The CEAS reform package: the death of asylum by a thousand cuts?

Working papers
Number 6

January, 2017
Jesuit Refugee Service Europe
Brussels, Belgium

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Destroying trust in refugees and between Member States

1. EXECUTIVE SUMMARY:

The CEAS reform package continues a trend of externalisation and restriction in the European Union's asylum policy, rather than an improvement in solidarity, the quality of protection for forced migrants and the respect for international protection obligations.

The Dublin IV proposal reinforces the existing Dublin system with additional restrictions on asylum seekers and Member States to ensure that asylum seekers will be sent back to the first country of entry to the EU. This will put more pressure on the asylum and legal systems in Member States at the external borders such as Greece and Italy. Whilst some asylum seekers will be sent back to these countries, some asylum seekers will leave for other EU countries under the EU Relocation Scheme. Forced migrants will again be treated as mere packages to be either distributed or redistributed over and over again according to arbitrary categories and contradictory rules. Reinforcing Dublin is contradictory to this scheme and previous attempts to improve solidarity with refugees and between Member States in the EU.

Coercive measures (such as denying reception conditions to all forced migrants, including unaccompanied children, who do not stay within the first country of entry to the EU) are corrosive to the generation of trust between applicants and authorities. As they act as a strong disincentive for applicants and beneficiaries to remain engaged with authorities and the asylum determination process.

The proposals, if enacted, will not only fail the protection and reception needs of forced migrants, but also run the risk of again failing Member States (particularly those at the Union's external borders) and the Union as a whole.

The combined effect of the amendments represents a serious challenge to the safety and welfare of forced migrants. The infusion of temporary protection into the CEAS represents the erosion of the right to international protection as enshrined in the 1951 Refugee Convention. If enacted, subjecting both recognised refugees and those with subsidiary protection to regular status reviews will disproportionately impact families and children as well as presenting a real risk to the social inclusion prospects of beneficiaries of international protection.

Overall, the reform package represents a harmonisation down rather than up of protection standards in the EU. As witnessed in 2015 and 2016, restrictive measures fail both forced migrants and at achieving solidarity amongst Member States. Another race to the bottom would be highly dangerous in all respects.

1.1 KEY ISSUES:

Opening the hospital door with the safety chain on: following the so-called success of the EU-Turkey deal, instead of creating more safe pathways (e.g. humanitarian visas, liberalisation of family reunification etc.) to complement a functioning CEAS, ever more restrictive policies for accessing EU territory have been introduced. Even more forced migrants will die in the Mediterranean and on dangerous journeys in their attempts to reach safety.

Children travelling alone will be hit the hardest: if passed the proposals will put children more at risk of detention, more at risk of forced transfer under Dublin and also more at risk of forced finger printing under EURODAC – the minimum age for this has been lowered from 14 to just 6 years old.

Families will be kept apart: the right to family life as enshrined in the EU Charter and the ECHR will be undermined. Compulsory status reviews jeopardise education and employment opportunities, hampering the ability of families to maintain their dignity and provide a healthy and secure environment for children. The risks of destitution and social exclusion are increased. The use of compulsory admissibility criteria under Dublin will in many cases prevent asylum seekers from reuniting with family members already residing in other Member States.

Increasing the number of hurdles protection-seekers must jump: the proposals formalise the problematic concepts 'first country of asylum', 'safe third country', 'internal protection'. Forced migrants must pass initial screening tests before they are even allowed to lodge an application for international protection.

We'll protect you, but only for a while: the introduction of compulsory status reviews undermines the security and permanency of status for beneficiaries of international protection. This approach is entirely at odds with the levels of displacement that the world is currently facing. It will simply cripple the ability of refugees to build new and successful lives within the EU.

Increasing rather than reducing detention: the legislation potentially creates more circumstances in which asylum seekers could be detained, such as if they deny to provide their fingerprints. Detention can cause long-lasting psychological damage and JRS Europe continues to strongly advocate against its widespread use by Member States. Alternatives to detention must be used in order to reduce human suffering.

1.2 RECOMMENDATIONS:

With a focus on the legal and conceptual limitations of the CEAS reform package, JRS Europe calls upon the European Union (EU) institutions to:

Stop the externalisation of protection responsibilities:

- Assume responsibility to extend international protection to all forced migrants who fulfil the protection criteria as laid out in the 1951 Geneva Convention. This means that migration management cannot be misused to outsource responsibility for the asylum claims of protection-seekers to so-called 'safe third countries'.
- Refrain from viewing the EU-Turkey Deal and the hotspot approach as desirable policy outcomes to emulate. The political dimensions of the EU-Turkey Deal are characterized best by volatility and European dependence on Turkey's good-will. At the same time, the hotspot approach strengthens legal provisions that undermine existing rights of forced migrants. Committing to the strategy of externalizing migration by modelling the CEAS reform package along this approach not only proves detrimental to vulnerable people, it also draws a picture of a reactive and politically indeterminate EU.
- JRS Europe calls for "effective protection" to replace the problematic notion of "sufficient protection". The standard against which protection is measured in third states must be equivalent to or higher than the EU level of protection. JRS Europe calls on the EU to prevent the return of people to countries where there is no access to "effective protection".
- Provide the *European Union Agency for Asylum* (EUAA) with a pronounced protection mandate to ensure that protection concerns rather than political concerns guide decisions to endorse common EUAA-Member State analyses. JRS Europe calls upon the EU to ensure that EUAA regularly consults and cooperates with civil society organisations in the field to provide better safeguards against an erosion of rights and standards, instead of solely relying on Member State approved information.

Commit to greater solidarity with refugees and between Member States:

- Allow Member states to trigger the corrective allocation mechanism already when they reach their maximum intake of refugees. This entails setting a new threshold of 100% instead of what was proposed to be 150%. Overstepping national capacities prevents states to ensure that reception conditions and the rights of forced migrants are upheld at all times. JRS Europe calls on the EU to make the effective implementation of the corrective allocation mechanism a policy priority.
- Abstain from establishing sanctions to be taken against applicants for not fulfilling their obligations under EU law, at least where non-compliance is a result of Member State failure to meet procedural and reception condition standards that compel applicants and beneficiaries to seek protection and maintain their dignity in a Member State other than that of first entry or asylum.
- Withdraw the proposal's provision that provides for the applicants' loss of the right to appeal against the negative decision on the asylum claim issued in the first country of asylum once they have moved on to another Member State and are subsequently subjected to a 'take back'. JRS Europe highlights that this provision clearly contravenes Article 47 of the EU Charter.
- Amend the shortened time limits which would be the result of changing the legal formulation "reasonable period of time" to a strict seven-day period for the applicant to file an appeal. JRS Europe conceives this an unduly short time limit which is not compatible with the right to effective remedy as laid out in Article 47 of the EU Charter.

- Consider deletion of Article 28(4) of the Proposed Dublin IV Regulation, restricting the material scope of the appeal against transfer decisions only on grounds of inhuman or degrading treatment or punishment or the contravention of family protection obligations. This is not only contrary to Article 47 of the EU Charter (see recent CJEU decision in Ghezelbash) but also to Article 1 Protocol 7 ECHR, that includes the protection of the right to file an appeal against premature negative transfer decisions.

Prioritise social inclusion and integration of forced migrants in European societies:

- Critically examine the impact of its proposed curbing of residence rights and introduction of compulsory status reviews for refugees and for beneficiaries of subsidiary protection. Cessation and exclusion clauses in particular prove harmful to the well-being and integration prospects of forced migrants as they act as disincentives for both Member States and beneficiaries of international protection to commit to social inclusion processes.
- Clearly define the legal formulation of “significant change in the country of origin” because this is the basis for status withdrawal. The revised definition needs to be in line with refugee law and has to uphold the position that the vulnerability of beneficiaries of international protection qualifies them to receive the utmost legal protection against refoulement.
- Rectify the misrepresentation of family reunification criteria and live up to the understanding that children belong in the most vulnerable group of people in need of international protection. It is unacceptable to place an obligation to submit information and the burden of proof on applicants of family reunification to substantiate the presence of family members and relatives. In relation to the best interests of children applying for asylum, JRS Europe requires the EU to change the provision holding the first country of arrival responsible for the assessment of the child’s asylum claim. This is an illegitimate demand provided that the Court of Justice ruled in MA that the child’s best interest is reflected when their claim is heard in the country where they are currently present.
- Delete any provision legalizing reception conditions sanctions or constraints imposed on applicants that are counter-intuitive to encouraging and incentivising applicants to participate in integration measures. Taking a coercive and punitive approach is inappropriate given that the applicants’ motivations for moving to another Member State may well be the result of Member States’ failures to meet asylum determination, procedural or reception condition standards. Applicants cannot be punished for what are the failures inherent to the design of the Dublin system.
- Think beyond penalizing beneficiaries for residing in a country other than the one granting them asylum as this merely attempts to deal with the symptoms rather than targeting the underlying causes of onward movements by beneficiaries of international protection. JRS Europe suggests a system which incentivises beneficiaries to participate in integration programmes.
- Lower the period for the right of permanent residence to be established to two years, down from five, after which beneficiaries may reside in a Member State other than the one that gave them protection.

Abstain from the disproportionate and excessive use of detention:

- Clarify and upscale the protection objectives behind the definition of “absconding”. Absconding may not be interpreted loosely and a non-exhaustive list of factors constituting absconding is intolerable. JRS Europe proposes a narrow definition of absconding where action is only permitted as a means of preventing applicants or beneficiaries against whom substantiated legal accusations can be raised from leaving the country in which they are present.
- Reconsider and revise the provision of Article 8(3)(c) of the Proposed Reception Conditions Directive on the new circumstances in which detention may be ordered as it undermines Article 5(1)(b) ECHR and Article 6 of the EU Charter. Detention may not be issued in terms of non-compliance as is the case here, provided that Article 5(1)(b) ECHR prohibits detention for punitive purposes.

2. Introduction

The Common European Asylum System (CEAS) is, for the third time and so shortly after the implementation of the second phase, the subject of legislative reform. The CEAS reform package ("the reform package") covers the breadth of EU secondary legislation on international protection. However, notwithstanding the breadth of review, the reform package is breath-taking in its sheer lack of ambition to undertake a wholesale reconceptualisation of the CEAS and concretely address its inherent weaknesses – weaknesses that have long been manifest but which were dramatically compounded by events over the past 18 months. The reform package reveals not only a slavish adherence to the Dublin system but a harsher policy environment for forced migrants, mainstreaming key elements of the EU-Turkey Deal. The nature of the reforms, although lacking in vision, evidence an incremental approach. Seen in the isolation of the respective legislative texts, these incremental amendments are deceptively unassuming. However, their aggregate impact reveal the concretisation of the seismic shift in EU asylum policy that most visibly manifested in March 2016 in the form of the EU-Turkey Deal.

This policy discussion paper is designed to give an overview of the legal and policy implications of the "the reform package" at the present time. The paper is not designed to be an exhaustive statement or exploration of all issues – rather, its purpose is to highlight the key policy and legal challenges which the reform package presents from the perspective of forced migrants. In an effort to consolidate the key concerns amongst civil society actors, the paper acknowledges and draws upon the meticulous legal analysis conducted by ECRE,[1] the Christian Group,[2] the International Commission of Jurists,[3] the Meijers Committee,[4] and the European Data Protection Supervisor.[5]

Firstly, this paper recalls the policy context of the EU-Turkey Deal into which the reform package has been introduced and how the Deal has shaped the legislative response. Secondly, the paper progresses to identify the key features of the reform package, characterised by the commitment to the existing Dublin principles, the insertion of a permanent corrective allocation mechanism, and the attempts to harmonise asylum procedures and reception conditions across Member States. Thirdly, through identifying cross-cutting themes across the reform package, the paper explores the cumulative effects of the proposals.

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[1] The complete collection of legal analyses on the reform package can be found at AIDA (2016), "ECRE completes analysis of Common European Asylum System reform proposals", 9 November.

[2] ACT Alliance EU, Caritas Europa, CCME, COMECE, Don Bosco International, ICMC, European Federation of the Community of Sant'Egidio, JRS Europe, Protestant Church in Germany, QCEA (2016), "Comments on the European Commision's proposal for a regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application international protection lodged in one of the Members States by a third-country national or stateless person - Dublin IV - (recast – COM (2016) 270 final)", October, Brussels.

[3] International Commission of Jurists (2016), "Procedural rights in the proposed Dublin IV Regulation", 27 September.

[4] Meijers Committee (2016), "Statement on behalf of the Meijers Committee During the Public Hearing on 'The reform of the Dublin System and Crisis Relocation' of 10 October 2016 by Ms. Nejra Kalkan, Executive Secretary"; Meijers Committee (2016), "Note on the proposed reforms of the Dublin Regulation (COM (2016) 197), the Eurodac recast proposal (COM (2016) 272 final), and the proposal for an EU Asylum Agency (COM(2016)271 final)", CM1609; 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)", CM 1614.

[5] European Data Protection Supervisor ("EDPS") (2016), "Opinion on the First reform package on the Common European Asylum System (Eurodac, EASO and Dublin Regulations)", Opinion 07/2016, 21 September.

When looking at the cumulative effects of the reform package, there is a high risk that the reform package will compound, rather than relieve, inequalities experienced in frontier Member States due to adversely compelling and prolonging their responsibilities, leading to outcomes that run a substantial risk of negatively affecting both Member States and forced migrants alike.

3. Context

In order to assess the implications of the reform package, it is necessary to place it within the context of the EU-Turkey Deal of 18 March 2016.[6] That deal (or "statement"[7]) represents a seismic shift in EU asylum policy and characterised by closer relations with Turkey, the closure of the Balkan Route and a policy focus on Greece. The result was a policy of 'containment' of asylum seekers in Greece.[8]

The EU-Turkey Deal has been hailed as a "success" on more than one occasion by the Commission,[9] as well as by certain think tanks.[10]

Firstly, the definition of "success" bears scrutiny. The Commission has attributed the reduction in numbers arriving in Greece directly to the EU-Turkey Deal.[11] "Success" has been narrowly defined by the purported effectiveness of the EU-Turkey Deal to reduce the number of arrivals in Greece. The ability of states to control migration has been the subject of considerable academic discussion, particularly in light of prior attempts to measure the effectiveness of migration policies with methodological shortcomings stemming from discursive, implementation and efficacy gaps.[12] Although the "effect" or "effectiveness" of the EU-Turkey Deal will not be examined here, Spijkerboer has observed that the number of arrivals reaching Greece dropped dramatically in the months preceding the Deal and had stabilised before the deal was finalised and implemented, leading him to conclude that the reduction in numbers

[6] European Council (2016), EU-Turkey Statement, 18 March 2016, 18 March; see also 9 European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council, Next Operational Steps in EU-Turkey Cooperation in the Field of Migration, COM(2016a) 166 Final, Brussels, 16 March.

[7] Sophie In't Veld is reported as noting that the Commission used the term "agreement" until 19 April, after which time it used the term "statement" to describe the EU-Turkey Deal: see, N. Nielsen (2016), "EU-Turkey deal not binding, says EP legal chief", EU Observer, 10 May.

[8] JRS Europe (2016), "The EU-Turkey Deal – Analysis and Considerations", JRS Europe Policy Discussion Paper, 29 April.

[99] European Commission (2016b), Communication from the Commission to the European Parliament, the European Council and the Council – Second Report on the progress made in the implementation of the EU-Turkey Statement, COM(2016c) 349 final, Brussels, 15 June, P.2; European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council – Third Report on the progress made in the implementation of the EU-Turkey Statement, COM(2016) 634 final, Brussels, 28 September, P.2; E. Zalan (2016), "Turkey and EU hail successes of migrant deal", EU Observer, 20 April.

[10] European Stability Initiative (2016), "Fire in the Aegean – Scenario of failure – How to Succeed", ESI Newsletter 7/2016, 11 October; Heinrich Böll Stiftung (2016), "The EU-Turkey Refugee Deal: Failure, Success or Betrayal of European Values?", Event Report, Brussels, September.

[11] European Commission (2016b), op. cit., European Commission (2016c), op. cit.

[12] M. Czaika, and H. de Haas (2013), "The effectiveness of immigration policies", *Population and Development Review*, Vol. 39, No. 3, pp. 487-508 at pp. 487-488; H. de Haas and M. Czaika (2013), "Measuring Migration Policies: Some Conceptual and Methodological Reflections", *Migration and Citizenship*, Vol. 1, No. 2, pp. 40-47, at pp. 40-41; see also M. Provera (2015), "The Criminalisation of Irregular Migration in the European Union", CEPS Liberty and Security in Europe Paper, February, pp. 7 and 23.

may not be caused by the Deal itself.[13] If one were to accept that conclusion, one might ask whether the "success" of the Deal is not *actual* control – but rather *the perception* of control. Human Rights Watch observes that the EU-Turkey Deal should not be seen in isolation, but rather recalls the parallel developments of border closures on the Balkan Route and the deterrent effect of being stranded in Greece.[14] Accordingly, one might ask whether the perception of control that is attributed to the EU-Turkey Deal (and distinct from other measures such as the closure of the Balkan Route) is of just as much political capital as actual control.

Secondly, this rather narrow definition of "success" is representative of a State-centric perspective rather than a protection-centric perspective. If the perspective of forced migrants is taken, the Deal can hardly be the resolution to their search for dignity and protection. If the perspective of the international community is taken, the success of the Deal also represents the deflection of responsibility for international protection to outside the EU, further diminishing the will to formulate an approach based on international solidarity. If this approach were extended by all States, it would result in the perpetual deflection of responsibilities to protect forcibly displaced people.

Thirdly, the perceived "success" of the EU-Turkey Deal has motivated a similar approach by the EU to 'priority' third countries identified as Niger, Nigeria, Mali, Senegal.[15] Germany's Chancellor Merkel has also called for an EU-Turkey-style deal with Tunisia and Egypt.[16]

Fourthly, the proliferation of such approaches also begins to concretise not only the hotspot model (a concept still bearing no basis in EU law) but also reinforces the misguided notion of "good" refugees (those that stay in Third Countries and out of Europe) and "bad" refugees (those that come to Europe). This deserving/undeserving dichotomy reinforced by the EU-Turkey Deal (and its like) ignores the fact that the primary legal obligation of Member States is to examine the asylum claims of those on its territory.[17] Dealing with those outside EU territory in Third Countries (particularly in the form of resettlement) represents an entirely voluntary commitment and, with it, the possibility for selectivity (two features which are not at the disposal of States when dealing with those who have reached their territory due to the prohibition of non-*refoulement* and the prohibition on discrimination under the Geneva Convention[18]).

Fifthly, consideration should be given to how the civil society call for "safe and legal" routes to protection in Europe has been co-opted into the justification for such agreements. The call for "safe and legal" routes to protection in Europe is a response to the EU's territorial notion of asylum – that is, through the use of existing EU instruments to overcome the legal and other obstacles placed in forced migrants' paths to gain safe access to EU territory, a claim for

[13] T. Spijkerboer (2016), "Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths?", University of Oxford, Border Criminologies Blog, 28 September.
[14] Human Rights Watch (2016), "Q&A: Why the EU-Turkey Migration Deal is No Blueprint", 14 November.
[15] European Commission (2016), Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 Final, 7 June ("the Partnership Framework"); EBL News (2016), "Balkan route countries call for tighter borders to halt migration", 24 September; European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council, First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 700 final, 18 October; E. Maurice (2016), "EU hails first result in Africa migration deals", EU Observer, 18 October.
[16] Reuters (2016), "Merkel: We need migrant deals with African states like EU-Turkey pact", 26 September; H. P. Siebenhaar (2016), "Merkel Wants Refugee Deal With Egypt", Handelsblatt Global, 26 September.
[17] Article 3(1), Dublin III Regulation.
[18] Articles 3 and 33(1) Geneva Convention.

protection can then be made. The EU Resettlement Framework[19] and the EU Partnership Framework[20] both reference the "safe and legal" mantra but, when viewed in the broader context of the CEAS reform, it is arguable that "safe and legal" has been instrumentalised to essentially justify a highly restrictive migration and asylum policy by conflating irregular modes of arrival with "illegal" and, at the same time, opening a small window to forced migrants to access asylum procedures. Civil society's call for "safe and legal" ways to reach Europe was about providing modes *complementary* to a well-functioning CEAS, not in *substitution* for it.[21] The appropriation of "safe and legal" in the Commission proposals has arguably been used to justify ever more restrictive policies for accessing the territory, whilst at the same time providing disproportionately limited avenues for forced migrants to arrive regularly. It is analogous to opening the hospital door with the safety chain on.

Even if it is accepted that the EU-Turkey Deal is a "success" and one sets aside its consequences, the fragility of the Deal has been a key concern since shortly after its inception. Turkey has, over the past months, indicated a number of times its intention to cease upholding its end of the Deal, particularly given that visa liberalisation for Turkey has stalled due to Turkey not conceding to EU demands to change its terrorism laws.[22] More recently, Turkey's position seems to have been more optimistic – particularly given recent diplomatic efforts[23] and the launch of DG ECHO's EUR348m debit card initiative for refugees in Turkey.[24] However, that optimism seems to have been short-lived.[25] Although a real measure of the

[19] European Commission (2016), Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM(2016) 468 final, 13 July ("the proposed Resettlement Framework"), Explanatory Memorandum pp. 3, 4, 7, 8 and 9, Recital 9, Article 3(a) and (b).

[20]European Commission (2016), Communication from the Commission to the European Parliament, The European Council, The Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, 7 June, p.8.

[21] Caritas Europa, CCME, COMECE, Eurodiaconia, ICMC, JRS Europe, QCEA (2014), "Recommendations for the development of safe and legal paths to protection in the European Union", 19 November, Brussels, p.4, para 18.

[22] N. Nielsen and E. Zalan (2016), "EP stops work on Turkey visa waiver", EU Observer, 10 May; K. Siegfried (2016), "The EU-Turkey migration deal is dying. What's Plan B?", IRIN, Oxford, 3 June; J. Stares (2016), "Cyprus sidelined as Brussels scrambles to save Turkey migrant deal", Politico, 6 June; N. Nielsen (2016), "EU-Turkey readmission deal in doubt", EU Observer, 6 June; J. Barigazzi (2016), "'Fragile' progress on EU-Turkey migration deal", Politico, 15 June; N. Nielsen (2016), "Pay up on migrant deal, Turkey tells EU", EU Observer, 26 July; D. Gatoploulos & E. Becatoros (2016), "With Turkey in turmoil, EU migrant deal back under fire", Yahoo News, 26 July; Reuters (2016), "Turkey says to back away from EU migrant deal if no visa-free travel", 31 July; Deutsche Welle (2016), "Turkey out of migrant deal if EU fails of visa-free travel: Cavusoglu", 31 July; N. Nielsen (2016), "Turkey threatens to scrap migrant deal with EU, again", EU Observer, 1 August; E. Maurice (2016), "Turkey threatens to scrap refugee deal, again", EU Observer, 26 August; J. Stearns (2016), "EU's Refugee Pact with Turkey May Collapse Over Visa Dispute", Bloomberg, 26 August; NOS (2016), "Bedenker Turkijedeal vindt uitwerking een schande", 31 August.

[23] N. Nielsen (2016), "EU in Turkey charm offensive", EU Observer, 1 September; European Commission (2016), Remarks by Commissioner Avramopoulos at the Press Conference with Turkey Minister of EU Affairs Ömer Çelik, Ankara, 1 September; E. Maurice (2016), "EU ministers look for ways to appease Turkey", EU Observer, 2 September; VOA (2016), "Turkey Vows to Uphold Migration Deal With EU", 3 September; J. Barigazzi (2016), "EU and Turkey seek help to resolve terror law dispute", Politico, 3 September; E. Maurice (2016), "Turkey sends EU mixed messages on migration", EU Observer, 4 September; EU Observer (2016), "Report: Turkey relaxes EU visa waiver demands", 5 September.

[24] European Commission (2016), "EU announces more projects under the Facility for Refugees in Turkey: €348 million in humanitarian aid to refugees in Turkey", press release, Brussels, 8 September; The Brussels Times (2016), "Ahead of crucial meeting in Ankara: EU announces electronic cash cards for refugees in Turkey", 8 September; Aljazeera (2016), "EU to issue pre-paid cash cards for refugees in Turkey", 26 September.

[25] Zeit Online (2016), "Türkei droht mit Ende des Flüchtlingsabkommens", 3 November; Council of the EU (2016), "Declaration by the High Representative on behalf of the EU on the latest developments in Turkey", 8 November

fragility of the deal is difficult to accurately assess, it does raise the question of what is to be the 'Plan B' if it ends? Indeed, the Deal is not the only aspect that is fragile - the hotspot approach (already under extreme pressure) is also a source of fragility in the event of an increase in the rate of arrivals.

The EU-Turkey Deal is also reflected in the design of CEAS reform package and supporting legislation. For what were meant to be "temporary" measures,[26] it is of grave concern that the key features of the Deal and the relocation/hotspot approach have become mainstreamed in the reform package. Looking at some of the key characteristics of the EU-Turkey Deal, a counterpart approach can be found in the CEAS reform package: firstly, the use of mandatory admissibility procedures based on the safe third country and first country of asylum concepts;[27] secondly, the exclusion of persons who have irregularly entered, stayed or attempted to enter EU territory in the past five years from eligibility for resettlement (adopting and extending the core element of the 'one for one' approach under the EU-Turkey Deal and revealing that the Resettlement Framework places an emphasis on migration control);[28] and thirdly, the mobilisation of EU funding as leverage for Third Country adherence to EU migration outcomes (most notably the conditionality of development aid as contemplated in the EU Partnership Framework[29] and the risks of politicising humanitarian funding through "programming" – a concept, as Den Hertog points out, not normally associated with humanitarian assistance[30]).

Accordingly, the EU-Turkey Deal has been hailed as a "success" but its purported consequences are not above scrutiny, least of all from the perspective of forced migrants and

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2016; Andalou Agency (2016), "Turkey deems EU foreign chief's comments 'unacceptable'", 8 November; R. Middleton (2016), "Report slamming Turkey on free speech and democracy could derail EU refugee deal with Erdogan", International Business Times, 9 November; A. Rettman & E. Zalan (2016), "EU must not ditch Turkey, ministers warn", EU Observer, 15 November; M. de la Baume (2016), "Parliament vote to freeze EU accession talks angers Turkey", Politico, 17 November; D. M. Herszenhorn (2016), "Loud calls in Parliament for ending EU membership talks with Turkey", Politico, 22 November; N. Nielsen (2016), "MEPS intensify push to halt Turkey talks", EU Observer, 23 November; Reuters (2016), "EU lawmakers urge halt to Turkey EU membership talks", 24 November; N. Nielsen (2016), "EU in damage control on festering Turkey relations", EU Observer, 25 November; Daily Sabah (2016), "EU leaders stress closer cooperation with Turkey, disregard EP's baseless decision", 27 November. See also, A. Paul and D. M. Seyrek (2016), "The EU cannot afford to just 'muddle through' on Turkey", European Policy Centre, Commentary, 8 December.

[26] European Council (2016), EU-Turkey Statement, 18 March 2016, 18 March, para 1; European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council, Next Operational Steps in EU-Turkey Cooperation in the Field of Migration, COM(2016) 166 Final, Brussels, 16 March, p. 2, para 2.1 and p. 9, para 3; European Council (2016), Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 239, 15 September, Recital 6 and Article 13(2).

[27] Article 3(3) of the Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) ("proposed Dublin IV Regulation"); and Article 36(1) of the 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 ("the proposed Procedures Regulation").

[28] Article 6(1)(d) of the proposed Resettlement Framework.

[29] The Partnership Framework, op. cit.; JRS Europe (2016), "Civil society calls on EU Council to uphold migrants' rights", 27 June; see also European Parliament (2016), "Growing impact of EU migration policy on development cooperation", Briefing, October.

[30] Note the considerable position of power by virtue of the advisory status of Turkey under Article 5(1) of Commission Decision of 24.11.2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism – the Refugee Facility for Turkey, C(2015) 9500 final, 24 November: L. Den Hertog (2016), "EU Budgetary Responses to the 'Refugee Crisis' – Reconfiguring the Funding Landscape", CEPS, LSE Paper No. 93, May, p. 11.

international solidarity. The hails of "success" have also paralleled the mushrooming of discussions to implement similar agreements with other Third Countries, justified by "safe and legal" but with a clear focus on migration management. Although it is difficult to quantify the fragility of the EU-Turkey Deal, which is purportedly temporary in nature in any event, key elements of the Deal look set to have a more mainstream and enduring quality under the reform package.

4. Key Features of the CEAS Reform Package

The CEAS reform package consists of three key features. Firstly, the commitment to the existing Dublin mechanism; secondly, the introduction of the corrective allocation mechanism within the proposed Dublin IV Regulation; and thirdly, attempts to harmonise the implementation of CEAS legislation.

The Dublin IV Regulation's express objectives are to increase the efficiency and effectiveness of determining the Member State responsible for determining the application; to ensure a fair sharing of responsibilities through the corrective fairness mechanism; and to discourage abuses and prevent secondary movements.[31] However, JRS Europe is concerned that Dublin IV, as proposed, would compound, rather than relieve existing distribution inequalities.

4.1 Commitment to the existing Dublin mechanism

The proposed Dublin IV Regulation is committed to the existing mechanism – essentially leaving intact the responsibility of first Member State of asylum to determine the asylum claim[32] but with a corresponding obligation on applicants to apply in the first Member State of entry or prior lawful stay.[33] The bulk of that responsibility will be borne by frontier Member States who will be additionally compelled to undertake mandatory admissibility assessments.[34] Given the inequalities that have resulted from the inherent design of the Dublin system, the commitment to this system design is breath-taking in its lack of ambition at a time when a wholesale revision of the CEAS is sorely needed.

Firstly, notwithstanding high levels of coercion, there are few incentives for both Member States and asylum seekers to comply with its requirements. Indeed, this has been a characteristic of the current CEAS.[35] Under the proposed Dublin IV Regulation this characteristic is perpetuated. Member States are incentivised *not* to undertake admissibility assessments because only those asylum seekers whose applications are not inadmissible are eligible to be subject to the Dublin hierarchy.[36] This is further compounded because the proposed Dublin IV Regulation contains a 'one shot rule' meaning that the hierarchy of criteria

[31] Explanatory memorandum to the proposed Dublin IV Regulation, pp. 3-4.
[32] Article 3(2), proposed Dublin IV Regulation.
[33] Article 4(1), proposed Dublin IV Regulation.
[34] Article 3(3), proposed Dublin IV Regulation.
[35] M. Den Heijer, J. Rijpma, and T. Spijkerboer, "Coercion, prohibition, and great expectations: the continuing failure of the Common European Asylum System" *Common Market Law Review*, Vol. 53, pp. 607-642 at pp. 614-615.
[36] Article 3(3)-(5), proposed Dublin IV Regulation.

can only be applied *once*,[37] as well as being underscored by the limited material scope of review of Dublin decisions (discussed further below).[38]

Secondly, changes have been made which sustain a Member State of first entry or asylum's responsibility. A Member State will be responsible for determining the asylum application where the asylum seeker has held a residence permit less than two years previously or held a visa which expired less than six months before the first asylum application.[39] Under the current Dublin III Regulation, a Member State's responsibility to determine an asylum application ceased 12 months after an asylum seeker left the territory but that Member State is now responsible in perpetuity due to the deletion of the cessation of responsibility clause.[40] In addition, under the current Dublin III Regulation, responsibility shifts from the Member State of entry to the Member State where the asylum seeker is physically present after a period of five months – under the proposed Dublin IV Regulation this provision has now been deleted meaning that presence by secondary movement can no longer shift responsibility to another Member State.[41] Collectively, these two provisions also go to the very heart of defeating church asylum.[42] Similarly, if a Member State has been compelled to take back an asylum seeker, this obligation no longer ceases three months from the date the asylum seeker departed from the EU also due to the deletion of that provision.[43] In the case of admissibility assessments, the Member State conducting the admissibility assessment will be responsible for the application if the application is declared inadmissible[44] and will remain so if the asylum seeker makes a subsequent application.[45]

Thirdly, the consequences of sustained Member State responsibility and the additional steps required to undertake an admissibility determination will disproportionately affect frontier Member States. This approach risks creating even more administrative burdens due to the additional procedural hurdles that must be applied based on the obligation to assess whether the asylum seeker has come from a first country of asylum, safe third country, safe country of origin or is a threat to public order and security before applying the Dublin responsibility hierarchy.[46] JRS Europe is concerned that this may also result in corresponding pressure on the significantly overstretched hotspot approach, resulting in compounding the challenges in asylum determination procedures, as well as provision for reception conditions whilst

[37] Article 9(1), proposed Dublin IV Regulation.
[38] Article 28(4) and Recital 24, proposed Dublin IV Regulation. See further, ECRE (2016), "ECRE Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270", October, p. 10.
[39] Articles 14(1)-(2), proposed Dublin IV Regulation.
[40] Article 13(2) deleted from 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 (recast) ("the current Dublin III Regulation"); See Article 15, proposed Dublin IV Regulation.
[41] Article 13 (2) second paragraph has been deleted from the current Dublin III Regulation; see Article 15, proposed Dublin IV Regulation.
[42] In the context of their engagement for refugees and other forced migrants, parishes or religious orders sometimes accommodate persons who are about to be deported or transferred to a country where they would face serious human rights violations ('church asylum' or 'sanctuary'). The purpose is to open a dialogue with the responsible state authorities in order to achieve a review of the previous deportation order. JRS is involved in some of these 'church asylums' and supports the respective parishes and communities financially and politically. In many cases, 'church asylum' has been effective in the meaning that authorities have indeed rescinded deportation orders and provided the persons in question with residence permits.
[43] Article 19 of the current Dublin III Regulation has been deleted under the proposed Dublin IV Regulation.
[44] Article 3(4), proposed Dublin IV Regulation.
[45] Article 3(5), proposed Dublin IV Regulation.
[46] Article 3(3), proposed Dublin IV Regulation.

applicants are having their admissibility or substantive application examined. Indeed, the consequences of sustained responsibility may themselves *give rise* to the very reason why secondary movements occur in the first place – the maintenance of dignity when reception conditions breach human rights standards and to ensure the best prospects of accessing the procedure and/or having one's asylum claim determined when determination systems fail.[47]

4.2 Corrective allocation mechanism

Notwithstanding the commitment to the existing Dublin mechanism, a "corrective allocation mechanism" has been incorporated into the proposed Dublin IV Regulation in an attempt to address the inequalities of responsibility amongst Member States. Based on a "reference key",[48] it operates when a Member State exceeds its 150% of its allocation of asylum applications under the key,[49] and ceases when the number of asylum applications falls below 150% of its allocations under the reference key.[50] There is no justification given in the proposal for why 150% is identified as the suitable figure.

The very existence of the corrective allocation mechanism is a tacit admission that the design of the proposed Dublin IV Regulation will continue to compound the inequitable distribution of asylum seekers, particularly as regards frontier Member States. This is at odds with the stated objective of a "fair sharing of responsibility between Member States"[51] or solidarity contemplated by Article 80 TFEU.

The proposed corrective allocation mechanism operates in *parallel* to the Dublin system, not in *substitution* for it, leading to the potentially incongruous situation whereby the 'benefitting Member State' (that is, the Member State whose 150% allocation of asylum applications has been reached) may still be expected to *receive* Dublin transfers from other Member States yet simultaneously may be *sending* asylum seekers to other Member States under the corrective allocation mechanism. JRS Europe supports ECRE's calls for Dublin transfers to the benefitting Member State to be suspended during the operation of the corrective allocation mechanism.[52]

Even if one puts to one side those concerns, JRS Europe is concerned that waiting for a Member State to exceed 150% of its allocation before the mechanism is triggered may mean reaching a point so critical that human rights standards and procedural standards have already been breached. A greater safeguard for the protection of rights would be for the threshold to be set at no more than 100% and maintained until such time as a significant reduction in applications has occurred in order to allow the Member State to introduce appropriate measures. Indeed, JRS Europe is also concerned that relying on numerical quantifiers introduces a degree of human commodification that may overlook the very real qualitative factors that reception conditions or asylum determination procedures have breached fundamental rights standards in real terms.[53] The 150% threshold also sits uneasily with

[47] See further, Council of Bars and Law Societies of Europe (CCBE)(2016), "CCBE comments on the Commission proposal for a regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) – COM(2016) 270", Brussels, 16 September, p. 3.

[48] Article 35, proposed Dublin IV Regulation.

[49] Article 34(2), proposed Dublin IV Regulation.

[50] Article 43, proposed Dublin IV Regulation.

[51] Recital 34, proposed Dublin IV Regulation.

[52] ECRE (2016), "ECRE Comments on Dublin IV", op. cit., p. 33.

[53] This is also an identified concern in light of the proposed EU Asylum Agency's role of monitoring and assessing Member States' performances – see Article 14(1) of the European Commission(2016), Proposal for Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing

Member States of allocation who are not obliged to take any further asylum seekers once they have reached 100% of their capacity under the mechanism.[54] This inconsistent treatment as regards allocation thresholds between benefitting Member States and Member States of allocation runs the risk of compounding inequalities amongst Member States.

The corrective allocation mechanism also introduces a level of administrative complexity which may well undermine the stated object of efficiency.[55] Asylum seekers (but excluding first country of asylum, safe third country and safe country of origin applicants[56]) would then have to pass from the benefitting Member State to the Member State of allocation in order to determine the Member State responsible for examining the application.[57]

4.3 Attempts to harmonise

Variances in recognition rates and procedures across Member States has long been a key shortcoming of the CEAS. It should be recalled that harmonisation is a way to ensure consistently high standards of protection and reception for those seeking international protection and not an objective to be achieved in the abstract. Attempts to harmonise have manifested in the proposal in three principal ways: firstly, through changing the legal form; secondly, through greater integration and an enhanced role of EASO; and thirdly, through the transformation of certain provisions from discretionary to mandatory for Member States.

4.3.1 The legal form has changed from a Directive to a Regulation in the case of the proposed Qualifications[58] and Procedures[59] Regulations, enabling for their direct effect in Member States.

4.3.2 The European Union Agency for Asylum ("EUAA") will be given an enhanced role, essentially strengthening the interaction with national authorities, training and curriculum generation, monitoring as well as assessment and operational assistance. This enhanced role for the EUAA cannot be overstated because "a significant change in the country of origin" triggers an obligation on determining authorities to carry out status reviews of beneficiaries of international protection[60] - that trigger is based on information gathered by the EUAA[61] or developed in common with Member States.[62]

Regulation (EU) No 439/2010, COM(2016) 271 final, 4 May ("the proposed EUAA Regulation") – see further, ECRE (2016), "ECRE Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016)271", July 2016, p. 13.

[54] Article 36(1), proposed Dublin IV Regulation.

[55] Explanatory memorandum to the proposed Dublin IV Regulation, pp. 3-4.

[56] Article 36(3), proposed Dublin IV Regulation.

[57] Article 36(2) and 39(c), proposed Dublin IV Regulation; see further ECRE (2016), "ECRE Comments on Dublin IV"; op. cit. p. 36.

[58] European 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, COM(2016) 466 final, 13 July ("the proposed Qualification Regulation").

[59] European Commission (2016), 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, COM(2016) 467 final, 13 July ("the proposed Procedures Regulation").

[60] See below and Articles 15(a) (refugees) and 21(a) (subsidiary protection), proposed Qualification Regulation.

[61] Article 8, proposed EUAA Regulation.

[62] Article 10, proposed EUAA Regulation.

Firstly, the proposed EUAA Regulation contains a mutual obligation on national asylum authorities, immigration and asylum services and the Agency to cooperate in good faith and exchange information.[63] The EUAA will take a key role in training and developing curricula for national administrations, courts, tribunals and national services responsible for asylum matters.[64] The EUAA has greater competence in relation to the provision of Country of Origin information.[65] However, JRS Europe shares the concerns of ECRE that, in the absence of a clear protection mandate for the EUAA, political rather than protection concerns may guide decisions to endorse (or refrain from so doing) common EUAA-Member State analyses, given that the EUAA Management Board is composed of a representative from each Member State.[66]

Secondly, the EUAA will undertake a new role of monitoring and assessing Member States' asylum and reception systems.[67] However, the information that EUAA is to take into account is obtained from Member States – no provision has been made for taking into account information from NGOs or UNHCR.[68] Regrettably, there is no express mandate for the monitoring of detention, resettlement or access to legal assistance by EUAA.[69] JRS Europe shares concerns expressed by others that quantitative monitoring is insufficient and that more substantive monitoring against international , refugee and regional human rights law would provide a more realistic and nuanced analysis and, in consultation with expert national NGOs, provide a more robust assessment and safeguard of standards.[70]

Thirdly, the EUAA will provide greater operational assistance to asylum systems under disproportionate pressure[71] – a role that essentially consolidates the role of the EUAA in hotspots through organisation and coordination.[72] Of concern is the role of EUAA staff in the formation of the asylum support teams[73] and the ambiguity surrounding their role in examining international protection applications. JRS Europe is similarly concerned regarding the role of those drawn from the asylum support teams[74] or the asylum intervention pools.[75] There is ambiguity around the level of accountability when operating as part of a migration management support team and undertaking tasks such as screening, registering or provision of information[76] and – most significantly – when examining applications for international protection.[77] A tension occurs because the host Member State assumes full responsibility for the experts from other Member States but the experts from the EUAA which come from other Member States lack accountability to the host Member State for their actions.[78]

4.3.3 The CEAS reform package proposals also introduce more mandatory provisions and effectively reduce Member State discretion in implementing the CEAS secondary legislation. As will be explored in the subsequent analysis, it is arguable that the cumulative effect of these

[63] Article 3, proposed EUAA Regulation.
[64] Article 7, proposed EUAA Regulation.
[65] Article 10, proposed EUAA Regulation.
[66] ECRE (2016), "ECRE Comments on EUAA proposal", op. cit., p. 9.
[67] Article 13, proposed EUAA Regulation.
[68] Article 13(2), proposed EUAA Regulation.
[69] Article 13(1)(a), proposed EUAA Regulation.
[70] See ECRE (2016), "ECRE Comments on EUAA proposal", op. cit., p. 13.
[71] Chapter 6, proposed EUAA Regulation.
[72] Article 16(3), proposed EUAA Regulation.
[73] Article 17(2), proposed EUAA Regulation.
[74] Article 17, proposed EUAA Regulation.
[75] Article 18, proposed EUAA Regulation.
[76] Article 21(2), proposed EUAA Regulation.
[77] Article 21(2)(b), proposed EUAA Regulation; *contra* Recital 16, proposed EUAA Regulation.
[78] ECRE (2016), "ECRE Comments on EUAA proposal", op. cit., pp. 14-15, particularly n.45.

provisions amount to an harmonisation down rather than up. Most notable of these provisions includes (but is not limited to) the compulsory admissibility assessments based on safe country of origin, safe third country and first country of asylum concepts which, under the current secondary legislation, are discretionary for Member States.[79] Other provisions include mandatory status reviews,[80] limitations on the use of the sovereignty and humanitarian clauses under the proposed Dublin IV Regulation[81] underscored by compulsory take charge and take back requests for Member States,[82] and the imposition of short procedural deadlines.[83] As will be explored below, these mandatory provisions also parallel greater obligations, and the introduction of sanctions, upon applicants for, and beneficiaries of, international protection.

5. Key Concerns

JRS Europe holds a number of key concerns about the impacts of the CEAS reform package.

5.1 Temporary nature of protection through compulsory status reviews

JRS Europe is concerned at the introduction of compulsory status reviews[84] through the application of the cessation[85] and exclusion[86] clauses upon beneficiaries of international protection.

Temporariness of protection is infused into the CEAS through compulsory reviews of protection status. Under the proposed Qualification Regulation, status reviews must occur in at least two circumstances: firstly, at the renewal of a residence permit (that is, once only after three years for a refugee, twice for a subsidiary protection holder after the first year and third year)[87] or secondly, when EUAA country of origin information and common analysis (EUAA and Member State) country of origin information "indicate a significant change in the country of origin".[88] The legislative text is silent as to what constitutes a "significant change in the country of origin", leading to a great deal of uncertainty of status due to the foreseeability of when a "significant change in the country of origin" may occur. The burden of proof would appear to rest on the reviewing authority, not on the beneficiary of international protection.[89] It would appear that those resettled under the proposed Resettlement Scheme would also be subject to the full EU asylum *acquis*,[90] with no express exemption from status reviews.

[79] Articles 44-50, proposed Procedures Regulation; Article 3(3), proposed Dublin IV Regulation.
[80] Articles 14-15, 20-21 and 26, proposed Qualification Regulation.
[81] Article 19(1) and (2), proposed Dublin IV Regulation.
[82] Articles 24(1) & 26(1), proposed Dublin IV Regulation.
[83] Article 28(2) (applicant) and (3) (decision by Member State), proposed Dublin IV Regulation; Articles 34 (duration of procedure by Member State), 53(6) (applicant's lodging of appeals), 55 (duration of first level appeals by Member State), proposed Procedures Regulation.
[84] Articles 14-15, 26 (refugees) and 20-21 and 26 (subsidiary protection) proposed Qualification Regulation (Refugees).
[85] Articles 11 (refugees) and 17 (subsidiary protection), proposed Qualification Regulation.
[86] Articles 12 (refugees) and 18 (subsidiary protection), proposed Qualification Regulation.
[87] Under the proposals, residence permits for refugees have a validity of three years and may only be renewable for a period of three years at a time. For subsidiary protection holders, residence periods are initially valid for one year and may be subsequently renewed for a period of two years: see Article 26(1), proposed Qualification Regulation.
[88] Articles 14 & 15 (refugees), 20 and 21 (subsidiary protection) and 26. proposed Qualification Regulation.
[89] Articles 14(4) (refugees) and 20(2) (subsidiary protection), proposed Qualification Regulation.
[90] Recital 25, proposed Resettlement Framework and pp. .12-13, Explanatory Memorandum, proposed Resettlement Framework.

Both circumstances that trigger status reviews undermine the security and permanency of status for beneficiaries of international protection. The compulsory status review at the time of residence permit renewal provides an extremely short duration of security for beneficiaries (three years for refugees, one year for subsidiary protection holders). Status reviews stemming from a "significant change in the country of origin" may also result in periods of protection shorter than the period of validity of the residence permit.

There is insufficient policy reasoning supporting the introduction of compulsory status reviews. The stated policy objective is to ensure that "protection is only for as long as the grounds for persecution or serious harm persist, without affecting person's [*sic*] integration prospects".[91] However, as will be demonstrated below, that rationale warrants scrutiny. Concerns about the brevity of residence statuses and their impact on integration extend back to the first phase Qualification Directive.[92] In the Commission's proportionality assessment, making status reviews compulsory is said to be necessary because the provisions in the current recast Qualification Directive were not systematically applied.[93] However, recent research conducted by ECRE has revealed that 21 out of 28 Member States retain more favourable residence duration provisions than required by the current recast Qualification Directive.[94] Accordingly, it begs the question why harmonisation should occur to a lower, lesser standard when the clear majority of Member States currently have more favourable provisions than they are obliged to provide under EU law. This fact should logically justify harmonisation upwards, rather than downwards.

Further, the research conducted by ECRE also indicated that there is no systematic revocation of refugee or subsidiary protection statuses on the basis of ceased circumstances in most Member States.[95] To that end, compelling Member States to undertake such a review has a compounding effect on the administrative burden that Member States are to bear through the need to not only assess new applications for international protection, but also to review previously determined applications. Germany has long had provisions for automatic review of refugee status (subsidiary status is not subject to such reviews) at the latest three years after the grant of status but, from August 2015, is no longer compulsory in all cases.[96]

The lack of policy rationale and the disjunction between Member State practice and the proposed provisions indicate a clear downward harmonisation of residence rights. The only policy rationale that can be inferred from this approach is to create a harsh environment for beneficiaries of international protection but which may have significant and long-lasting social and economic consequences.

Effectively conceptualising protection as temporary is entirely at odds with the level of displacement that the world is currently facing – currently the length of protracted refugee situations is, on average, 26 years.[97] Accordingly, an entire generation of people are affected. Temporary protection engendered through compulsory status reviews and short residence periods is in no way an appropriate response to a situation which behoves long term, durable solutions.

[91] Explanatory Memorandum, proposed Qualification Regulation, p. 5.
[92] UNHCR (2007), "Note on the Integration of Refugees in the European Union", May, p. 6, paras 18 and 21.
[93] Pp. 7-8 Explanatory Memorandum, Qualification Regulation
[94] ECRE (2016), "Asylum on the Clock? Duration and review of international protection status in Europe", June, pp. 4-5.
[95] Ibid., p. 8.
[96] Ibid., p. 7
[97] UNHCR (2016), "Global Trends – Forced Displacement in 2015", Geneva, June, p. 20.

Protection predicated on temporariness not only fails to contribute to the global need for durable solutions, but also detrimentally and cruelly affects beneficiaries of international protection. This is largely due to the uncertainty that mandatory status reviews generate. *Firstly*, the anxiety generated by temporary protection can exacerbate the effects of past trauma,[98] whilst permanency and security of status has been shown to be a factor in improving the mental health of those who have suffered past trauma.[99] *Secondly*, JRS Europe is concerned that temporary status would act as a disincentive for both Member States and beneficiaries of international protection to commit to social inclusion processes. The concern is that Member States may be unwilling to fully commit to investing in quality services enabling beneficiaries to integrate in host communities because Member States may tend to view beneficiaries as being only a temporary responsibility.[100] Similarly, the uncertainty created by the compulsory status reviews de-motivates beneficiaries from committing to social inclusion processes as the effort may well be seen as futile if they are forced to return to their country of origin. With such a strong disincentive for both Member States and beneficiaries to commit to social inclusion processes, JRS Europe is concerned that social exclusion may be a foreseeable consequence, resulting in destitution. *Thirdly*, the brevity and uncertainty of status also acts as a strong disincentive for the labour market to hire and skill beneficiaries of international protection – placing such a strong disincentive in one of the key factors to social inclusion further exacerbates the risk of social exclusion and destitution. *Fourthly*, the differences in residence permit periods as well as the number and timing of compulsory status reviews effectively, unjustifiably and illogically winds back the Commission's previously stated policy of reducing distinctions between refugee and subsidiary protection statuses.[101]

Permanency and security of status are not only essential to avoid the social and economic consequences associated with remedying the consequences of temporary protection, but are also essential for beneficiaries of international protection to reach their full human potential.

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[98] S. Momartin, Z. Steel, M. Coello, J. Aroche, D. Silove, and R. Brooks (2006), "A comparison of mental health of refugees with temporary versus permanent protection visas" *Medical Journal of Australia*, Vol. 185, No. 7, pp. 357-361; Z. Steel, D. Silove, R. Brooks, S. Momartin, B. Alzuhairi, I. Susljik (2005), "Impact of immigration detention and temporary protection on the mental health of refugees", *The British Journal of Psychiatry*, Vol. 188, No. 1, pp. 58-64.

[99] Z. Steel, D. Silove, T. Phan, and A. Bauman **(**2002**),** "The long-term impact of trauma on the mental Health of Vietnamese refugees resettled in Australia: A population-based study", *Lancet*, Vol. 360, No. 9339, pp. 1056 – 1062.

[100] On the framing of the relationship between immigration and integration policies, see R. Penninx (2015), "Perceptions of Immigration and Integration in Policies of European Countries and the European Union: who leads the Frame Mobilisation?", presentation at EPC-workshop on "Perceptions of Migration and Political Leadership", Brussels, 8 December.

[101] European Commission (2009), Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009) 551 final, p. 8 "An amendment expected to significantly simplify and streamline procedures and to reduce administrative costs is aimed at approximating the rights granted to the two categories of beneficiaries of protection. When subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them a lower level of rights in certain respects. **However, practical experience acquired so far has shown that this initial assumption was not accurate. It is thus necessary to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified.** Such an approximation of rights is necessary to ensure full respect of the principle of non-discrimination, as interpreted in recent case law of the ECtHR13, and of the UN Convention on the Rights of the Child. It responds moreover to the call of the Hague Programme for the creation of a uniform status of protection [emphasis added]."

Families and children in particular will be greatly affected by such a policy shift (as discussed below).

5.2 Impact on Families

JRS Europe is extremely concerned at the impact of the CEAS reform package on families, the right to family life and the maintenance of family unity.

In light of the compulsory status reviews, JRS Europe is concerned that such reviews will have a chilling effect on employers when it comes to hiring and skilling beneficiaries of international protection – an issue that could disproportionately affect children and families by jeopardising the ability of families to maintain their dignity and provide a healthy and secure family environment for children, and reduce the risk of destitution.

The proposed Dublin IV Regulation requires asylum seekers undergo a compulsory admissibility determination *before* applying the Dublin responsibility criteria, which include provisions related to the existence of family members in other Member States.[102] This means that family members who arrive at the border, seek asylum and have family members already present in another Member State will not have the Dublin responsibility criteria applied to them if their application is deemed inadmissible. Member States will be required to: firstly, undertake an assessment of whether the safe third country or first country of asylum concepts apply to the person;[103] secondly, apply accelerated procedures to a person's application if they come from a safe country of origin or are a threat to national security or public order;[104] thirdly, conduct a Dublin procedure (applying the responsibility criteria) if the application remains admissible.

Notwithstanding that respect for family life in accordance with the EU Charter[105] and the ECHR[106] is stated as a primary consideration under the proposed Dublin IV Regulation[107], JRS Europe is concerned that the compulsory admissibility criteria represent a breach of the family life of asylum seekers who reach a frontier Member State and who have come from a first country of asylum, a safe third country, a safe country of origin or are a threat to national security or public order. This is further compounded by recent measures imposed by certain Member States to limit rights to family reunification[108] and the increased proportion of women and children from 27% to 60% (September 2015 to March 2016) who had entered Greece from Turkey.[109] Asylum experts have also indicated that, in the latter part of fieldwork in Greece, they frequently came across individuals who referred to having family members in Northern Europe.[110] Accordingly, the combined effect of the admissibility determinations against the backdrop of these measures and profiles may well result in significant impacts on the family life of asylum seekers and a disproportionate impact on women and children seeking to be reunited with family members already in Europe.

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[102] Article 3(3), proposed Dublin IV Regulation.
[103] Article 3(3)(a), proposed Dublin IV Regulation by reference to Article 33(2)(b) and (c) of the Procedures Directive.
[104] Article 3(3)(b), proposed Dublin IV Regulation by reference to Article 31(8) of the Procedures Directive.
[105] Article 7, EU Charter.
[106] Article 8, ECHR.
[107] Recital 16, proposed Dublin IV Regulation.
[108] Austria, Germany, Finland, Ireland, Sweden, Denmark and Norway – see further, ELENA (2016), "Information Note on Family Reunification for Beneficiaries of International Protection in Europe", June, p. 4, para 1, fn. 3.
[109] H. Crawley, F. Duvell, N. Sigona, S. McMahon and K. Jones (2016), "Unpacking a rapidly changing scenario: migration flows, routes and trajectories across the Mediterranean", MEDMIG Project, Research Brief No. 1, March, P.4.
[110] Ibid., p. 6.

JRS Europe welcomes the broader definition of family members under the proposed Dublin IV Regulation to include any siblings of the applicant for international protection and those family relationships formed before arriving in an EU Member State,[111] consistent with ECtHR jurisprudence.[112]

However, JRS Europe is concerned that the expanded definition of family members is effectively nullified by the compulsory admissibility procedures which must be undertaken before the Dublin responsibility criteria containing family unity provisions are applied.[113] Further, the new definition of family member reveals a disjunction as regards family relationships formed outside the country of origin for *dependant persons* which are precluded under Article 18(1) of the proposed Dublin IV Regulation (remaining unchanged from the current Dublin III Regulation).[114] Lastly, the new definition of family does not include parent-adult child family relationships within its scope, resulting in family reunification for parents and adult children being only possible at the discretion of the Member State rather than mandatory under the Dublin responsibility hierarchy.[115]

JRS Europe is also deeply concerned at the limitation on the use of the sovereignty and humanitarian clauses under the proposed Dublin IV Regulation.[116] The sovereignty and humanitarian clauses have had their material scope limited to remedy family relationships not contemplated by the amended definition of family under Article 2(g). Due to the now compulsory take charge, take back and transfer provisions,[117] the practical effect on both the (discretionary) clauses is to reduce their temporal scope such as to allow family members to be reunified on in circumstances where another Member State has *not yet* been determined as responsible for examining their application.

The limitation on the sovereignty clause is at odds with the sovereign right of a state to determine the merits of an asylum application under the Geneva Convention and sits in contradistinction to the ECtHR jurisprudence in *MSS v Belgium and Greece* where the use (or lack thereof) of sovereignty clause (as applied by Belgium with respect to Greece) was central to an understanding of whether Belgium could comply with its ECHR obligations.[118] Similarly, in *NS v UK,* the CJEU held that discretionary power under sovereignty clause forms "part of the mechanism for determining the Member State responsible for an asylum application" and is an "element of the Common European Asylum System", concluding that a "Member State which exercises that discretionary power must be considered as implementing European Union law" within the meaning of the EU Charter.[119]

In relation to the humanitarian clause, JRS Europe is concerned that, by omitting humanitarian circumstances which may warrant another Member State voluntarily assuming responsibility for determining the claim, applicants suffering from health or vulnerabilities may be precluded from family support. Accordingly, vulnerability or health grounds contained in the current

[111] Article 2(g), proposed Dublin IV Regulation.
[112] *Hode Abdi v United Kingdom*, Application No. 22341/09, Judgment, 6 November 2012.
[113] Article 3(3), proposed Dublin IV Regulation, see above
[114] Article 18(1), proposed Dublin IV Regulation.
[115] Articles 18(1) and 19, proposed Dublin IV Regulation.
[116] Articles 19(1) and (2), proposed Dublin IV Regulation.
[117] Article 24(1), 26(1) and 30(1), proposed Dublin IV Regulation
[118] *MSS v Belgium and Greece*, Application No. 30696/09, Judgment, Grand Chamber, 21 January 2011.
[119] Cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform,* judgment, Grand Chamber, 21 December 2011, para 68.

Dublin III Regulation should be retained to allow Member States to deal with those eventualities in order to comply with their obligations under the EU Charter.

In relation to the presence of family members and relatives in other Member States, asylum seekers are now *obliged* to submit and *substantiate* the presence of such family member and relatives.[120] JRS Europe is concerned that the obligation to *submit* information and an unreasonable imposition of the burden of proof on applicants to *substantiate* that information will effectively undermine the prospects of family unity through a narrow reading of this provision.

5.3 Impacts on Children

JRS Europe is particularly concerned at the impact of the CEAS Reform Package on children.

In light of the compulsory status reviews and their impact on families, and the inalienable need for children to flourish, JRS Europe is concerned about the disproportionate impact of those provisions on children. The instability, uncertainty and anxiety caused by the compulsory status reviews run a high risk of undermining the ability of children to make plans for their future, to make choices about whether to further their education or enter the workforce, to set long-term goals for themselves, and be motivated to continue their education and language instruction. Without permanency and security of residency, children will be unable to achieve the highest standard of mental health,[121] the maximum possible development,[122] and the ability to recover from past torture and trauma.[123]

For unaccompanied children that have moved to a second Member State, the proposed Dublin IV Regulation presumes that the Member State of first asylum is responsible for the unaccompanied child's application, unless it is not in the child's best interest.[124] This provision sits in contradistinction to the Court of Justice's decision in *MA* in which the Court held that, in the best interest of the child, the Member State where the unaccompanied child *presently is* bears responsibility for determining the child's application.[125] Importantly, the Court established the presumption that it is not in the best interest of the unaccompanied child to be transferred to another Member State.[126] The proposed provision, in light of the Court's reasoning, would place it in breach of Article 24(2) of the EU Charter. The concern is that, not only will an unaccompanied child in this situation have the determination of his or her application prolonged, but also that the child would also bear the onus of proof to demonstrate why being sent back to the first Member State of entry or asylum is *not* in his or her best interests.

This additional evidential burden is also underscored by representation and assistance to unaccompanied children being *limited* to "where an unaccompanied child is obliged to be present"[127] – which may be in a Member State other than which the unaccompanied child *presently is*. The absence of that right to representation and assistance in the Member State where an unaccompanied child *presently is* not only severely inhibits the determination of what

[120] Article 6(1)(d), proposed Dublin IV Regulation.
[121] Article 24(1), UN Convention on the Rights of the Child.
[122] Article 6(2), UN Convention on the Rights of the Child.
[123] Article 39, UN Convention on the Rights of the Child.
[124] Article 10(5) and 8(4), proposed Dublin IV Regulation.
[125] Case C-648/11 *M.A.& ors v Secretary of State for the Home Department*, judgment, 6 June 2013.
[126] Ibid., para 55.
[127] Article 8(2), proposed Dublin IV Regulation.

is in his or her best interests, but also sits clumsily with the strengthened procedural guarantees for children under the Proposed Procedures Regulation.[128]

Unaccompanied children also risk being gravely impacted by the new time limits imposed under the proposed Dublin IV Regulation. As the overall time limit for take back notifications under the proposal amounts to approximately four months (including appeal) to undertake the Dublin procedure,[129] JRS Europe shares the concerns of ECRE[130] that this time limit may negatively impact on the requirements to appoint a guardian for the unaccompanied child,[131] to conduct a best interests assessment[132] and to initiate family tracing procedures.[133]

Children who have moved, either accompanied or unaccompanied, to a Member State other than first entry or prior lawful stay are excluded from all reception conditions - including schooling and education - as part of the range of punitive measures imposed on asylum seekers to deter secondary movements (discussed in more detail below). The proposed Dublin IV Regulation excludes those who are not in the Member State responsible for their asylum application from accessing reception conditions under the Reception Conditions Directive (including provisions relating to access for schooling for children[134]) with the exception of emergency health care.[135] At the most fundamental level, it is perverse to exclude children from reception conditions in this way for moving to a second Member State. This proposed provision ignores the jurisprudence of the Court in *MA* which held that it is in the best interests of unaccompanied children *not* to be transferred to another Member State (and, by corollary to make and have their claim assessed in the country they are actually in).[136] Further, the exclusion of reception conditions is entirely at odds with the Court of Justice decision in *CIMADE & Gisti* which held that the Reception Conditions Directive fully applies to those in a Dublin situation.[137] The exclusion of children from reception conditions when in a Member State other than first entry or of prior lawful stay also contradicts the European Committee on Social and Economic Rights' ruling that migrant children have rights to food, clothing and shelter under the European Social Charter.[138]

In addition to proposing to collect facial images, the age from which children's fingerprints will be taken by authorities will be lowered from 14 years of age to six years of age under the Eurodac Proposal.[139] The rationale behind such an approach is to "strengthen the protection of unaccompanied children who have not applied for international protection and those children who may become separated from their families" in order to assist with the identification of a child and family tracing.[140] Further justification in the Explanatory Memorandum points to "many Member States collect[ing] biometrics from minors at an age of 14 years for visa, passports, biometric residence permits and general immigration control".[141]

[128] Articles 21 and 22, proposed Procedures Regulation.
[129] Articles 24(1) (take charge request); 25(1) – (2) (reply to take charge request, replies to request as a result of a Eurodac or VIS hit); 26(1) (take back notification resulting from a Eurodac hit); 30(1) (taking a transfer decision; carry out transfer), proposed Dublin IV Regulation.
[130] ECRE (2016), "ECRE Comments on Dublin IV", op. cit., p. 27.
[131] Article 8(2), proposed Dublin IV Regulation.
[132] Article 8(4), proposed Dublin IV Regulation.
[133] Article 8(5), proposed Dublin IV Regulation.
[134] Article 14, recast Reception Conditions Directive.
[135] Article 5(3), proposed Dublin IV Regulation.
[136] Case C-648/11 *M.A.& ors v Secretary of State for the Home Department*, judgment, 6 June 2013, para 55.
[137] Case C-179/11 *Cimade & Gisti*, Judgment, 27 September 2012.
[138] *DCI v The Netherlands*, Complaint No. 47/2008, 20 October 2009.
[139] Articles 2(2), 10(1), 13(1) and 14(1), proposed Eurodac Regulation.
[140] Recital 25, proposed Eurodac Regulation.
[141] Explanatory Memorandum, proposed Eurodac Regulation, p. 4.

However, as pointed out by the European Data Protection Supervisor, the fact that "many" Member States collect biometrics from children under the age of 14 years "is not convincing as such" as the collection of such data is not *per se* efficient, proportionate and useful.[142] Further, the collection of the data must examined against the principle of the best interests of the child,[143] but the legislation does not compel that such a best interests examination be carried out by authorities. Accordingly, for the data to be lawfully gathered from a child, authorities must show that it is for the benefit of the child in the *individual case* in order to undertake family tracing. An examination of the best interests of the child should be incorporated into the proposed provision to make it clear that data cannot be obtained from children systematically and without individual justification. Similarly, the policy rationale of pre-emptive collection of data from children who are accompanied but "who *may* become separated from their families [emphasis added]"[144] should not be used to justify systematic collection of data but rather only be collected when warranted in an individual case, particularly as the "may" in Recital 25 may give rise to speculative and disparate interpretations amongst Member States.

5.4 Obligations on Asylum Seekers and Beneficiaries of International Protection

The CEAS reform package introduces a number of evidential, procedural, presence and participatory obligations on asylum seekers as a basis for the imposition of sanctions for their breach (see below). JRS Europe notes the increasing level of obligations imposed on asylum seekers and beneficiaries of international protection and is concerned that the evidential and procedural burdens are, in some cases, shifting from a collaborative effort between the applicant and authorities towards the applicant *simpliciter*. There are three key sources of new obligations – firstly, under the Dublin IV proposal; secondly, the proposed Qualification Regulation; and thirdly, the Eurodac Regulation.

Dublin IV Proposal

Under the Dublin IV proposal asylum seekers are obliged to:

1. make their application in the Member State of first entry or, if legally present in a Member State, in that Member State;[145]
2. submit all elements and information for determining the Member State responsible for their application as soon as possible and *before* the personal interview;[146]
3. cooperate with the competent authorities of the Member State;[147]
4. comply with a transfer decision;[148]
5. be present and available to the competent authorities in the Member State of application and in the Member State to which the person is transferred.[149]

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[142] European Data Protection Supervisor ("EDPS") (2016), "Opinion on the First reform package on the Common European Asylum System (Eurodac, EASO and Dublin Regulations)", Opinion 07/2016, 21 September, p. 9, para 27.
[143] Recalled in recital 26, proposed Eurodac Regulation.
[144] Recital 25, proposed Eurodac Regulation.
[145] Article 4(1), proposed Dublin IV Regulation.
[146] Article 4(2), proposed Dublin IV Regulation.
[147] Article 4(2), proposed Dublin IV Regulation noting however, that this obligation already exists in Article 13(1) of the current recast Procedures Directive and is also foreseen in Article 4 of the proposed Qualification Regulation.
[148] Article 4(3)(a), proposed Dublin IV Regulation.
[149] Article 4(3)(b), proposed Dublin IV; note that the obligation to be "present and available" is also foreseen in Article 4(1) of the proposed Qualification Regulation.

JRS Europe is concerned that the formulation creates ambiguity by the use of the undefined terms "elements" and "information" and that this may result in diverging interpretations across Member States to the detriment of asylum seekers. The requirement to submit *all* "elements and information" before the first interview compels applicants to be proactive in supplying information and places a disproportionate and unrealistic burden on applicants to collect and submit information in circumstances where flight from the country of persecution and the challenges of the journey itself may effectively nullify attempts to do so. Similarly, the terms "present" and "available" are undefined and are susceptible to divergent Member State interpretations which may amount to arbitrary determinations about when applicants are in non-compliance. JRS Europe is concerned that the ambiguity created by these terms erodes legal certainty as Member States will inevitably have varying interpretations of what constitutes compliance.

Qualification Regulation

Under the proposed Qualification Regulation, asylum seekers are additionally[150] obliged to:

1. cooperate with the determining authority; [151] and
2. remain present and available throughout the procedure.[152]

JRS Europe repeats its concern that "cooperation", "remain present" and "available" are ambiguous formulations that are open to divergent interpretations across Member States to the detriment of asylum seekers. Further, the formulation of Article 4(1) of the proposed Qualification Regulation has omitted "[i]n cooperation with the applicant" that precedes the Member State obligation to assess the relevant elements of the application. JRS Europe is concerned that, contrary to ECtHR jurisprudence,[153] this represents a shift in the burden of proof to the detriment of asylum seekers as well as away from a collaborative effort between both parties.

Under the proposed Qualification Regulation, beneficiaries of international protection:

1. are obliged to reside in the Member State which granted them protection (by expressly denying them the right to reside in a Member State other than the one which granted international protection).[154]
2. may be obliged to participate in integration courses.[155]

The consequences for beneficiaries of international protection breaching the obligation to reside in the Member State which granted them protection (that is, transfer back to that Member State) is now brought within the scope of the Dublin Regulation.[156] JRS Europe is of the view that, in the absence of a matching system, freedom of movement post-status

[150] Noting that under the recast Qualification Directive, asylum seekers are obliged to "submit as soon as possible all the elements needed to substantiate the application for international protection" – Article 4(1) and (2), recast Qualification Directive. JRS Europe is pleased to observe that "as soon as possible" has been omitted from Article 4(1) of the proposed Qualification Regulation with the consequence that timeliness of the application cannot therefore be used to reduce the credibility of an applicant – see Article 4(1), proposed Qualification Regulation.
[151] Article 4(1), proposed Qualification Regulation; note also foreseen in Article 4(2), proposed Dublin IV Regulation, and Article 13, recast Procedures Directive.
[152] Article 4(1), proposed Qualification Regulation; note also foreseen in Article 4(3)(b), proposed Dublin IV Regulation.
[153] *Hirsi Jamaa v Italy*, Application No. 27765/09, Judgment, 23 February 2012, para 133; *JK and Others v Sweden*, Application No. 59166/12, Judgment, 23 August 2016, para 96; *FG v Sweden*, Application No 43611/11, Judgment, 23 March 2016, para 122.
[154] Article 29(1), proposed Qualification Regulation.
[155] Article 38(2), proposed Qualification Regulation.
[156] Article 29(2), proposed Qualification Regulation.

recognition should be granted in order to fulfil the aspirations of a "uniform status, valid throughout the Union".[157]

The discretion of Member States to compel beneficiaries of international protection to participate in integration measures is of concern due to the corresponding discretion for Member States to make access to social assistance conditional upon "effective participation" in integration measures.[158] The concern here is that the combined effect of these two provisions may incentivise Member States to adopt coercive and conditional integration measures rather than focus on the quality of the integration measures themselves,[159] which should, in any event, take into account the individual circumstances of the applicant (such as age, literacy or level of education).[160] JRS Europe shares the concerns of ECRE that "effective participation" is an ambiguous term that does not make clear whether the fulfilment of the obligation is one achieved by *performance* or *result*.[161]

In addition to the obligation to take fingerprints, the proposed Eurodac Regulation compels Member States to take facial images.[162] The personal scope of the Regulation has been extended to include "illegal immigration", secondary movements, identification, removal and repatriation of "illegally staying third country nationals".[163] Accordingly, the Regulation compels the collection of fingerprints and facial images not only of applicants for international protection[164] and those apprehended in connection with an irregular border crossing,[165] but also those found to be "illegally staying" within the territory of a Member State.[166] JRS Europe shares the concerns of the European Data Protection Supervisor (EDPS) that the purpose of the database has moved beyond facilitating the implementation of the Dublin Regulation, and creates tensions with the purpose limitation principle.[167] In addition, JRS Europe also shares the EDPS' concerns about the proportionality of the processing which may arise due to the proportionality for one purpose not necessarily remaining proportionate for other purposes.[168] Similarly, the expansion of the material scope to facial images reveals internal inconsistencies within the proposal, which on the one hand provides for an automatic comparison of both fingerprints and facial data,[169] yet on the other also provides that the facial data be used for comparison *as a last resort* only when fingerprint quality doesn't allow comparison or when a person refuses to comply with the fingerprinting process.[170] JRS Europe supports the EDPS recommendations that a comparison of facial images and/or fingerprints only take place as a last resort.[171]

[157] Article 78(2)(a) TFEU.
[158] Article 34(1), proposed Qualification Regulation.
[159] ECRE (2016), "ECRE Comments on the Commission Proposal for a Qualification Regulation COM(2016) 466 final", November, p. 20.
[160] Case C-579/13 *P & S,* Judgment, 4 June, para 49. This is reflected in the Explanatory Memorandum at p. 17 but is absent from Article 38 or Recital 53, proposed Qualification Regulation.
[161] ECRE (2016), "ECRE Comments Qualification Regulation", op. cit., p. 20.
[162] Article 2(1), together with Articles 10(1), 13(1) and 14(1), proposed Eurodac Regulation.
[163] Article 1(b), proposed Eurodac Regulation.
[164] Article 10(1), proposed Eurodac Regulation.
[165] Article 13(1), proposed Eurodac Regulation.
[166] Article 14(1), proposed Eurodac Regulation.
[167] EDPS (2016), "EDPS Comments on Eurodac", op. cit., p. 8.
[168] Ibid.
[169] Article 15(1), proposed Eurodac Regulation.
[170] Article 16(1), proposed Eurodac Regulation.
[171] EDPS (2016), "EDPS Comments on Eurodac", op. cit., p. 8.

5.5 Sanctions

The CEAS reform package, having established a number of additional obligations on applicants and beneficiaries of international protection, has included corresponding sanctions for their breach. These sanctions take three chief forms: procedural sanctions, reception condition sanctions, and personal liberty and coercive sanctions. These three chief forms will be identified in each of the pieces of the proposed secondary legislation. An additional fourth sanction, against Member States, takes the form of the "financial solidarity" mechanism.

JRS Europe strongly opposes the use of sanctions, particularly where non-compliance is a result of Member State failure to meet procedural and reception condition standards that compel applicants and beneficiaries to seek protection and maintain their dignity in a Member State other than first entry or asylum. Coercive measures are corrosive to the generation of trust between applicants and authorities and act as a strong disincentive for applicants and beneficiaries to remain engaged with authorities and the asylum determination process.

5.5.1 Procedural Sanctions

5.5.1.1 *Proposed Dublin IV*

If an applicant has irregularly entered a Member State, and has failed to make his or her application for international protection in that Member State of first entry (as outlined above)[172], several sanctions are imposed. These are described in the proposed Regulation as "appropriate and procedural consequences".[173] ECRE has rightly observed that these sanctions are at odds with the non-penalisation provisions under Article 31 of the Geneva Convention.[174]

Firstly, the applicant is subjected to an accelerated procedure[175] when returned to the responsible Member State[176] (which is also reiterated later in the post take-back obligations for Member States).[177] An accelerated procedure is used to expeditiously process manifestly unfounded claims. Accordingly, the Dublin IV proposal mistakenly draws a link between secondary movements and the veracity of the applicant's claim to protection. It is entirely inappropriate and misguided to make any link between the veracity of an applicant's claim and his or her secondary movement, especially without any assessment of the applicant's special needs, but particularly when the motives for secondary movement may have resulted from failed asylum determination systems or reception conditions.

Secondly, information submitted after the personal interview will not be admissible.[178]

Thirdly, for those applicants subjected to a "take back", further representations from applicants following a discontinued application will be treated as a *subsequent* application under the Procedures Directive,[179] meaning that Member States will no longer have discretion to re-open applicants' applications and is at odds with the stated policy purpose of ensuring effective access to the asylum procedure.[180] This provision also represents a marked distinction from

[172] Article 4(1), proposed Dublin IV Regulation.
[173] Recital 22, proposed Dublin IV Regulation.
[174] ECRE (2016), "ECRE Comments on Dublin IV", op. cit., p. 22.
[175] Article 31(8), proposed Procedures Regulation.
[176] Article 5(1), proposed Dublin IV Regulation.
[177] Article 20(3), proposed Dublin IV Regulation.
[178] Article 5(4), proposed Dublin IV Regulation.
[179] Article 20(4), proposed Dublin IV Regulation.
[180] Recital 5, proposed Dublin IV Regulation.

the current Dublin III Regulation which *prohibits* the responsible Member State from treating the application as a subsequent application.[181]

Fourthly, for those applicants subjected to a "take back" and who have had their application rejected in one Member State and make an application in a second Member State or are present in that second Member State without a residence permit, they will be excluded from the right to appeal the negative decision taken in the first Member State once returned there.[182] JRS Europe is concerned that this provision is entirely at odds with the right to an effective remedy under Article 47 of the EU Charter.

5.5.1.2 Qualification Regulation Proposal

Under the proposed Qualification Regulation, beneficiaries of international protection are also the subject of punitive procedural measures when they have breached their obligation to reside only in the Member State that granted them international protection. In addition to beneficiaries of international protection being subject to a take back procedure under the proposed Dublin IV Regulation in such circumstances (meaning that they also benefit from the procedural safeguards under Dublin),[183] the five year requirement of legal stay required to fulfil the Long Term Residents Directive (in order to reside lawfully in another Member State) will start afresh each time.[184]

JRS Europe is concerned that this "additional disincentives"[185] approach merely attempts to deal with the symptoms rather than underlying causes of onward movements by beneficiaries of international protection. JRS Europe suggests, in the absence of a matching system, a system which incentivises beneficiaries to participate in integration programmes as well as a lowering of the period from five years down to two years, after which a beneficiary may reside in a Member State other than the one that gave him or her protection.

4.5.2 Reception Conditions Sanctions

5.5.2.1 Proposed Dublin Regulation

An asylum seeker in a Dublin situation is denied the right to reception conditions except for emergency health care and is only entitled to reception conditions in the Member State in which he or she is required to be present.[186] This is also reiterated in the proposed Reception Conditions Directive.[187] In addition to contravening the Court of Justice's decision in *Cimade and Gisti* that applicants in a Dublin situation are entitled to reception conditions under the Reception Conditions Directive,[188] this provision creates an internal ambiguity with Recital 22 of the proposal, which refers to Member States' obligations to meet "immediate material needs" in line with the EU Charter. It is not clear what the distinction is between "immediate material needs" and "reception conditions". JRS Europe supports the view of ECRE that "immediate material needs" must include the right to food, housing, education and medical

[181] Article 18(2), second para, recast Dublin III Regulation.
[182] Article 20(5), proposed Dublin IV Regulation.
[183] Article 29(2), proposed Qualification Regulation.
[184] Article 44(1), proposed Qualification Regulation which introduces Article 4(3a) into the EU Long Term Residents Directive.
[185] Proposed Qualification Regulation, Explanatory Memorandum, p. 5, part 4.
[186] Article 5(3), proposed Dublin IV Regulation.
[187] Article 17a(1), proposed Reception Conditions Directive.
[188] Case C-179/11 *Cimade & Gisti*, Judgment, 27 September 2012, paras 39-40, 46-48.

care. In any event, this provision must interpreted in way to ensure full respect of the right to dignity under the EU Charter.[189]

5.5.2.2 Proposed Reception Conditions Directive

Under the proposed Reception Conditions Directive a number of consequences flow from the breach of obligations. The nature of the sanctions consist chiefly of restrictions on reception conditions and restrictions on, and the deprivation of, personal liberty of asylum seekers (considered in 5.5.3.1 below). These sanctions are dovetailed with obligations under the proposed Dublin IV Regulation.

The consequences for breaching obligations under both the proposed Reception Conditions Directive and under the proposed Dublin IV Regulation are arguably imbued with a punitive character, given the existing possibility for the reduction or withdrawal of reception conditions under the current recast Reception Conditions Directive.[190]

Consequences include replacing financial allowances or vouchers for accommodation, food, clothing and other essential non-food items with reception conditions in kind.[191] However, the current provisions under the recast Reception Conditions Directive on reducing or, in exceptional circumstances, withdrawing material reception conditions have been amended under the proposal to only allow the reduction or withdrawal of the daily allowance.[192] This represents an improvement over the current Reception Conditions Directive because it means that Member States cannot withdraw in-kind material reception conditions entirely.

However, the *grounds* for the replacement, reduction or withdrawal of reception conditions is of concern due to the additional grounds included in the proposed Directive.

Firstly, as indicated earlier, reception condition sanctions under the proposal may be imposed where the applicant has breached his or her obligation under the proposed Dublin IV Regulation to apply in the first Member State of entry[193] and has instead "travelled to another Member State without adequate justification and made an application there".[194]

Secondly, and related to secondary movements, reception condition sanctions may be imposed where the applicant has been sent back "after having absconded to another Member State".[195] The issue of "absconding" will be explored in further detail below.

Thirdly, reception condition sanctions may be imposed where the applicant has seriously breached the rules of the accommodation centre or behaved in a seriously violent way.[196]

Fourthly, failure to attend compulsory integration measures may also result in reception condition sanctions.[197] JRS Europe is concerned at the potentially divergent and arbitrary constraints imposed on applicants, as well as being counter-intuitive to encouraging and incentivising applicants to participate in integration measures in partnership with authorities as part of a two-way process.

[189] Article 1, EU Charter,
[190] Article 19(1)(a), recast Reception Conditions Directive.
[191] Article 19(1)(a), proposed Reception Conditions Directive.
[192] Article 19(1)(b), proposed Reception Conditions Directive.
[193] Article 4(1), proposed Dublin IV Regulation.
[194] Article 19(2)(g), proposed Reception Conditions Directive.
[195] Article 19(2)(h), proposed Reception Conditions Directive.
[196] Article 19(2)(e), proposed Reception Conditions Directive.
[197] Article 19(2)(f), proposed Reception Conditions Directive.

JRS Europe is concerned that taking such a coercive and punitive approach through the use of reception condition sanctions, particularly in the context of Dublin and secondary movements, is entirely inappropriate given that the applicants' motivations for moving to a Member State may well be a result of the failure of Member States to meet asylum determination, procedural or reception condition standards – factors expressly acknowledged in the recitals themselves.[198] JRS Europe considers it inconsistent and arbitrary to punish applicants for what are essentially the failures of Member States to fulfil their obligations under the secondary legislation, the EU Charter and the ECHR and which are compounded by inherent design of the Dublin system.

5.5.3 Sanctions Related to Personal Liberty and Coercion

5.5.3.1 Proposed Reception Conditions Directive

Some of the most serious sanctions resulting from breaching obligations under the proposed Dublin IV Regulation relating to secondary movements[199] can be found in the proposed Reception Conditions Directive in the form of restrictions on personal liberty.[200] The restrictions on personal liberty can, in cases of non-compliance and a risk of absconding, also result in detention.[201]

As a consequence of breaching obligations under the proposed Dublin Regulation or as a result of a Dublin transfer, Member States are *obliged*[202] to require applicants to reside in a "specific place" in order "to effectively prevent the applicant from absconding".[203] The words "in particular" suggest that the circumstances in which absconding can be prevented are not limited to Dublin situations. However, consistent with the Court of Justice's interpretation of "in particular" in the context of the circumstances in which a person can be detained under the Return Directive,[204] this provision under the proposed Reception Conditions Directive should similarly be narrowly interpreted as an exhaustive set of circumstances in light of the very real likelihood that the measures will result in restrictions on, or even deprivations of, liberty. Indeed, the restrictions on residence in Dublin situations[205] or for "the swift and effective monitoring" of the asylum[206] or Dublin applications[207] draw only a tenuous link to the grounds set out in Article 2, Protocol 4 ECHR.[208]

From the outset, the measure of deciding on an applicant's "residence […] in a specific place" is at the very least a restriction on liberty but may also actually result in a form of detention, given "the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance".[209]

The definition of "absconding" is also cause for concern. The definition contemplates a person either leaving the territory where he or she is obliged to be present or not remaining available to the competent authorities, court or tribunal "in order to avoid asylum procedures". Firstly,

[198] Recital 5, proposed Reception Conditions Directive.
[199] Article 7(2)(d), proposed Reception Conditions Directive.
[200] Article 7(2), proposed Reception Conditions Directive.
[201] Article 8(3)(d), proposed Reception Conditions Directive.
[202] This is currently discretionary under the recast Reception Conditions Directive ("may").
[203] Article 7(2)(d), proposed Reception Conditions Directive.
[204] Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)*, Judgment, 30 November 2009, paras 68-71.
[205] Article 7(2)(d), Proposed Reception Conditions Directive.
[206] Article 7(2)(b), Proposed Reception Conditions Directive.
[207] Article 7(2)(c), Proposed Reception Conditions Directive.
[208] See further, ECRE (2016), "ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive COM (2016) 465", October, p. 9.
[209] *Guzzardi v Italy*, No, 7367/76, 6 November 1980, Judgment, Plenary Chamber.

the definition perpetuates the misguided understanding of the reasons for secondary movements. Invariably applicants make secondary movements not to avoid asylum procedures but, rather to do the exact opposite – to make use of the asylum procedures but in another Member State due to reception conditions that are in breach of standards or due to faltering asylum procedures in the first Member State. Secondly, the definition shows the absurdity of the Dublin system and its obligations by lumping together secondary movements (that is, *leaving* a Member State) with not remaining available to the competent authorities, court or tribunal (that is, including situations where the applicant *remains* in the Member State but has not 'remained available'). Thirdly, as ECRE quite rightly point out, the definition of "absconding" in the substantive provisions contemplate two very different types of absconding that are very much context dependent:[210] on the one hand, "absconding" contemplates an applicant who attempts to circumvent *procedures* in the Member State where they are (that is, trying to have the application processed in a country other than where he or she presently is).[211] On the other hand, "absconding" also means to circumvent the *transfer* to another country (that is, trying to have his or her application processed in the Member State where he or she presently is).[212]

Related to the issue of residence determination, is the prospect of detention when the applicant has not complied with a residence determination and there is a risk of absconding. A new circumstance in which detention may be ordered has been inserted as Article 8(3)(c). The jurisprudence of the ECtHR has seen some exceptions to permitting the detention of asylum applicants for the purpose of "preventing an unauthorised entry" under Article 5(1)(f) due to applicants having the express right to remain on the territory of the Member State under the Procedures Directive.[213] The exception to Article 5(1)(f) arises because States retain the possibility to exceed their obligations or create more favourable rights as permitted by Article 53 ECHR.[214] The Court has indicated that the detention of asylum applicants for making an "unauthorised entry" under Article 5(1)(f) ECHR may raise an issue as to the lawfulness of detention due to the right to remain granted during the asylum procedure.[215] Accordingly, the detention of asylum seekers may in some circumstances only be lawful in order to "secur[e] the fulfilment of an obligation prescribed in law" under Article 5(1)(b) ECHR.[216] JRS Europe is concerned that the new circumstance in which detention may be ordered under Article 8(3)(c) of the Proposed Reception Conditions Regulation? does not comply with Article 5(1)(b) ECHR and Article 6 of the EU Charter. Firstly, Article 8(3)(c) is cast in terms of non-compliance – leading to the conclusion that detention under this provision is punitive in its character, contrary to Article 5(1)(b) ECHR.[217] Secondly, the obligation contained in Article 8(3)(c) is not sufficiently specific and concrete as required by Article 5(1)(b) ECHR due to the wide

[210] ECRE (2016), "ECRE Comments on the proposed Reception Conditions Directive", op. cit., p. 8.
[211] Article 7(2)(d), third indent, also supported by Article 8(3)(b), proposed Dublin IV Regulation.
[212] Article 7(2)(d), first and second indents, supported by Article 8(3)(g), proposed Dublin IV Regulation.
[213] Article 9(1) Recast Procedures Directive; *Musa v Malta*, Application No. 42337/12, Judgment, 23 July 2013, para 97; *O.M. v Hungary*, Application No. 9912/15, Judgment, 5 July 2016, para 47.
[214] *Musa v Malta*, Application No. 42337/12, Judgment, 23 July 2013, para 97; *O.M. v Hungary*, Application No. 9912/15, Judgment, 5 July 2016, para 47.
[215] Ibid.
[216] Noting, however, the judicial silence on the application of Article 5(1)(b) in *Elmi and Abubakar v Malta*, Application Nos. 25794/13 and 28151/13, Judgment, 22 November 2016, particularly at para 141; *Jama v Malta,* Application No. 10290/13, Judgment, 26 November, at paras 139 and 144.
[217] *O.M. v Hungary*, Application No. 9912/15, Judgment, 5 July 2016, para 42.

interpretation that may be given to what might arguably be described as a 'pseudo obligation'[218] for applicants to reside in a specific place. [219]

5.5.3.2 Proposed Eurodac Regulation

The proposed Eurodac Regulation introduces the possibility for Member States to introduce "effective, proportionate and dissuasive sanctions in national law" against third country nationals who do not comply with the fingerprinting process or the capture of their facial image.[220] As pointed out by the European Data Protection Supervisor, the prohibition on the "use of sanctions to coerce the taking of fingerprints or a facial image"[221] from vulnerable persons or children does rather regrettably imply that such measures are possible against other third country nationals.[222]

The proposal presents a number of concerns. Firstly, the sanctions allow potentially divergent and wide-ranging possibilities for actions taken by Member States to coerce the taking of fingerprints or facial images – further compounded by the open-ended list of sanctions for non-compliance contained in the Commission Staff Working Document which included, *inter alia*, resorting to physical coercion.[223] As ECRE rightly observes, any provisions on sanctions for non-compliance in this context should be circumscribed, particularly by the rights contained in the EU Charter[224] and through the application of the principle of proportionality.[225] The use of coercion raises concerns about human dignity.[226] Secondly, as ECRE has argued, detention for the purpose of obtaining fingerprints or a facial image would appear to be legally possible given the broader personal scope of the proposal over the current (2013) Eurodac Regulation.[227] However, under the grounds for detention in the current recast Reception Conditions Directive,[228] detention for the purpose of determining or verifying identity would not provide a sufficient legal basis for the detention of asylum applicants due to the possibility that determining or verifying identity can be achieved by other means – namely, through documents – and, in the case of first-time asylum applicants, the gathering of such data cannot be used to determine or verify identity given the prohibition on the sharing of data with third countries.[229]

5.5.4 Sanctions against Member States

In addition to applicants being subjected to punitive measures, the coercive character of the proposed Dublin IV Regulation has also been directed towards Member States who may be compelled to pay EUR250,000 for each applicant that would have been allocated to them under the corrective allocation mechanism, as part of a temporary opt-out of 12 months.[230] JRS Europe is concerned that, although described as "financial solidarity", the size of the

[218] When read in conjunction with Recital 21
[219] *O.M. v Hungary*, Application No. 9912/15, Judgment, 5 July 2016, para 42.
[220] Article 2(3), proposed Eurodac Regulation.
[221] Article 2(4), proposed Eurodac Regulation. See also Recital 30 of the proposed Eurodac Regulation.
[222] EDPS (2016), "EDPS Comments on Eurodac", op. cit., p. 14.
[223] European Commission (2015), "Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints", SWD(2015) 150 final, 27 May, pp. 4-5, para 7.
[224] Articles 1 (dignity), 3 (physical and mental integrity), 4 (inhuman and degrading treatment), 6 (liberty), 7 (privacy), 24(2) (best interests of the child), EU Charter.
[225] ECRE (2016), "ECRE Comments on the Commission Proposal to recast the Eurodac Regulation COM(2016) 272", July, pp. 12-14.
[226] See further, EDPS (2016), "EDPS Comments on Eurodac", op. cit., p. 14.
[227] ECRE (2016), "ECRE Comments on Eurodac", op. cit., p. 13.
[228] Article 8(3)(a), recast Reception Conditions Directive.
[229] Article 37(1)-(2), proposed Eurodac Regulation; ECRE (2016), "ECRE Comments on Eurodac", op. cit., p. 13.
[230] Article 37, proposed Dublin IV Regulation.

contribution effectively acts as a coercive measure that is more likely to breed discontent by Member States that take the opt-out, as well as resentment by Member States that do participate in the corrective allocation mechanism on account of the perception of opting-out Member States "buying out" their obligations. Such a coercive approach does little to incentivise Member States to act in solidarity.

5.6 Lowering of Substantive and Procedural Standards

The CEAS reform package also represents a lowering of standards both substantively and procedurally in some key provisions. There is a greater degree of reiteration and dovetailing amongst the proposed secondary legislation (namely the proposed Dublin IV and the proposed Procedures Regulation), particularly with respect to admissibility determinations and time limits. It is not intended to provide an exhaustive analysis of all provisions within the reform package, but rather to highlight key concerns.

5.6.1 Mandatory Admissibility Determinations

The cornerstone of the CEAS reform package is the inclusion of the mandatory admissibility procedure – acting as the first threshold for applicants to cross in order to access the substantive asylum determination procedure. As under the proposed Dublin IV Regulation,[231] the proposed Procedures Regulation mirrors the obligation on Member States to conduct an admissibility assessment based on the first country of asylum and safe third country concepts.[232] Although this possibility exists under the current recast Procedures Directive[233] (together with other admissibility grounds)[234] by way of Member State discretion, the proposed Procedures Regulation not only compels a mandatory *assessment* under these grounds, but also compels a mandatory *rejection* as inadmissible if those grounds apply.[235]

As has been explored above in relation to such assessments under the proposed Dublin IV Regulation, this represents a significant obstacle to applicants gaining effective access to asylum determination procedures and, consequently, protection. The mandatory nature of both assessments *and* rejections (if a ground is fulfilled) means that Member States cannot exercise any discretion to allow those applicants that have *prima facie* well-founded claims from making an application for international protection. Such an approach brings the new provision into tension with the right of States to exercise their sovereignty to determine the substance of asylum claims. Accordingly, this approach highlights a policy of protection responsibility deflection to Third Countries, whilst at the same time increasing the administrative burdens on Member States' determination authorities, particularly for frontier Member States. If such an approach were adopted widely by States globally, then the

[231] Article 3(3), proposed Dublin IV Regulation.
[232] Article 36(1), proposed Procedures Regulation.
[233] Article 33(1) and (2), recast Procedures Directive.
[234] The proposed Procedures Regulation retains the current recast Procedures Directive's grounds for inadmissibility of a subsequent application (Article 32(2)(d) of the Recast, Article 36(1)(c) of the Proposal) as well as the situations where a separate application has been made without justification in what was a previously joint application by consent – however, the proposal amends "dependants" in the current Recast to "specify spouse, partner or unaccompanied minor" in the Proposal: see Article 32(2)(e) of the Recast and Article 36(1)(d) of the Proposal).
[235] Article 36(1), proposed Procedures Regulation, "The determining authority shall assess the admissibility of an application, in accordance with the basic principles and guarantees provided for in Chapter II, and shall reject an application as inadmissible where any of the following grounds applies".

possibilities for persons to access effective protection would be largely extinguished at a time when protection possibilities are so greatly needed.

5.6.2 Content of Mandatory Admissibility Determinations – the First Country of Asylum and Safe Third Country concepts

In relation to the first country of asylum concept, the proposal amends the current requirement under the recast Procedures Directive that the person be "recognised in that country as a refugee"[236] to "enjoyed protection in accordance with the Geneva Convention in that country".[237] This standard for applying this concept is effectively lowered as refugee status can only be granted by those countries that apply the Geneva Convention without geographic limitation, as was discussed in the JRS Europe EU-Turkey Deal Policy Analysis.[238] The adoption of the terminology "enjoyed protection in accordance with the Geneva Convention" is much more ambiguous and appears consistent with the Commission's view that that terminology entirely contemplates those countries with a geographical limitation on the Convention.[239] In relation to the alternative "sufficient protection" criteria,[240] greater clarity has been achieved by setting out the elements of "sufficient protection.[241] However, JRS Europe shares ECRE's view that, firstly, if the concept is to be retained, that it only be used where the level of protection is equivalent to the EU level of protection, and secondly, that the term "sufficient protection" should be replaced with the term "effective protection" and which should be reflected by including additional elements into the proposed "sufficient protection" criteria.[242]

In relation to the safe third country concept, the proposed Procedures Regulation contains three chief innovations which effectively lower the bar from the current recast Procedures Directive. *Firstly*, under the current recast Procedures Directive, the possibility must exist for a person to "request refugee status" and "to receive protection in accordance with the Geneva Convention" in the third country.[243] This has been scaled downwards under the proposed Procedures Regulation by amending the possibility "to receive protection in accordance with the *substantive standards* of the Geneva Convention or sufficient protection" in accordance with the first country of asylum concept [emphasis added].[244] The omission of "refugee status" and the inclusion of "substantive standards" not only creates ambiguity and runs the risk of divergent interpretation across Member States, but is in obvious deference to the geographical limitations of the Geneva Convention held by Turkey, especially in light of serious questions of the compatibility of the *current* recast Procedures Directive against Turkey's geographic limitation.[245] As noted by ECRE, "substantive standards of the Geneva Convention" falls well short of "in accordance with the Geneva Convention" contemplated by Article 78(1) TFEU.[246] *Secondly*, the proposal also lowers the threshold to apply the safe third country concept by

[236] Article 35(a), recast Procedures Directive.
[237] Article 44(1)(a), proposed Procedures Regulation.
[238] JRS Europe (2016), "JRS Policy Analysis EU-Turkey Deal", op. cit., pp. 16-17.
[239] European Commission (2016), Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, Brussels, 10 February, p. 18. See further on the use of this terminology in the context of the safe third country concept in JRS Europe (2016), "JRS Europe Policy Analysis EU-Turkey Deal", op. cit., pp.13-14.
[240] Article 44(1)(b), proposed Procedures Regulation.
[241] Article 44(2), proposed Procedures Regulation.
[242] ECRE (2016), "ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467", November, pp. 53-54.
[243] Article 38(1)(e), recast Procedures Regulation.
[244] Article 45(1)(e) proposed Procedures Regulation.
[245] JRS Europe (2016), "JRS Europe Policy Analysis EU-Turkey Deal", op. cit., pp.13-14.
[246] ECRE (2016), "ECRE Comments Proposed Procedures Regulation", op. cit., p. 55.

introducing the possibility for Member States, as an alternative to the "substantive standards" criterion, to apply the "sufficient protection" criterion as contemplated in the first country of asylum context.[247] There is a logical and legal disjunction with the use of that criteria. The first country of asylum concept applies where those persons have *obtained* protection status, whereas safe third country concept applies to those persons who *were not granted protection*, even if they had the opportunity to apply for it in the third country. The result of this amendment represents a confusion of the two concepts and a significant downgrading of protection in the safe third country context – potentially resulting in people being sent back to countries where there is no *effective* protection.[248] *Thirdly*, the level of connection between the third country and the applicant has been drastically lowered through providing for mere transit through a third country which is geographically close to the applicant's country of origin. This provision is entirely at odds to the "meaningful link" criteria that the UNHCR has long called for – expressly indicating that mere transit is insufficient to establish the requisite level of connection due to the fortuitous circumstances applicants find themselves in.[249]

5.6.3 Mandatory Internal Protection Assessment

Even if an applicant's application is found to be admissible, an additional hurdle to receiving international protection has been constructed through changing the current *discretionary* assessment of whether internal protection in the country of origin is possible[250] into a *compulsory* assessment.[251] Although the proposal contains greater procedural safeguards than the current recast, making such an assessment compulsory is problematic due to it finding no foundation in the Geneva Convention. The compulsory application may potentially lead to the incongruous situation where an applicant may be entitled to protection under the Geneva Convention but is denied protection under the proposed Qualification Regulation.

5.6.4 Cap on Member States providing "more favourable treatment"

The current recast Qualification Directive provides that Member States can introduce or retain more favourable standards for determining who qualifies as a beneficiary of international protection as well as the content of international protection.[252] This provision has been removed from the proposed Qualification Regulation[253] on the premise of approximating divergent standards and recognition rates across Member States.[254] JRS Europe is concerned that the removal of this provision from the proposal is a clear signal for Member States to approximate standards down, rather than up. Rather than taking an approach which incentivises Member States to reach higher standards of protection, it effectively acts as a deterrent for Member States with higher standards to approximate their standards to Member States applying lower standards.

[247] Article 45(1)(e), proposed Procedures Regulation.
[248] See further, ECRE (2016), "ECRE Comments Proposed Procedures Regulation", op. cit., p. 55.
[249] UNHCR (2016), "Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept," 23 March, p. 6 and n. 34.
[250] Article 8(1), recast Qualification Directive.
[251] Article 8(1), Recitals 24-25, proposed Qualification Regulation.
[252] Article 3, recast Qualification Directive.
[253] Note the new Article 3 of the proposed Qualification Regulation.
[254] See Explanatory Memorandum, pp. 12-13, recitals 3, 5, 8-9, proposed Qualification Regulation.

5.6.5 Time Limits

Both the proposed Dublin Regulation and the proposed Procedures Regulation introduce very short time limits on applicants and Member States, raising concerns about access to an effective remedy and the quality of the determination process.

Under the proposed Dublin IV Regulation, the timeframe for appeals on transfer decisions has changed from a "reasonable period of time"[255] to a strict seven-day period for the applicant to exercise their right to appeal.[256] JRS Europe shares the concerns of ICJ and ECRE that the unduly short time limit is not compatible with the right to an effective remedy guaranteed by Article 47 of the EU Charter, as well as CJEU and ECtHR jurisprudence, as it greatly affects the ability of an individual to prepare his or her case (including access to legal assistance and representation). This is particularly so in circumstances where evidence may need to be gathered on systemic procedural deficiencies or reception conditions in order to successfully challenge a transfer decision.[257] JRS Europe calls for the reinstatement of the "reasonable period of time" formulation as provided for under the current Dublin III Regulation.

Under the proposed Procedures Regulation Member States have a period of one month to determine admissibility applications, but which is reduced to ten days where the first Member State of application applies the first country of asylum or safe third country concepts in accordance with Article 3(3) of the proposed Dublin IV Regulation.[258] JRS Europe echoes the concerns of ECRE that such a time limit would effectively incentivise Member States to determine admissibility applications with a rapidity and inaccuracy that may also result in ineffective access to legal assistance and the opportunity for the applicant to effectively present his or her case.[259]

Similarly, the proposed Procedures Regulation also imposes time limits for determining first level appeals.[260] However, the utility of introducing time limits for appeals of both admissibility applications and first level appeals is highly questionable given that any breach of the time limits would appear not to result in any procedural repercussions not only for the applicant, but also for the court or tribunal deciding the matter. Accordingly, the proposal reveals an asymmetry of legal consequences for non-compliance as between Member States and applicants.

Of greater concern are the time limits for *lodging* an appeal under the proposed Procedures Regulation. *Firstly*, a time limit of one week is set for lodging an appeal against decisions rejecting a subsequent application as inadmissible or manifestly unfounded;[261] *secondly*, a time limit of two weeks is set for lodging an appeal of a decision rejecting an application as inadmissible, explicitly withdrawn or abandoned, or against a decision rejecting an application as unfounded or manifestly unfounded in relation to refugee or subsidiary protection status following an accelerated examination procedure or border procedure or while the applicant is held in detention;[262] and *thirdly*, a time limit of one month is set for appealing against a decision rejecting an application as unfounded in relation to the refugee or subsidiary protection status

[255] Article 27(2), Dublin III Regulation.
[256] Article 28(2), proposed Dublin IV Regulation.
[257] ECRE (2016), "Comments on Proposed Dublin IV", op. cit., pp. 28-29; International Commission of Jurists (2016), "Procedural rights in the proposed Dublin IV Regulation", 27 September, pp. 2-4.
[258] Article 34(1), proposed Procedures Regulation.
[259] ECRE (2016), "Comments on Proposed Procedures Regulation", op. cit., p. 40.
[260] Article 55, proposed Procedures Regulation.
[261] Article 53(6)(a), proposed Procedures Regulation.
[262] Article 53(6)(b), proposed Procedures Regulation.

if the examination is not accelerated or in the case of a decision withdrawing international protection.[263]

The mandatory nature of the time limits for *lodging* an appeal and the inability for Member States to provide any flexibility for their extension effectively means that the individual circumstances of the applicant cannot be taken into account, contrary to the jurisprudence of the ECtHR[264] and the CJEU.[265] JRS Europe is concerned that circumstances such as being in detention or in a border procedure, the inability to receive adequate legal advice or give adequate instructions, the difficulties in arranging interpreters as well as the complexity of the case itself and factors personal to the applicant (such as vulnerability or special needs) may well mean that the time limits of one week and two weeks are incompatible with Article 47 of the EU Charter.

5.6.6 Diminished Scope of Appeals - Dublin Transfers

The proposed Dublin IV Regulation limits the scope of appeals of transfer decisions to an assessment of inhuman or degrading treatment or punishment (Article 3(2)), or the contravention of the family provisions contained in Articles 10-13 and 18.[266] The limitation of the material scope of the appeal is contrary to the recent CJEU decision in *Ghezelbash*[267] (which overturned the narrow interpretation of available remedies against a transfer decision enunciated by the Court in its previous decision of *Abdullahi*[268]). In *Ghezelbash*, the CJEU held that an effective remedy against a transfer decision must be available to the applicants against *all* the criteria for determining which Member State is responsible under the Dublin Regulation.[269] JRS Europe is concerned that the restriction of the material scope of the appeal for transfer decisions is not only contrary to Article 47 of the EU Charter but also Article 1 Protocol 7 ECHR. Accordingly, JRS Europe calls for the deletion of Article 28(4) of the Proposed Dublin IV Regulation.

5.6.7 Curtailed Discretionary Clauses – Sovereignty and Humanitarian Clauses

Under the proposed Dublin IV Regulation, the scope of the sovereignty clause (whereby a Member State may decide an application even though another Member State is responsible)[270] has been limited to family circumstances that essentially fall outside the definition of family contained in the proposal.[271] In addition, a timeframe has been imposed on this discretion – meaning that it cannot be exercised *after* a Member State has been determined as responsible. JRS Europe is concerned that the proposal's limitation of Member State discretion is not only contrary to a State's sovereign right to substantively examine an application for asylum, but leaves no room for Member States to express solidarity by electing to examine applications currently made in their territory instead of compelling the transfer of the applicant to another Member State.

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[263] Article 53(6)(c), proposed Procedures Regulation. See further, ECRE (2016), "Comments on Proposed Procedures Regulation", op. cit., pp. 65 – 66).

[264] *I.M. v France*, Application No. 9152/09, Judgment, 2 February 2012, para 147.

[265] *Case C-69/10 Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment, 28 July 2011, paras 66-68; Case C-63/08 Pontin v. T-Comalux SA, Judgment, 29 October 2009, Paras 48, 62-69.

[266] Article 28(4) and Recital 24, proposed Dublin IV Regulation.

[267] Case C-63/15 *Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, Judgment, 7 June 2016.

[268] Case 394/12 *Abdullahi v Bundesasylamt*, Judgment, 10 December 2013.

[269] Case C-63/15 *Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, Judgment, 7 June 2016, para 61 (reasoning from para 46ff).

[270] Article 19(1), proposed Dublin IV Regulation.

[271] Article 2(g), proposed Dublin IV Regulation.

Similarly, as indicated earlier, the humanitarian clause has also been limited to bringing together family relations by deleting "humanitarian grounds based in particular on family considerations". JRS Europe is concerned that, by omitting humanitarian circumstances which may warrant another Member State voluntarily assuming responsibility for determining the claim, applicants suffering from health or vulnerability may be precluded from family support.[272]

5.6.8 Exclusionary and Discriminatory Provisions on Access to Labour Market

Although the Proposed Reception Conditions Directive reduces the waiting period for applicants to access the labour market from nine months to six months, the proposal also takes an exclusionary and discriminatory approach based on the *category* of asylum seeker. The proposal firstly, excludes those who have been subject to accelerated procedures in particular circumstances from accessing the labour market;[273] and secondly, urges (but does not compel) the prioritisation[274] of applicants who have claims that are "likely to be well founded" by reducing the waiting time for access to the labour market to three months.[275] These exclusionary and discriminatory provisions are not only contrary to the non-discrimination provisions of the Geneva Convention (Article 3), but also further compound an approach of nationality discrimination that has become increasingly visible in EU asylum policy over the past 12 months.[276] Further, JRS Europe is increasingly concerned at the concretisation of a binary "good refugee, bad refugee" discourse through the preferential treatment based not on an individual assessment of the applicant's case, but on factors such as likelihood of protection status recognition on account of nationality.

6. Conclusions

The CEAS reform package concretises the seismic shift in the European Union's asylum policy and its international protection obligations that became evident in the March 2016 EU-Turkey Deal. The breadth of reform across the existing EU secondary legislation is significant, particularly so shortly after the implementation of the second phase of the CEAS. However, what the reform package has in breadth, it lacks in ambition to address the inherent and long-standing shortcomings of the CEAS resulting not least from the dogged devotion to the Dublin system. The proposals, if enacted, will not only fail the protection and reception needs of forced migrants, but also run the risk of again failing Member States (particularly those at the Union's frontiers) and the Union as a whole.

Taken as individual amendments in the respective secondary legislation, the reforms are deceptively unassuming. However, the combined effect of the amendments represents a serious challenge to the safety and welfare of forced migrants. The infusion of temporary protection into the CEAS is a pernicious development that, if enacted, will disproportionately impact families and children as well as presenting a real risk to the social inclusion prospects of beneficiaries of international protection. The introduction of new obligations on both applicants for, and beneficiaries of, international protection parallels the introduction of procedural, reception condition, personal liberty and coercive sanctions that demonstrate the

[272] Article 19(2), proposed Dublin IV Regulation; see further ECRE (2016), "ECRE Comments on Dublin IV", op. cit., p. 18.
[273] Article 15(1), proposed Reception Conditions Directive.
[274] See Article 33(5)(a). proposed Procedures Regulation.
[275] Recital 35, proposed Reception Conditions Directive.
[276] JRS Europe (2016), "JRS Europe Policy Analysis EU-Turkey Deal", op. cit., p. 22-23.

misguided attempts to deal with symptoms rather than underlying systemic shortcomings of the Dublin system. Member States are also subject to a coercive, rather than incentivised, approach that is clothed as “financial solidarity” but which is likely to exacerbate differences between Member States rather than resolve them. Finally, the lowering of substantive and procedural standards in key provisions witnesses the harmonisation down, rather than up, that is symptomatic of a reactionary rather than a visionary response to the protection needs not only of those forced migrants that have reached EU territory but those maintaining hope beyond the EU’s borders. The cumulative effects of the reform package are a serious cause for concern, not least for forced migrants, and which should be met with both scrutiny and vision.