting the elements where political agreement is easier to reach⁵. This goes against the 'package approach' that the European Parliament held during last term's negotiations. Spain, Italy, Greece, Cyprus and Malta (MED5) defended a common position, which was also in line with the gradual approach proposed by the French Presidency. They agreed to allow such a 'gradual advance' (provided that it respects the principles of responsibility and solidarity), to support actions relating to the external dimension of migration policy, and to reinforce European partnerships with the main countries of origin and transit⁶. The French Presidency was expecting an agreement to be reached between March and June 2022; however, the Russian invasion of Ukraine has interrupted the process.

¹ There was political agreement between the European Parliament and the Council on some of those proposals: Proposal to review the Reception Conditions Directive, the Directive on Recognition and the Settlement Scheme. The EU Parliament and Council reached a partial agreement on the reform of Eurodac.

² Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0012.02/DOC_1&format=PDF . . The other documents with proposals are available at: https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en

³ Véase: <http://www.interior.gob.es/documents/10180/12986337/Med-5+Joint+Statement+ESPA%C3%910L.pdf/e78302ff-c2e5-4ff8-808b-50c1dcf98219>

⁴ <https://es.euronews.com/2022/01/07/francia-expone-sus-prioridades-para-su-presidencia-del-consejo-de-la-ue>

⁵ <https://media.euobserver.com/49e08c4f5b6bd88f0f29ad24f6b83c25.pdf>

⁶ https://www.lamoncloa.gob.es/lang/en/gobierno/news/Paginas/2022/20220214_migration-asylum.aspx?qfr=131

2. The proposals of the new European Pact

On 23 September 2020, the European Commission presented a New Pact on Migration and Asylum. Vice-President Schinas described the Pact as a house with three floors. The first floor would hold the external dimension and the cooperation with third countries in order to help their citizens and fight human trafficking. The second, a robust system of management of external borders, and on the third floor we would find the internal rules of solidarity.

In particular, the new Pact includes five legislative proposals:

- Proposal for a Regulation on Asylum and Migration Management⁷
- Proposal for a Regulation introducing a screening of third country nationals at the external borders⁸
- Proposal for a Regulation establishing a common procedure for international protection in the Union⁹
- Proposal for a Regulation addressing situations of crisis and force majeure¹⁰
- Amended proposal for a Regulation on the establishment of 'EURODAC'¹¹

2.1. Regulation on Asylum and Migration Management

The proposal for a regulation of the European Commission on Asylum and Migration Management (hereinafter, RAMM proposal)¹² replaces the 2016 proposal to amend the Dublin Regulation, cornerstone of CEAS and whose negotiations came to a standstill in Congress¹³. The failure to reach an agreement was mainly related to the creation of a system to allocate responsibility for processing an application for international protection.

The RAMM proposal sets out the **common criteria to determine which Member State shall be responsible for examining an application** for international protection lodged in one of the Member States by a third-country national or a stateless person. The hierarchy of criteria of the current Dublin III Regulation is substantially maintained, although it includes a wider definition of family members and the possibility to present a diploma or qualification to prove his/her connection with a Member State.

The responsibility to assess asylum applications remains with the first country of entry. Therefore, the RAMM proposal does not seem to provide a true and efficient solution to the deficiencies of the Dublin System or to the pressure on external borders, in countries such as Greece, Italy or Spain.

⁷ Proposal for a regulation of the European Parliament and of the Council on asylum and migration management amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]: [EUR-Lex - 52020PC0610 - EN - EUR-Lex \(europa.eu\)](#)

⁸ Proposal for a regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817: [EUR-Lex - 52020PC0612 - EN - EUR-Lex \(europa.eu\)](#)

⁹ Amended 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: [EUR-Lex - 52020PC0611 - EN - EUR-Lex \(europa.eu\)](#)

¹⁰ Proposal for a regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum: [EUR-Lex - 52020PC0613 - EN - EUR-Lex \(europa.eu\)](#)

¹¹ Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818: [EUR-Lex - 52020PC0614 - EN - EUR-Lex \(europa.eu\)](#)

¹² PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]: Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2a12bbbba-ff62-11ea-b31a-01aa75ed71a1.0022.02/DOC_1&format=PDF

¹³ The RAMM proposal repeals and replaces the Dublin III Regulation (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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).

CEAR REMARKS

We believe that Article 10, which lays down the consequences of non-compliance by the applicant and their exclusion from the reception conditions, guaranteeing only an adequate standard of living, is unreasonable. The term 'adequate' could be interpreted unevenly across Member States. In CEAR's opinion, Article 10 should be deleted.

Articles 9 to 12 of the RAMM proposal set out the obligations and rights of the applicant, including the right to information and a personal interview, which we appreciate.

The RAMM proposal includes two additional hierarchy criteria, the responsibility of the Member State where the applicant has obtained his/her diploma, and entry after disembarkation following SAR regulations (Articles 20 and 21).

CEAR REMARKS

Under Article 21 of the RAMM proposal, the responsibility of the first country of entry for examining the application is extended from 1 to 3 years after the date on which the border crossing took place, which, in our opinion, must be rectified, as it might be detrimental to the applicant.

Regarding **children and family members**, the proposal includes several positive aspects, but there are also some worrying points that could potentially lead to serious situations of lack of protection.

CEAR REMARKS

In relation to Article 13 of the proposal, on guarantees for minors, the right to education should be recognised in all cases where minors are involved in proceedings to determine which Member State is responsible, in accordance with Articles 14 and 24 of the EU Charter of Fundamental Rights.

Regarding unaccompanied minors, Article 15 of the RAMM proposal maintains the provisions of the Dublin III Regulation, but only for unaccompanied minors applying for international protection. Such stipulations, in accordance with the best interest of the child, establish that the Member State responsible shall be that where a family member of the unaccompanied minor (or a relative that can take care of him/her) is legally present. In the absence of a family member or a relative, the Member State responsible shall be that where the unaccompanied minor's application for international protection was first registered, unless it is demonstrated that this is not in the best interests of the minor.

Bearing in mind that there is a large number of unaccompanied minors who, for different reasons, cannot apply for international protection, this exclusion could leave many children unprotected. And since they would not be allowed to access the procedure, it would be impossible to assess their individual needs.

Regarding family members (Articles 16 and 17), enlarging the scope of the Regulation to include siblings as well as families formed in transit countries is a very positive and important point. The fact that siblings were not considered family members particularly affects unaccompanied minors, whose only family ties in a Member State are usually their siblings. Moreover, it would be necessary to include children over the age of majority, who are also part of the family unit.

We also appreciate the proposal regarding unaccompanied minors (Article 12.4) about the role of the cultural mediator which, in our opinion, could similarly be implemented for dependent persons as set out in Article 24 of the proposal.

Lastly, in Article 24 on dependent persons, the RAMM proposal does not introduce any amendments and maintains the requirement for family ties to exist before the applicant arrived on the territory of a Member State. In this respect, it would be necessary to include family ties created in transit before the arrival to the Member State. Similarly, note should be taken that many applicants for international protection are in a situation of serious illness and/or disability, and have no family ties in any Member State. However, for medical reasons, they are not in a situation to be transferred to the Member State responsible, thereby creating a relation of dependence with the Member State where their application for international protection was registered. These two instances should be included in the RAMM proposal.

As for Article 25 on discretionary clauses, the RAMM proposal limits the discretion of a Member State to examine an application that would not be their responsibility under the Regulation in order to group other family members excluded from the definition of family unit, for humanitarian or cultural reasons.

In this respect, it is crucial to consider that, in some Member States, there could be quantitative and qualitative shortcomings affecting procedural guarantees and reception conditions that could jeopardise the fundamental rights of persons seeking international protection. This limitation will prevent countries from taking charge of persons coming from those Member States. There could arise situations where a Member State cannot guarantee the provisions laid down in the Directives, and therefore it is necessary to maintain the discretion of Member States to decide to examine an application for international protection even if such examination is not their responsibility.

Regarding the **obligations of responsible Member States and the cessation of responsibility**, the proposal continues to place the burden of responsibility on the external border countries. Moreover, it does not foresee the possibility of an effective appeal against transfer decisions.

CEAR REMARKS

Under the RAMM proposal, the responsibility for an application in the current system ceases after a person has been away from the territory of a Member State for three months. Article 28 states that the country where an application for international protection is first registered shall continue the process of determining the Member State responsible even if the applicant leaves the territory 'without authorisation or is otherwise not available to the competent authorities of that Member State'. This means that the responsibility is virtually permanent, and aggravates the pressure on external border

countries, which has a negative impact on applicants.

As in the Dublin IV Regulation, the take back application (Article 31) is merely a 'notification'. When a take back notification takes place following a positive Eurodac hit or at the request of a person relocated in another Member State, the scope of the remedy shall be limited to an assessment of whether the transfer would result in a real risk of inhuman or degrading treatment for the person concerned (Article 33.1). However, according to the ECJ, the right to be heard must be guaranteed in respect of any adverse effect for an applicant, therefore this new Regulation on migration and asylum management cannot pose limitations to the scope of the right to appeal a transfer decision.

The RAMM proposal extends the scope of the take back procedure by the Member State responsible to the persons who have been relocated, but it does not address the individual or general reasons that often motivate secondary movements.

As for Article 29 on the submission of a take charge request, the RAMM proposal states that it must be done without delay and in any event within two months of the date on which the application was registered (Art. 29.1). It must be pointed out that such a short timeframe is unrealistic in the current context and may render the procedure ineffective. In this sense, it is important to keep in mind both the difficulties in many cases of obtaining evidence to support the take charge requests and the number of arrivals through external border countries, which would be once again burdened with a disproportionate responsibility, given their existing resources. A three-month period could be a more reasonable margin for more efficient and realistic procedures. In any event, it is a positive step that Article 29.1 of the RAMM proposal expressly mentions that the procedure may continue despite the expiry of the time limits where the applicant is an unaccompanied minor. We also welcome the fact that Article 30, on the reply to a take charge request, established that the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility. Article 30.8 also includes a reference about the transfer of responsibility to the requested Member State if it does not object to the request within one month of receipt, although this time limit should be extended, in our opinion.

Article 32 of the RAMM proposal, establishing the notification of a transfer decision, should be amended to fix a time limit for the Member State to inform of its decision regarding the person concerned.

Article 32.4 of the RAMM proposal mentions the information that must include the decision of transfer, which is fundamental, but it also specifies that the legal remedies shall not have an automatic suspensive effect if suspension is not applied for. In CEAR, we consider it essential that the legal remedies available to these persons have an automatic suspensive effect. In addition, the time limit set out in Article 33.2 of the RAMM proposal to exercise the right to an effective remedy should be extended from two to four weeks.

Similarly, the proposal should delete the provision in Article 33.5 restricting access to legal assistance where the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success. The benefit of free justice and access to effective legal protection must be guaranteed in all cases without restriction.

Regarding the 4 to 12 week detention period prior to the transfer under Article 34.3 of the RAMM proposal, clear and precise criteria should be included regarding the exceptional nature of the detention, the assessment of the need and the proportionality of the measure.

The RAMM proposal also **introduces a new solidarity mechanism**. Solidarity measures are, in general, **voluntary, except in two mandatory cases**: in the event of disembarkation after search and rescue operations, or when a Member State is under strong migratory pressure. In those situations, the proposal lays down a mechanism of solidarity a la carte, allowing Member States to choose between the relocation of applicants who are not subject to the border procedure, return sponsorship of illegally staying migrants, or other capacity-building measures for Member States under pressure or cooperation with third countries.

In general terms, this solidarity scheme relegates the protection of persons to a second place, focusing mainly on issues relating to return. This is a missed opportunity to create a mechanism of compulsory relocation that could alleviate the pressure of external border countries.

The European principle of solidarity is thus called into question, since what is being proposed is a new way of understanding solidarity in a flexible, voluntary and non-binding way, which would also fail to guarantee an equitable sharing of responsibilities in terms of protection and reception.

CEAR REMARKS

Article 45.1.d) of the RAMM proposal sets out vague measures to exercise solidarity. In addition, by establishing measures to be implemented through cooperation with third countries, solidarity is once again being linked to border externalisation. Therefore, the section 'measures aimed at responding to migratory trends affecting the benefitting Member State through cooperation with third countries' should be deleted.

Article 47 of the proposal establishes a series of measures for solidarity after disembarkations following search and rescue operations, which we welcome, because they can help avoid circumvention of responsibility by some Member States when it comes to disembarkations after rescue operations. However, compulsory measures of solidarity commitments could also be implemented for Member States after these operations and subsequent disembarkation. Ideally, all solidarity contributions should consist of relocation proposals.

Article 49 of the RAMM proposal refers to the solidarity pool for search and rescue operations. The wording of Article 49.2 is confusing, since it does not clarify or elaborate on the meaning of 'eligible persons to be relocated'. Furthermore, the procedures indicated are complex. The vulnerability criteria should also be clarified.

Regarding the solidarity mechanism proposed for situations of migratory pressure (Articles 50 to 53 of the RAMM proposal), there is a risk that the actions listed will focus on preventing situations of migratory pressure rather than on preparing to address them. In these cases, the option of return sponsorship as a solidarity commitment should be removed, too.

The distribution key established in Article 54 of the RAMM proposal does not take into account the will of the person concerned, the conditions of the different reception standards (which across Member States) or even the possibility of detention measures being applied.

For its part, the return sponsorship (Article 55 of the RAMM proposal) should be suppressed from the proposal, as it could lead to focusing on returns instead of seeking to provide solidarity responses

linked to asylum. Moreover, it presents the risk of a prolonged use of detention (until the person is transferred to the Member State responsible for his/her return or relocation) or of the return procedure itself. Besides that, the very concept of return sponsorship is unspecific and unclear on the responsibilities of each Member State and too strongly linked to the willingness to cooperate with third countries.

This regulation should introduce a series of clear and compulsory commitments regarding relocation, as well as an assessment of the preferences of the asylum applicant in the event of relocation. In this sense, the regulation could bring back the 2016 proposal, which included a solidarity system to be implemented as soon as the relevant State reached its maximum capacity.

It is also unclear how to assess the solidarity commitments of Member States that do not engage in relocation.

Article 57.3 on the procedure before relocation states that each Member State must take into account the existence of meaningful links between the person concerned and the Member State of relocation, which is an improvement.

Under Article 58.2 on the procedure after relocation, applicants may be transferred to a Member State they had not considered as a final destination for their relocation, and those whose applications have been rejected may be transferred from one State to another and eventually returned. The Member State responsible should be determined before transferring the individual.

Article 58.5 of the RAMM proposal establishes that where the Member State of relocation has relocated a third-country national who is illegally staying on its territory, the Return Directive shall apply. This could lead to an extensive and prolonged use of detention, which should be the last measure to be applied and always with a clear purpose.

Regarding the **relations with third countries**, the RAMM proposal maintains an approach based on the externalisation of migration management, promoting cooperation with third countries to streamline return and take back, which entails the risk of persons being returned to unsafe countries. In addition, although it is still early to know whether certain countries will admit such returns, if they refuse, there is again a risk of keeping persons in prolonged detention during border procedures, or in legal limbos. Moreover, there is still a high risk of making development aid conditional on cooperation with migration control, thereby distorting the purpose of such aid and leaving aside human development issues and the eradication of the causes behind displacement, and forcing countries where human rights cannot be guaranteed to assume an excessive burden in receiving persons in need of international protection.

CEAR REMARKS

Article 3 of the RAMM proposal puts together a comprehensive approach to asylum and migration management, mostly referring to the responsibility of third countries, but making no relevant mention to the safe and legal channels of access to the European territory. In CEAR, we believe that this reinforces the trend towards border externalisation that we have been witnessing in recent years. In the same vein, Article 5 also seems to be promoting externalisation, as it states that Member States must take measures to reduce and prevent irregular migration, without taking into account that many

of those who enter Europe illegally are entitled to international protection. Furthermore, Article 7 is especially worrying, since it states that if a third country is not cooperating sufficiently on return and readmission, the Commission will submit a report to the Council with measures which could be taken to improve the cooperation of that third country. It is unclear whether this would prioritise EU interests over those of third countries, and whether it opens the door to conditionality in migration matters.

Lastly, the RAMM proposal also provides for the possibility of obtaining a long-term residence permit in a shorter period of time (three years) for beneficiaries of international protection, which should be emphasised in positive terms. However, a comprehensive and European approach to asylum policy, involving greater harmonisation of the eligibility criteria and the rights and obligations under the international protection act, as the New Pact attempts, should provide for such a residence permit to be valid in all Member States from the moment of recognition, and not three years later. This would contribute to the integration of the beneficiaries of international protection and would fulfil one of the lasting solutions set out in the Global Compact on Refugees.

As for the status of the negotiations on the RAMM proposal in the European Parliament, speaker Tomas Tobé (EPP) presented his draft report, followed by an exchange of opinions, in the LIBE committee meeting on 26 October 2021. More than 2,500 amendments to this proposal were tabled. The amendments proposed in this draft report include reinforcing cooperation with third countries in the fields of border management and migration, the relevance of the 'entrance criteria', and other questions related to the solidarity mechanism. The goal is for the European Parliament to establish a new position before 2022 summer holidays.

In the Council, Member States have based their positions on a large number of scenarios illustrated in numerical simulations that were presented by the European Commission and the European Union Agency for Asylum. The positions are still divided (North, South, Visegrad) and no significant progress has been made.

The French presidency of the Council has set the priority of reaching an agreement on the solidarity mechanism established in the RAMM proposal during this first stage. Particularly, the aim is to reach an agreement on the relocation mechanism for persons rescued at sea, while establishing that non-participant members must exercise solidarity by providing financial support to EU agencies and other Member States to improve external border controls. The Presidency has also proposed a mechanism for Member States to anticipate or complement the work of Frontex in times of crisis, which could involve the establishment of a rapid intervention (military) force.

2.2. Screening Regulation

The European Commission also tabled a proposal for a Regulation introducing a screening of third country nationals at the external borders (hereinafter, the Pre-entry Screening Proposal)¹⁴. This pre-entry screening is applicable to all third-country nationals who are present at the external border without fulfilling the entry conditions or after disembarkation, following a search and rescue operation, including asylum seekers.

¹⁴ PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL INTRODUCING A SCREENING OF THIRD COUNTRY NATIONALS AT THE EXTERNAL BORDERS AND AMENDING REGULATIONS (EC) NO 767/2008, (EU) 2017/2226, (EU) 2018/1240 AND (EU) 2019/817, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:0e922ce2-ff62-11ea-b31a-01aa75ed71a1.0007.02/DOC_1&format=PDF

The proposal also establishes that this pre-entry screening be applied to irregular migrants apprehended within the territory and who eluded border controls. The screening includes identity checks, health and security checks, vulnerability examinations, and the registration of biometric data in Eurodac. The aim is to channel third-country nationals to the appropriate procedure, referring those in need of international protection towards the asylum procedure and swiftly returning irregular migrants to their countries of origin.

This proposal is based on the assumption that arrivals to the EU are mainly composed of mixed migration flows, and not exclusively of persons in need of international protection. Thus, the European Commission has sought to create a mechanism to quickly identify the persons who do not need international protection. This entails great risks for those in actual need of such protection. Having to go through the pre-entry screening before formally accessing the international protection procedure may involve serious concerns regarding access to this right, such as the risk of violating the principle of non-refoulement, which may put asylum seekers in situations of lack of protection.

It is worth mentioning that many of the provisions in this document were already laid down in other regulations, such as the Schengen Code (rules on how to perform the controls to third-country nationals at the external borders, for instance) or Eurodac (regulations on the collection of data/fingerprint, etc.). The same is true of the rules for medical examinations (which were already covered by the Reception Conditions Directive).

Again, this proposal implies increased pressure on external border countries, not only at an administrative level, but also in terms of reception, in addition to a number of risks to compliance with the obligation of non-refoulement.

As for the status of the negotiations in the European Parliament, speaker Birgit Sippel (S&D) presented her draft report, followed by an exchange of opinions, in the LIBE committee meeting on 30 November 2021. More than 700 amendments were proposed (the submission deadline was 14 January 2022). From a technical standpoint, the text has made great progress thanks to the Council. The text was part of the agenda of the JHA Council on 08 November 2021, though no mandate was adopted.

Lastly, the French Presidency of the Council has made it a priority for the first stage of its 'step-by-step' approach for the adoption of the New Pact, to reach an agreement regarding the health and security checks and the apprehension of persons at the external borders.

CEAR REMARKS

We consider the wording of Article 1 of the proposal, referring to its subject matter and scope, to be unclear and confusing. The concept of jurisdiction cannot be dispensed with. If a person is under the effective control of the authorities of a Member State, he or she is considered to be within its jurisdiction, and therefore the binding regulations for the protection of human rights apply. The pre-entry screening proposal poses a further danger that persons in need of international protection will not have access to the necessary guarantees. The security approach of the whole proposal is also worrying.

Article 3 of the proposal regulates the screening at the external border. We believe this is a way of delaying access to the procedure (and all its guarantees) for asylum seekers, by introducing a pre-

entry screening to channel persons, thereby implying that they are outside the European territory. In addition, in Article 3.1, we should be cautious with the stipulation that 'the screening shall apply to those persons regardless of whether they have applied for international protection', as we should ensure that this does not criminalise the irregular entry of applicants (which would be a violation of Article 3 of the Geneva Convention). The same could be said of Article 3.2.

Article 4 regulates the authorisation to enter the territory of a Member State. We believe that there is a risk of an excessive use of detention (which should be the last resort), since migrants would have to wait at the borders while the pre-entry screening takes place. Article 4.1 seeks to create a legal fiction whereby it is implied that those persons are outside the EU's territory. It is unclear where the screening would take place, inside or outside EU territory, and at any rate, clarification would be needed on issues relating to the exercise of jurisdiction by the authorities carrying out such control. There is a risk of potential violation of the European Convention on Human Rights and the case law of the European Court of Human Rights regarding what is considered the exercise of jurisdiction by a State Party.

Article 5 of the proposal refers to the screening within the territory. We consider that there is a serious risk that racial checks will be used. Furthermore, the regulation would be equating the treatment given to persons inside the territory with that accorded to those deemed not to have entered the territory (Article 3), which is confusing.

Article 6 of the proposal establishes the requirements concerning the screening. Regarding Article 6.1, as with Article 4, we believe that there is a risk of an excessive use of detention (which should be the last resort) since migrants would have to wait at the borders while the pre-entry screening takes place. Furthermore, this could violate the Reception Conditions Directive, as it is unclear if adequate facilities are available to meet the requirements of this Directive. The same applies to Article 6.2, which raises the risk that detention centres may be used for the screening of persons already identified in the territory. Article 6.7, for its part, is not sufficiently specific. Further clarification is needed, especially considering that, under European law, EU agencies may, in principle, intervene in situations of disproportionate migratory pressure; however, in this article, it seems that these agencies would play a greater role.

In connection with Article 7 of the proposal and the mechanism to monitor compliance with fundamental rights, we believe it is crucial to guarantee the complete independence of such a mechanism.

Article 14 regulates the outcome of the screening, and establishes that a form shall be issued upon termination of the screening procedure. It is unclear if it would be possible to appeal this document, despite the fact that it includes very relevant information regarding the rights of the person concerned. The person should have the right to be heard before such a form is completed (given the implications for him/her of a referral to one procedure or the other) and the right to obtain information on the reasons for applying one procedure or the other.

2.3. Asylum Procedures Regulation

In this instance, the European Commission builds on the agreements reached in 2016, and has published an amended proposal based on the 2016 proposal, resulting in the recast of the Regulation establishing a common procedure for international protection in the Union¹⁵ (hereinafter, Proposal on Procedures). This proposal introduces a specific amendment to include new asylum and return border procedures, in order to link them with each other and also with the Regulation introducing pre-entry screening and the recast Return Directive.

The European Commission's 2016 proposal on this matter sought to establish a common procedure for asylum applications, harmonise standards of protection and rights of asylum seekers and unify the reception conditions in the European Union in order to reduce the differences in recognition rates across Member States, discourage secondary movements and ensure common effective procedural guarantees for asylum seekers.

The 2020 proposal on Procedures maintains the previous 2016 proposal in force, using it as a starting point to introduce specific amendments on the issues where no agreement had been reached between Member States. These include the conditions for the use of the border procedure and the extent to which such procedure should be made compulsory for Member States.

In this way, it seeks to establish, together with the proposal for a Regulation introducing a pre-entry screening and the proposal amending the Return Directive, 'a seamless link between all stages of the migration process, from arrival to processing of asylum requests and, where applicable, return of those who are not in need of international protection'. The Commission did not consider it necessary to introduce far-reaching amendments to the 2016 proposal, but acknowledged that negotiations have so far failed to result in agreements between Member States on the use of the border procedure and the extent to which this should be made compulsory for Member States.

All this has led to a new 'pre-entry' phase, a 'border procedure', and an 'end-to-end asylum and return procedure'. During the pre-entry phase, as already mentioned, third country nationals have no right to enter the territory of the EU and asylum applications will only be registered once the screening has been completed and the necessary information has been gathered to determine whether the border procedure should be used. The asylum border procedure would become compulsory in certain cases, and its maximum duration would be extended. The new return border procedure, replacing the one established in the 2018 recast Return Directive, shall be immediately applicable where an international protection is denied at the asylum border procedure.

This proposal is based on the following premises: firstly, that asylum applicants do not file their application in the first country of entry; secondly, that multiple applications for international protection are registered within the EU; and thirdly, that there is a need to reform the current Dublin system. It also assumes that most applicants for international protection are very unlikely to be granted such protection.

As for the status of the negotiations, speaker Fabienne Keller (Renew) presented her draft report, followed by an exchange of opinions, in the LIBE committee meeting on 26 October 2021. More than 500 amendments were proposed (the submission deadline was 25 November 2021). Agreement will be sought on the main

¹⁵ This amended 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 is available at: <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=COM%3A2020%3A611%3AFIN>

issues: relation to the new screening procedure, selection criteria for applicants to be channelled to the asylum border procedure, time limits for asylum and return border procedures and their binding nature, the fiction of non-entry, detention and flight risk, the right to an effective remedy, suspensive effect of remedies, and guarantees of fundamental rights. The Council has reviewed the text, but Member States have not yet agreed on the obligation of the border procedure, which has a political component.

The main ideas put forward by the European Commission in 2016 that are maintained in the 2020 proposal are as follows:

- A new obligation to apply for international protection in the country of first irregular arrival or in the country of legal stay, and to gather fingerprints, photographs and relevant data.
- A compulsory interview on the admissibility and the grounds for application, granting the applicant or his/her lawyer access to the recording of the interviews before making a decision, except in accelerated procedures.
- Guarantee of the right to free legal assistance at all stages of the administrative procedure and to appeal at first instance, although with limitations, particularly when the applicant has sufficient resources and where the application or appeal are considered as having no tangible prospect of success.
- Right to documentation for the applicant for international protection.
- Explanation of the special needs assessment process which will start as soon as the wish to apply for international protection is expressed and will continue throughout the procedure. Where the assistance required by the applicant cannot be provided as part of an accelerated procedure, such a procedure will cease to apply.
- A provision to guarantee that the best interest of children is protected and the obligation for staff to receive specialised training in dealing with minors.
- Reinforcement of guarantees for unaccompanied minors: maximum period of 5 days for the appointment of a legal guardian and 10 days to formalise the application from the appointment of the guardian. However, the proposal maintains the use of medical examinations to determine the age and the border procedure, overlooking special needs or the best interest of the minor.
- Implementation of 3 phases in the application for international protection: 1. Wish to receive international protection, 2. Registration, and 3. Formalisation through personal appearance.
- For applications made at border posts and detention centres, express mention of the right to information for unaccompanied minors, persons with mental health problems and persons who are presumed to be in need of international protection because of their country of origin.
- Obligation of Member States to take a decision rejecting the application even in cases of explicit or implicit withdrawals.
- Addition of new cases subject to accelerated procedure: applicants returned in accordance with the Dublin Regulation or not having applied for international protection in the country of first irregular entry or legal stay.
- Limitation of cases where the border procedure may be applied to an accompanied minor: when the minor is from a safe country of origin and when the minor is considered to be a danger to the national security or public order of a Member State.
- Introduction of a guarantee limitation in case of filing a subsequent application, aimed at penalising secondary movements.
- Establishment of a time-limit for applicants to lodge appeals, though very short (ranging from one week to one month, depending on the case), and exclusion of the automatic suspensive effect in accelerated procedures, applications rejected as inadmissible by the first country of asylum and applications rejected as implicitly or explicitly withdrawn.

- Designation of safe third countries and safe countries of origin at Union level and assessment based on information sources such as UNHCR, the European Union Agency for Asylum, the European Council and the European External Action Service. Pursuant to the Proposal, the concept of 'safe country' will be based on the general circumstances in terms of human rights and whether actors of persecution or serious harm exist in that country. An EU common list of safe countries of origin will be drafted and reviewed regularly by the European Commission.
- Nevertheless, Member States may continue to retain national designations of safe countries of origin or safe third countries for up to 5 years. If a country of origin is no longer considered a 'safe country' at Union level, Member States shall not be able to consider such country as a safe third-country or safe country of origin at national level.

CEAR REMARKS TO THE 2016 PROPOSAL

Accelerated and border procedures, as well as their subsequent applications, should enjoy the same procedural guarantees as in any ordinary procedure. This is not the case in the 2016 proposal, which cuts back rights in accelerated and border procedures such as the denial of access to the recording of the interview before the decision is taken, or the tight deadlines to review applications that involve complex issues such as the concept of 'safe country of origin' or 'danger to the national security'. Furthermore, the provision relating to the subsequent applications involves a disproportionate limitation of guarantees that entails the risk of not allowing for the assessment of personal circumstances and/or changes in conditions in the country of origin.

Moreover, it is essential to identify the specially vulnerable applicants before the procedure starts. Special vulnerability is not compatible with the application of the accelerated procedure as it is designed in the 2016 Proposal. As regards border procedures, it is worth underlining the lack of trained staff to identify migrants in situations of extreme vulnerability. Therefore, the presence of trained staff at border posts should be reinforced to ensure that persons with an extremely vulnerable profile are detected as soon as possible and do not have to undergo border procedures.

Similarly, the application of the border procedure to unaccompanied minors should be removed in all cases, so they can benefit from the special procedural guarantees that they need.

The new obligations for applicants for international protection involve serious consequences. In the event of failing to comply with the obligation to lodge the application in the country of first arrival or legal stay, those consequences are particularly disproportionate (accelerated procedure with reduced guarantees under the new Proposal).

The exclusion of the right to free legal assistance for applications considered ill-founded or for subsequent applications should be eliminated.

CEAR REMARKS TO THE 2020 PROPOSAL

With regards to the access to the procedure (Article 26) of the Proposal, we consider that third-country nationals at European borders are already on EU territory, and are therefore entitled to rights and obligations from that moment. The proposal may result in delaying access to the international protection procedure and the right to be informed of their rights and obligations, a basic procedural guarantee, according to the ECHR. The moment a person expresses his or her willingness to apply for

international protection, these rights must be guaranteed immediately through the registration of his or her application.

Additionally, according to the CJEU (*Tsegezab Mengesteab v. Bundesrepublik Deutschland*), 'an asylum application must be considered to have actually been lodged as soon as the asylum seeker's intention has been confirmed with a competent authority', and an asylum application is considered to have been lodged as soon as the competent authority receives a written statement, a form or a record drawn up by the authorities. But the CJEU also determines that the application for international protection exists before it is submitted in writing, that is, when a third-country national verbally expresses his or her intention to seek international protection to a competent authority (the first stage, which must be differentiated from 'lodging').

We believe that the stipulations in Article 35a, on rejection of an application and issuance of a return decision, would undermine the suspensive effect of the appeal provided for in Article 54, which guarantees the applicant's stay until the expiry of the time limit for lodging appeals provided for in the same article.

This is hardly compatible with the automatic issuance of a return decision together with the decision rejecting the application for international protection. Referring to the Return Directive entails undermining the established guarantees. Some examples are the use of a form instead of a reasoned decision, the 48-hour deadline for lodging an appeal against the return decision (whereas the deadline to appeal a decision rejecting international protection is from one week to two months) and the extension of the cases where detention is applicable. This automatic issuing of a return decision at the same time as the decision rejecting international protection jeopardises the individual assessment provided for in Articles 2 and 3 of the European Convention on Human Rights.

Furthermore, we consider it necessary to abolish the use of an accelerated procedure for applicants or stateless persons from a third country for which the proportion of decisions granting international protection by the determining authority is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower (Article 40(1)(i)), as it is the individual situation of each applicant that must be taken into account. Some of the persons of a certain nationality who fall below this 20% recognition rate may be victims of individual persecution. In compliance with Article 3 of the Geneva Convention, the analysis must be individualised and non-discriminatory, never based of nationality alone.

Similarly, Article 40(1)(c) and (f) should be deleted. With regard to paragraph c), which refers to the assessment of the presentation of false documents or the withholding of information detrimental to the application, it should be noted that the lack of legal and safe channels push people in need of international protection to arrive at borders without documentation attesting their nationality and identity. Moreover, the Geneva Convention forbids criminal penalties to refugees who have been forced to enter safe territory irregularly. Regarding paragraph f), given the serious consequences for the applicant and the Member States of determining that the applicant may pose a danger to national security or public order, each case should be studied in detail and not under the accelerated procedure.

With regard to the provisions relating to border procedures (Article 41), we consider that paragraphs b), c) and d) of Article 41.1 should be removed, since they involve an increase in the number of cases covered by a procedure that entails loss of guarantees and shorter deadlines. Furthermore, the concepts used are imprecise and lead to defencelessness and lack of legal certainty. Applying Article 41b) would mean using this type of procedure with persons arriving on the islets or via the enclaves

of Ceuta and Melilla. Of particular concern is the application of this type of procedure to persons who are disembarked after a search and rescue operation, where it is necessary to conduct an individual analysis to identify any specific needs, and to provide a differentiated treatment depending on gender, age, victims of physical or sexual violence, torture or trafficking, among others. Consistent with the deletion of 41(1)(d), Article 41(8) should also be removed, since no applicant should be subject to two border procedures in two different Member States. Similarly, all references to this scenario in the following paragraphs should be deleted.

Additionally, we consider it necessary to eliminate the application of the border procedure to unaccompanied minors and to any minors below the age of 18 (article 41.5). It is essential to guarantee the best interest of the child. Furthermore, minors should never be detained. Given their lack of definition, border areas or nearby zones could fall outside the scope of procedural guarantees and judicial control.

As for the time limits, they cannot be extended beyond the provision of the current Minimum Standards Directive, which establishes 3 working days for the lodging of an application from its registration. However, article 41.10 of the Procedures Proposal extends this period to 5 days. Moreover, the maximum time limit of 12 weeks established in paragraph 11 contradicts the phrase 'as soon as possible'.

Article 41(13) refers to the examination of applications in a border procedure, and provides that persons at the external border or in transit zones must remain there. In this regard, it is worth mentioning that in Spain, in this type of situation, third-country nationals may be detained in CIEs (migrant detention centres) or airport facilities, or received in CATEs (Centre of Temporary Attention for Foreigners) or CETIs (Centre of Temporary Stay of Immigrants) if they arrive by sea or land. These facilities have an approximate total capacity of 5,000 places. In 2020, Spain received 41,861 arrivals, most applicants being of nationalities with low recognition rates. Therefore, the minimum standards of reception would not be ensured during the procedure due to the lack of the necessary reception infrastructure.

It is essential to ensure compliance with the obligations (information, interpreting services, access to counselling or advice) of the responsible authorities in detention centres and at border posts, especially when dealing with unaccompanied minors, persons suffering from mental health problems or persons who may be in need of international protection because of their country of origin.

It is also fundamental that these authorities are adequately trained to address persons in vulnerable situations.

Article 41.bis of the Procedures Proposal introduces a new maximum detention period of 12 weeks from the rejection of the application for international protection. As mentioned above, this period is incompatible with the phrase 'as soon as possible'.

The proposal builds on the Return Directive to extend the cases of detention if there is a risk of absconding. A risk of absconding will thus be presumed, unless proven otherwise, where the following criteria are met: use of false or forged identity documents or destruction or disposal of any other form of existing documents; violent or fraudulent opposition to the return procedures; failure to comply with measures aimed at preventing the risk of absconding; failure to comply with an existing entry ban.

These criteria include circumstances that affect a large number of asylum seekers, given the absence of legal access channels (lack of documentation, false or forged identity documents), without this

implying a risk of absconding. The four criteria above, unless otherwise proven, place the burden of proof on the applicant, and this could be disproportionate for those whose application has been rejected.

As regards Article 43, on the exceptions from the right to remain in subsequent applications, the 2020 proposal on Procedures provides for the deletion of the clear wording of paragraph (a), on subsequent rejected applications, to include an additional case (c), where the wording is confusing regarding its purpose and time criteria.

As to the right to an effective remedy (Article 53), the proposal should not limit the right to an effective remedy for beneficiaries of subsidiary protection against a decision rejecting their refugee status, even if the rights are comparable. This could compromise the principle of non-refoulement as these persons would no longer be covered by the Geneva Convention. Similarly, Article 54.3 should be deleted, since it seriously limits the right to an effective remedy by eliminating its suspensive effect. CEAR considers it essential to guarantee the suspensive effect of appeals in all cases, in accordance with the interpretation of the ECHR on effective remedy (in particular, ECtHR – AC and Others v. Spain, Application No. 6528/11). As a result, paragraphs 4 to 7, which refer to Article 54.3, should also be deleted.

The provision of paragraph 53.9, on applicants having only one level of appeal against decisions taken in the context of the border procedure, should be removed. It is more restrictive than some domestic laws, including Spanish Law, regarding the right to a second hearing, which is part of the fundamental right to effective legal protection.

Similarly, Article 53.7, which provides that the time-limit to lodge appeals for applicants from countries with a recognition rate below 20% may be reduced to one week, should also be deleted.

2.4. Regulation addressing situations of crisis and force majeure

This proposal complements the other proposals published along with the New Pact, in order to guarantee a comprehensive approach to asylum and migration management. This instrument (hereinafter, the Regulation on Crisis and Force Majeure)¹⁶ sets out a number of provisions to cover exceptional situations of mass influx of persons arriving irregularly in a Member State, rendering a Member State's asylum, reception or return system non-functional, as well as any situations where there is a risk of such arrivals.

This would provide for an adaptation of the standards regarding asylum and return procedures and the solidarity mechanism set forth in the RAMM Regulation, in order to guarantee that all Member States can respond to situations of crisis and force majeure. These measures include a simplified procedure and shortened timeframes for triggering the compulsory solidarity mechanism, the possibility of obtaining support for relocation from the EU Agency for Asylum, and the possibility of Member States providing assistance to each other in carrying out returns and return sponsorship. It also includes some exceptions to the Regulation on Procedure, such as the possibility to extend the scope of application of the border procedure to persons from countries with a recognition rate of 75% or lower, or to extend the duration for the examination of an application, or to establish exceptions to the provisions regarding the registration

¹⁶ PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ADDRESSING SITUATIONS OF CRISIS AND FORCE MAJEURE IN THE FIELD OF MIGRATION AND ASYLUM, available at: <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52020PC0613&from=es>

of applications for a longer period of time. The proposal of the Regulation on Crisis would also allow for exceptions to the Regulation on Procedure and the Return Directive for the management of returns, by extending the timeframe and the circumstances where the return border procedure would apply. In addition, this proposal would be allowing Member States to extend the time limits for the registration of applications set out in the proposed Regulation on Procedure, the time limits set out in the proposed RAMM for sending and replying to take charge requests and take back notifications by the Member State responsible, and the time limits for the implementation of the obligation to relocate or undertake return sponsorship.

The proposed Regulation on Crisis and Force Majeure sets out that the Temporary Protection Directive should be repealed and introduces the concept of 'immediate protection'.

As for the status of the negotiations, speaker Juan Fernando López Aguilar (S&D) presented his draft report, followed by an exchange of opinions, in the LIBE committee meeting on 30 November 2021. More than 600 amendments were proposed (the submission deadline was 11 January 2022). In this case, negotiations are underway to define the position of the European Parliament. The speaker has approached the crisis as a situation in which exceptions to the *acquis* are possible but limited, and with a more explicit element of solidarity. He has likewise introduced the concept of priority procedures in case of well-founded applications. All of which shall be subject to the search for commitments that will begin shortly. Lastly, the Council has made no remarks or amendments to the text.

CEAR REMARKS

The concepts are not well defined and are legally undetermined (Article 1), which involves the risk of a 'de facto suspension of the right to asylum'. The concept of 'imminent risk of crisis' is not properly defined and should be deleted. Similarly, the text does not provide a definition for 'massive influx' (which is in turn defined under the Temporary Protection Directive), and the concept of 'force majeure' is not defined with sufficient rigour and left entirely to the discretion of the Member States. Such a concept should be removed as it could be used by Member States to justify not fulfilling their obligations.

The definition of the concept of 'crisis' overlaps with the definition of migratory pressure in the RAMM proposal, leaving a wide margin of discretion to Member States. Moreover, the Return Directive and the Asylum Procedure Directive already provide standards to adapt the system to emergency situations, including the extension of time limits. The concept of crisis should be in accordance with the idea of emergency under Article 78.3 of the TFEU, as suggested in the analysis requested by the European Parliament's LIBE Committee .

It is also important to bear in mind that including a situation of 'political crisis' in the concept of force majeure could be used by Member States to circumvent their obligations under EU asylum law. No indicators other than population and GDP would be considered.

The proposal provides for an adjustment of the solidarity mechanism (Article 5) included in the RAMM. It proposes a flexible tool for solidarity *à la carte* whereby Member States would be given the choice of contributing through return sponsorship. Such a mechanism should include mandatory relocation quotas and delete the option of return sponsorship, since the proposed approach may increase the risk of dispersion, clarity and fragmentation in the implementation of the CEAS, over-emphasise return-related issues to the detriment of reception and protection matters, and weaken rather than strengthen the chances of achieving a harmonised, common and integrated migration and asylum policy.

The proposal presumes that most persons in asylum or return procedures are not eligible for international protection (Articles 4 and 5), but the truth is that a large number of persons entering the EU during these emergency situations are refugees or in need of international protection.

The possibility of extending the time limit to register applicants for international protection must be deleted, or else the provision should ensure access to all the rights inherent to the status of applicant for international protection.

The implementation of the border procedure exacerbates the shortcomings with regard to the time taken to reach a decision, the impossibility of carrying out an assessment of persons in situations of special vulnerability, the obligation to apply differential treatment and the risk of violating the principle of non-refoulement.

The provision that the border procedure is to be used for applicants whose nationalities have an EU-wide average recognition rate of 75% or lower means that most of them will see their procedural safeguards limited. Recognition rates are not uniform across Member States and this criterion based on nationality violates the Geneva Convention, which prohibits discrimination on the basis of the country of origin of applicants for international protection.

The use of crisis asylum management and crisis return management procedures would lead to an increased use of detention. CEAR considers that detention should be the last resort. Furthermore, the crisis return management procedure involves the possibility of longer deadlines and detention. It raises a presumption of risk of absconding that could lead to a systematic use of detention. These new presumptions of risk of absconding should be eliminated, precisely because they involve a risk of abusing detention measures.

Article 10 of the proposed Regulation on Crisis and Force Majeure covers the granting of immediate protection. Given the apparent difficulty of implementing the TPD (Temporary Protection Directive) since it was adopted, due in part to the lack of political will and the need for a qualified majority voting in the Council, the added value of implementing a new mechanism is unclear. The TPD left it up to the Council to implement it, whereas the new proposal now stipulates that it will be for the Commission to decide whether to activate immediate protection. Up until 2022, twenty years after its adoption, the Commission had never proposed the activation of the TPD.

The definition of immediate protection (which would be replacing temporary protection) set out in the proposal is narrow, as it is limited to displaced persons who are forced to move due to generalised violence caused by armed conflict. It would be necessary to expressly include further grounds, as well as a more extensive interpretation, taking into account other reasons for forced displacement, such as climate and environmental factors, gender, political persecution, etc. Apart from that, the time limit for granting immediate protection (a maximum of one year) has been reduced compared to the previous time limit for temporary protection (a maximum of 3 years). Incidentally, we consider that *prima facie* recognition could be granted instead of immediate protection.

In CEAR, we believe that the TPD should not be repealed, and we have called for its activation on numerous occasions (in response to the Syrian emergency in 2015 or the Afghan emergency in 2020). Finally, with the conflict in Ukraine, the Council has unanimously activated this TPD, and this is something we welcome. The response of the European Commission and the Member States to the arrivals in the

EU as a result of the Russian invasion of Ukraine should serve as a precedent for managing future crises. It has shown that, if the political will is there, large numbers of refugees can be taken in and granted protection automatically. While this response certainly carries risks and difficulties, we believe that the TPD is the right instrument to support the Member States and persons affected by crises.

2.5. Amended proposal for a Regulation on the establishment of Eurodac

This proposal (hereinafter, Proposal for Amendment of the Eurodac Regulation) is aimed at reforming the European system for the comparison of fingerprints of asylum applicants (Eurodac)¹⁷, building on the provisional agreements between legislators, and complementing these changes to transform Eurodac into a common European database to support EU policies on asylum, resettlement and irregular migration. The new proposal barely introduces any changes with regard to the proposal made by the European Commission back in 2016, aimed at extending the scope of the Eurodac database to monitor not only asylum, but also migratory flows in the EU.

The new changes included in 2020, based on the 2016 proposal and the 2018 agreement between the European Parliament and the Council, reflect the need to connect Eurodac with other proposals contained in the New Pact on Migration and Asylum, particularly the pre-entry screening proposal and the RAMM.

The Proposal for Amendment of the Eurodac Regulation puts in place a clear and consistent link between specific individuals and the procedures they are subjected to in order to better assist with the control of irregular migration and the detection of unauthorised movements. It also supports the implementation of the new solidarity mechanism and contains consequential amendments that will allow Eurodac to function within the interoperability framework between EU information systems.

Eurodac was designed to guarantee the implementation of the Dublin system, which determines the Member State responsible for examining an application for international protection. The 2016 recast proposal reshaped Eurodac as a multi-purpose tool with broader objectives in terms of immigration, including mainly the following aspects:

1. **Broadening of the categories of persons** for whom data should be stored, to identify **irregular migrants** and persons resettled or eligible for resettlement.
2. **Lowering the age for obtaining and storing fingerprints of minors from 14 to 6 years.** The collection of biometric data of minors raise serious concerns regarding the protection of their rights in accordance with the UN Convention on the Rights of the Child.
3. Discretion of Member States to impose administrative sanctions to persons refusing to comply with the registration procedure, including the **possibility of using detention** 'as a means of last resort in order to determine or verify a third-country national's identity'. The possibility of **coercing children** to obtain biometric data is not excluded.
4. **New categories of personal data**, including identity information and facial image alongside the biometric data.

¹⁷ https://ec.europa.eu/info/sites/default/files/proposal-regulation-biometric-data_en.pdf

5. Disproportionate extension of the data storage period: maintaining the 10 year period for asylum seekers, and increasing it to 5 years for irregular immigrants (an unreasonably long period of time in relation to its intended purpose, which is the return to the country of origin).

6. Transfer of Eurodac data to third countries with the only aim of identifying and re-documenting the return and take back procedure.

The changes introduced by the 2020 Proposal for Amendment of the Eurodac Regulation are, firstly, the creation of a new category of data subjects (persons rescued from search and rescue operations at sea who apply for international protection); and secondly, the consistency with the screening procedure, by adjusting the time limits for the collection of biometric data to the duration of the pre-screening procedure, and by introducing a new category of data: screening of security records.

CEAR REMARKS

After assessing the proposal, CEAR considers that irregular migrants and applicants for international protection should be given a differentiated treatment. Additionally, safeguards should be introduced against racial profiling, intrusive screenings and abuse of discretion.

3. Other concerns

3.1. Highly-qualified workers Directive

In 2021, the European Parliament and the Council reached an agreement on new rules of entry and residence for highly qualified workers from outside the EU by virtue of the revision of the Blue Card Directive¹⁸. Reaching an agreement on the Blue Card was one of the key goals of the New Pact on Migration and Asylum for the Commission. The new scheme introduces efficient rules for attracting highly skilled workers to the EU, including more flexible admission conditions, enhanced rights and the possibility to move and work more easily between EU Member States. Once the Directive is formally adopted, Member States will have 2 years to transpose the rules into national law.

3.2. The new European Union Agency for Asylum

The New Pact on Migration and Asylum also includes a Regulation on the European Union Agency for Asylum¹⁹. The European Commission urged that the negotiations on this instrument, which were already underway since 2016, be concluded before 2020. Thus, this Regulation builds on the 2016 proposal and the Interinstitutional Agreement adopted between the European Parliament and the Council in 2017. The Regulation was formally adopted on 15 December 2021 and entered into force on 13 January 2022.

The Regulation transforms EASO into a European Union Agency of Asylum, that is, a fully-fledged agency with a broader and improved mandate. This new agency:

- Allows for the quick deployment of operational assistance to Member States.
- Establishes a permanent asylum reserve pool.
- Establishes a broader asylum training curriculum for national officials.
- Enables de production of recommendations, tools and analyses which support the work of national asylum and reception authorities.
- Enhances the cooperation with third countries to support asylum and reception capacity building (i.e., coordination of resettlement activities).
- Establishes an independent Fundamental Rights Officer to ensure that the rights of asylum applicants are always safeguarded.
- Gives an enhanced role to civil society organisations through a more independent Consultative Forum.

3.3. Proposal to amend the Schengen borders Code and Proposal for a Regulation addressing situations of instrumentalisation

In response to the events of November 2021 at the Belarusian border, when Belarus encouraged the irregular entry of migrants into the EU, European institutions adopted a series of measures which called into question the right to asylum.

¹⁸ DIRECTIVE (EU) 2021/1883 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2021:382:FULL&from=EN>).

¹⁹ REGULATION (EU) 2021/2303 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (<https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32021R2303&from=EN>)

As a result, a proposal was drawn up to modify the Schengen Borders Code²⁰, which includes several concerning provisions on external borders that aim to place greater control over them.

Under Article 2.27 of this proposal, the concept of ‘instrumentalisation of migrants’ is defined as a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, with an intention to destabilise the Union or a Member State. It is an indeterminate concept that entails a serious risk of Member States evading their responsibilities in terms of asylum. Moreover, in accordance with Article 5.4, a Member State facing this situation may limit the number of border crossing points, which may threaten adequate access to the asylum procedures. A new paragraph is introduced as Article 13.5, establishing that a Member State may intensify border surveillance in order to ‘address the increased threat’. This leaves the door open to potential breaches in access to the appropriate procedures, including the international protection procedure.

Additionally, the European Commission published a proposal for Amendment of the Instrumentalisation Regulation²¹ alongside the proposal to amend the Schengen Border Code. This proposal is aimed at supporting the Member State facing ‘a situation of instrumentalisation of migrants by setting up a specific emergency migration and asylum management procedure, and, where necessary, providing for support and solidarity measures to manage in an orderly, humane and dignified manner the arrival of persons having been instrumentalised by a third country, with full respect for fundamental rights’. This proposal includes the measures offered to Latvia, Lithuania and Poland in the proposal for a Council decision on provisional emergency measures.

Thus, the proposal establishes an emergency procedure for migration and asylum management at external borders in situations of instrumentalisation.

As regards the emergency procedure for asylum management, the proposal is as follows:

- Possibility for the Member State concerned to register an asylum application and offer the possibility for its effective lodging only at specific registration points located in the proximity of the border, including the border crossing points designated for that purpose.
- Possibility to extend the registration deadline to up to four weeks.
- Possibility to apply the asylum border procedure to all applications and possibility to extend its duration.

Regarding the emergency procedure for return management, the proposal states that the Member State concerned should be equipped with the necessary legal tools to ensure a swift return of those who do not qualify for international protection, with the possibility of making exceptions to Article 41.bis of the proposed Regulation on Procedure or to the application of the Return Directive (Article 2.2.a).

In CEAR, we consider that this could lead to the creation of a parallel system based on exceptions to the asylum rules, which poses serious risks to the fundamental rights of individuals, such as a prolonged use of detention at border. The actual meaning of ‘instrumentalisation’ remains unclear. Moreover, this kind of provisions should be debated in the framework of the proposals for a New Pact, following the existing channels of legislative control.

²⁰ European Commission, Proposal amending the SBC, COM(2021) 891, 14 December 2021

²¹ <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52021PC0890&from=EN>

4. Conclusions

The current situation shows that member States are facing major challenges. As early as 2016, Commissioner Avramopoulos highlighted the need to move towards an efficient, fair and humane asylum policy, which would also function properly regardless of migratory pressure situations, in order to achieve a truly common system. To this end, it is necessary to reach consensus on the definition and scope of solidarity mechanisms, border procedures and the application of a pre-entry screening mechanism.

The legislative proposals presented by the European Commission in the context of the New Pact on Migration and Asylum are a repetition of past recipes that have not helped to resolve the main migration challenges of the European Union. Furthermore, far from bringing positions and solidarity closer together, it consolidates the different approaches and views on key aspects such as solidarity and the fair distribution of responsibilities or procedures. All of this hampers and prevents the achievement of a truly efficient and guarantee-based Common European Asylum System. The negotiations underway are proving to be complex, and are a testament of the difficulties in reaching common positions and real commitments based on trust between Member States and on a real commitment to establishing a protection framework in line with the utmost respect for fundamental rights.

One of the main issues that remains unresolved is the excessive responsibility that often falls on the external border countries, such as Spain. As has already been pointed out throughout this report, the new proposals on pre-entry screening and border procedure increase this responsibility.

In relation to the system for determining which Member State is responsible for examining an asylum application (known as the 'Dublin System'), the new proposals continue to lay such responsibility in the first country of entry. At the same time, the proposed system of solidarity represents an *à la carte* approach for Member states, with too strong a focus on return and too little emphasis on the protection of persons arriving on European territory. Moreover, it does not include a mandatory relocation mechanism.

Besides that, some of the proposed provisions increase the complexity of the system and undermine safeguards, such as those on procedures and crisis management.

The proposals place too much emphasis on increasing returns, which could entail sending people back to unsafe countries. On the other hand, although it is still early to know whether certain countries will admit such returns, if they refuse, there is again a risk of persons being kept in prolonged detention or in legal limbos.

Again, the proposal is still lacking clearer proposals and specific commitments regarding legal and safe channels of access. Although the New Pact on Migration and Asylum includes a recommendation on resettlement and complementary pathways, it lacks greater commitment and ambition to increase the chances for people to safely obtain protection without having to risk or even lose their lives on dangerous migration journeys.

5. References

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