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No Detention and Deprivation of Rights of People seeking Protection

Response to the German Outline for reorienting the Common European Asylum System

In her agenda for Europe, newly elected European Commission President Ursula von der Leyen announced her intention to present a New Pact on Migration and Asylum, including a reform of the Common European Asylum System (CEAS). A proposal for this reform is expected in spring 2020. It could be that this initiative will build on a paper by the German Federal Ministry of the Interior, Building and Community (BMI) of 13 November 2019.¹ The proposals released in November 2019 can be summed up as a border procedure with detention. Only if there is a positive pre-examination is the entry to the European Union (EU) allowed in order to undergo the asylum procedure. These asylum seekers will be re-allocated to different Member States on the basis of a distribution key. The asylum applications of those asylum seekers who do not pass the pre-examination will be decided definitively in the border procedure. If they are rejected they are to be returned from that point.

The ideas that the BMI has released are not at all suited to reaching the goals the ministry has set itself, i.e. to create a system that *»meets humanitarian standards«, »functions in practice«* and *»does not overburden individual member states or lead to intolerable overcrowding in detention camps«*. **Instead, precisely that overburdening and those camps are likely to come about – with dramatic impacts on persons seeking protection. The BMI proposal is a systematic attack on access to the individual right to asylum in the whole EU and on the right to an effective legal remedy.** This will be shown in the following human rights-based analysis of the BMI's proposal. The paper first describes the problem of detention and the obligatory pre-examination at the external border. Then it raises the issue of legal protection and, finally, questions the system of compulsory re-allocation.

¹ The proposal was published by Statewatch: <https://bit.ly/2RmK4tx>.

In view of the growing rightwing populism in the EU, which is already driving the actions of some governments, there is a risk that reforming the CEAS at this moment in time could lead to a reduction in standards based on human rights and the rule of law. As a consequence, PRO ASYL joined with many other organisations to issue the **Berlin Action Plan** on 25 November 2019. The Action Plan calls on the Commission as the guardian of the EU treaties to enforce the unconditional right to an individual, fair and thorough asylum procedure and to ensure compliance with this obligation at all levels of government in the EU. Likewise, Article 78(1) of the Treaty on the Functioning of the European Union (TFEU) must be implemented more effectively: this binds all actors to the 1951 Convention relating to the Status of Refugees (Refugee Convention) and other human rights instruments. A fresh start in European asylum policy means, first and foremost, a return to law, the rule of law and respect for international law at Europe's borders.² Since no new rules on responsibility for asylum are in sight, the humanitarian scope of the Dublin III Regulation must meanwhile be used to the fullest extent.

The right of family reunification set out in the Dublin III Regulation needs to be guaranteed without restrictions. Furthermore, the regulation opens the possibility of starting from an extended concept of family. Existing law also allows countries to take charge of boat refugees or refugee children in Greece on humanitarian grounds.

DETENTION AND COMPULSORY PRE-EXAMINATION OF ASYLUM APPLICATIONS AT THE EXTERNAL BORDER

A core element in the BMI's proposal is the obligatory pre-examination of asylum applications under detention conditions at the EU's external border. The BMI proposal indicates that, before entry, the following checks have to be made:

- Eurodac registration
- Security check
- Pre-examination: **»Manifestly unfounded or inadmissible applications shall be denied immediately at the external border, and the applicant must not be allowed to enter the EU. [...] In this regard we should consider particularly if entry should be denied to persons travelling from *safe third countries* and those persons who provide *contradictory or false information*.«**

Carrying out this pre-examination requires securing it with a *»measures restricting freedom of movement«*. According to the BMI, asylum seekers must not derive any benefit from not making their asylum application directly at the external border. Hence the same procedure as at the external borders should be carried out when they make their application after an irregular entry, e.g. to Germany. Logically this will entail detention, besides the pre-examination.

² Berlin Action Plan on a New European Asylum Policy, November 2019, <https://bit.ly/3aDSe8m>.

Applying »safe third country«-criteria or making a »prima facie examination« of the grounds for asylum are in practice such broad and extensive tasks that large camps and long periods of detention are unavoidable. The more elements that need checking in a border procedure, the longer it will take and the fuller the planned detention centres will become. PRO ASYL fears a repetition or perpetuation of the disastrous conditions in the Greek refugee camps on the Aegean Islands.

By breaking with the principle of the first country of entry and proposing a distribution key (*»fair share«*), the BMI approach seems to provide for a paradigm shift, away from the present system. Yet through the border procedure and detention camps the main responsibility would lie with the same Member States as before. Even with EU support in conducting the procedures, these states would need to organise not only accommodation in large camps, but also a judicial system prepared for thousands of appeals. Furthermore, the European border states would have to see to the deportation of the persons rejected in the pre-examination and consequently not re-allocated. It is not clear why current difficulties with deportations should disappear at this point.

Generalised mass detention

According to the BMI, its ideas about border procedures or pre-examination can only be implemented by depriving people of their freedom, in other words, detaining them.

Article 31 Refugee Convention provides that refugees must not be punished for illegal entry. **Fleeing is not a crime! Detention is one of the strongest ways in which the state can encroach on a person's rights.** The right to liberty is a fundamental human right according to Article 3 of the Universal Declaration of Human Rights (UDHR), Article 5 of the European

Convention on Human Rights (ECHR) and Article 6 of the Charter of Fundamental Rights of the European Union (CFR). In the case of detention, the principle of proportionality takes on particular importance. Accordingly, detention must only be used after an individual examination and as a final resort. Furthermore, a period of detention must be for a limited period and open to review before a court regarding its duration and

A practical example: the Moria disaster

The Moria refugee camp on Lesbos was planned for 3000 people. In early 2020 there were 18,806 refugees living in or around it, six times the original capacities. The conditions are appalling. The UNHCR reports that 14,000 people have set up makeshift camps in the olive groves. In some cases there is only one toilet for 200 people, so the sanitary conditions are dreadful. Medical care is also disastrous. Médecins sans frontières regularly sounds the alarm – also regarding the situation of the many children in the camp, who are under great psychological pressure. Since the EU-Turkey deal of 2016 (see below) there has been a steady growth in the number of people stranded there with no prospects of change. Keeping people on the Greek islands is part of the deal.

circumstances (see e.g. European Court of Human Rights (ECtHR), *Amuur vs France*, *Khlaifia*

and others vs Italy). **A generalised detention of all asylum seekers after they enter the EU would be out of all proportion.**

Moreover, it is predictable that rejected persons would be sent immediately into detention preceding deportation. The result would be **months of detention at the border.**³

The BMI ideas do not even provide for a restriction regarding minors and other vulnerable persons. The UN Committee on the Rights of the Child clearly states: **minors must on no account be detained on grounds of illegal entry.** This is never in the best interest of the child and violates their right to the best possible opportunities for development. After all, even a short period of detention may impact negatively on children. Families should not be detained either, in order to avoid children being separated from their parents.⁴

»Safe Third Countries«: outsourcing refugee protection

In the context of examining admissibility, the authorities decide on whether the asylum application is to be examined and processed. If they find an asylum application to be inadmissible, e.g. because the person could allegedly have received protection in a »safe third country« and can be returned there, the application will not be examined substantively.

With this admissibility check, the EU outsources refugee protection to third countries and withdraws from responsibility itself. According to UNHCR figures, 84% of refugees worldwide are already located in states with low or medium incomes. Such an attempt to surrender responsibility is also noticed by the international community and is diametrically opposed to the obligation to share international responsibility as set forth in the UN's Global Compact for Refugees adopted in 2018.

A practical example: the EU-Turkey Statement

Such outsourcing is already part of the EU-Turkey Statement. One of the core aspects of the statement of 18 March 2016 are admissibility checks, according to which Turkey is assessed as a »safe third country« in Greece.

Yet Turkey does not meet the criteria for this: Turkey only ratified the Refugee Convention with a geographical limitation. Rights granted theoretically – e.g. access to medical care, education and the labour market - remain *de facto* blocked. Additionally, Turkey does not

³ In this respect, see also ECRE's Comments on the Commission Proposal For a Recast Return Directive, November 2018, <https://bit.ly/2R7TCse>; in its position of June 2019 on the Proposal for a Return Directive (recast), the Council did not refer to the question of border procedures.

⁴ See UN Committee on the Rights of the Child, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN-Doc. CMW/C/GC/4-CRC/C/GC/23, para. 5 ff.

adhere to the non-refoulement principle, as seen e.g. from its deportations to Syria as documented by Amnesty International and Human Rights Watch.

The Munich administrative court had similar doubts when it stopped the transfer of a Syrian to Greece, pointing to the risk that a probably erroneous use of the »safe third country« criterion would lead to a chain deportation to Turkey (VG München, decision of 17 July 2019, ref. M 11 S 19.50722, M 11 S 19.50759).

The use of admissibility procedures leads to a domino effect, with each state attempting to declare the adjoining ones »safe third countries«. Hungary has classed Serbia as such, despite protest from the UNHCR. Serbia, in turn, considers Greece and Turkey to be »safe third countries«. That is leading to chain rejections and deportations, which deny refugees asylum and leave it up to the neighbouring states of crisis- and war-ridden countries to receive refugees.

In addition, the EU's attempt to induce other countries to take refugees back may stifle the development of refugee protection in those countries. In North African states such as Tunisia and Morocco there have so far been no national asylum systems; procedures to recognise refugees are conducted by the UNHCR. Accordingly, the UNHCR - in its Recommendations for the Croatian and German Council Presidencies – advises against compulsory admissibility procedures, as they are legally hard to implement and may **impact negatively on the development of asylum systems in third countries.**⁵

In the framework of negotiations on the proposal for an Asylum Procedures Regulation, which are currently on hold, both the Commission and the Council called for a lowering of the criteria for a »safe third country«.⁶ The Member States proposed that the necessary protection should only be required in parts of the country. The Commission took the line that the complete ratification of the Refugee Convention no longer needs to be a criterion and that solely having transited through a country is enough to constitute a necessary connection with it. **If the criteria for a »safe third country« are lowered that will increase the risk of deportations to countries in which the refugees are without protection and at risk of chain deportations to their country of origin. Such deportations would contravene international law.**

Preselection at the border

Obligatory pre-examinations prevent a speedy and proper substantive examination of the application for protection and the granting of the necessary protection. This also applies to a

⁵ UNHCR, UNHCR's Recommendations for the Croatian and German Presidencies of the Council of the European Union, 2020, p. 4, <https://bit.ly/373py6M>.

⁶ See Article 45 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for granting international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final; compromise proposals of the Presidency of 15 November 2017, Council doc. 14098/17, cf. here the motion of the party Bündnis 90/Die Grünen in the Bundestag of 12.12.2017, doc. 19/244.

prima facie check as to whether the asylum application can be rejected as »manifestly unfounded«, e.g. because the person comes from a supposedly »safe country of origin«. The BMI suggests that it would be possible to quickly establish whether an application was »manifestly unfounded« in a pre-examination. **It is misleading to stress the alleged »obviousness« of a decision, since even a rejection on such grounds must be based on a comprehensive and careful hearing of every single asylum seeker.**⁷ In Germany, the Federal Office for Migration and Refugees (BAMF) estimates a time-saving of only 10 minutes when processing the applications from persons from »safe countries of origin«.⁸

Greece is a good example of procedures often taking considerably longer than planned. Despite support by EASO, in 2018 it took an average of seven months from registration to the first-instance decision. And yet, according to the law, accelerated border procedures were meant to be completed within two weeks and an initial decision was to take only two days.

A practical example: German airport procedure

The BMI proposal is strikingly similar to the German airport procedure (§18a Asylum Act), which the Federal Constitutional Court allowed **only under certain conditions**. The airport procedure is an accelerated procedure. If the BAMF rejects the application within two days as »manifestly unfounded«, the person is refused entry. He or she only has a three-day period to apply for urgent legal protection and another four days to provide the necessary grounds for so doing. If the BAMF has not taken a decision within two days, the person is allowed to enter and the asylum procedure is conducted in the normal way. Likewise there is a legal claim to entry if the court has not ruled on the urgent application within 14 days.

In its 1996 decision on airport procedure the Federal Constitutional Court underlined the need to organise the accommodation on the airport grounds in such a way as not only to meet the standards of decent treatment but also to counteract possible disadvantageous impacts of the accommodation situation on the asylum procedure and the effective legal protection. Those concerned must be guaranteed access to the courts and the Federal Constitutional Court regards **cost-free, independent legal advice** as necessary for that purpose.

In addition, ECtHR case law on French airport procedure shows that overly short deadlines (in that case, 48 hours) for the legal remedy, and the applicant's lack of time and opportunity to prepare, may constitute a violation of Article 3 in connection with Article 13 ECHR (see ECtHR, *I.M. vs France*).

⁷ See also UNHCR, response to the public hearing in the committee for domestic policy and community of the German Bundestag on the motion of the FDP parliamentary party: "Regulated procedure for classifying safe countries of origin" (BT-Drs 19/8267), 6.12.2019, committee doc. 19(4)411 D, p. 3.

⁸ Draft law of the Federal Government to classify more states as safe countries of origin and facilitate access to the labour market for asylum seekers and foreigners with exceptional leave to remain, 26.05.2014, BT-Drs. 18/1528, p. 20.

German airport procedure shows that it would require a considerable amount of effort to conduct a pre-examination with »manifestly unfounded« rejections at the EU external borders while remaining in conformity with the rule of law and human rights. In particular, legal support needs to be guaranteed for every individual.

In addition, there are **well-founded doubts about the quality of decisions in border procedures and accelerated procedures** in general. EASO noted in an internal report that in 2018 the recognition rates in these special procedures were, at 11-12%, well below the recognition rates in regular asylum procedures (34%). This should not serve as an incentive to set up more special procedures but rather as a warning signal regarding their quality.⁹

NO EFFECTIVE LEGAL REMEDY?

With its proposal, the BMI is concerned to concentrate the capacities for legal protection and avoid »double legal protection«. There are strong legal doubts about these considerations.

If a person is rejected in a pre-examination, there is only supposed to be one instance of legal protection against the negative decision and refusal of entry. In order to meet the human rights and rule-of-law standards there needs to be an effective remedy in the context of which the appeal is subject to independent and precise examination. This also means that there needs to be time and opportunities for preparation along with legal support (cf. the remarks above on airport procedure). The BMI does not explain how this can be guaranteed for the hundreds, if not thousands of people detained in camps in remote places. Greece is again a warning: at the end of 2018 there were only three lawyers under the state legal support system on the northeast Aegean islands – a clearly inadequate number in view of the 40,000 refugees present (at the end of 2019/beginning of 2020).

Legal protection against the allocation decision is apparently only to be available in the Member State responsible for the asylum procedure, i.e. not until the person has been re-allocated. Likewise in the case of secondary movement, legal protection is to be possible only in the Member State responsible but not in the Member State in which the person is currently staying. **The case law of the Court of Justice of the European Union (CJEU) and the ECtHR is unambiguous in stating that, after moving from one country to another, a person cannot be sent back to the first one if there is a risk of severe human rights violations in that country** (cf. inter alia ECtHR, M.S.S. vs Belgium and Greece; CJEU, N.S. et al.). Even after a reform we must assume that in some Member States there will continue to be serious problems in the asylum procedure and/or reception system. Accordingly, **legal protection must be guaranteed before anyone is allocated or returned.** Otherwise this will be a violation of the right to an effective legal remedy (Article 47 CFR, Article 13 ECHR) in

⁹ EASO, Policies and practices regarding border procedures among EU+ countries, 2019, p. 3, <https://bit.ly/38erKbK>.

connection with the prohibition of torture or inhuman or degrading treatment (Article 4 CFR, Article 3 ECHR).

RELOCATION – COERCIVE SYSTEM PREVENTS ACCEPTANCE

According to the BMI proposal *»certain circumstances of the individual case could be considered [editor's note: during relocation] as far as practical, for example family relations and visas, or factors which could be relevant in case of return, such as member states' return partnerships with third countries.«*

Family reunification is a right and must always be guaranteed when it comes to allocation to a certain country - independently of the quotas calculated in a »fair share« model. The concept of family must be broadened to include more than just the core family, which does not even include siblings. Besides kinship, consideration should be given to pro-integration elements like cultural contexts, language knowledge, earlier residence in an area, and the like. Such consideration is more likely to create acceptance of the system by those concerned than any sanctions, however tough.

Drastic sanctions planned, instead of flexibility

The BMI proposal backs up the »fair share« between the member states with drastic sanctions against asylum-seekers if they do not keep to the allocation. Part of these sanctions is the **principle of »once responsible, always responsible«**. Unlike in the present Dublin system, there is to be no time limit on the responsibility of the country of first reception.

So far the Member State in which the asylum seeker is currently residing has to conduct the Dublin procedure, i.e. return him or her to the country of first reception, within certain time limits (six months, or in some cases, 18 months). Otherwise it will itself become responsible for the asylum procedure. These arrangements can settle humanitarian cases that have escaped attention, e.g. in the case of illness or families with small children. The future system no longer foresees such arrangements for transferring responsibility; the consequence may be a lasting separation between the place of residence and the Member State responsible. Persons concerned could therefore be deported to the latter even years later.

In order to compel the persons concerned to observe the rules on the Member State responsible, they are not to receive **any social benefits or accommodation if they move to another country**. This is not compatible with the CFR, which states in Article 1: **Human dignity is inviolable. It must be respected and protected.** Article 1 of the German Basic Law uses almost the same terms. The case law of the Federal Constitutional Court (*»Human dignity may not be relativised by migration policy«*, judgement of 2012 regarding the Asylum Seeker Benefit Act) and that of the CJEU (cf. e.g. *Haqbin*) both clearly state that a complete

exclusion from social benefits leading to a risk of **destitution** violates human dignity. Nor can it be politically desirable to force people into **illegality** in order to escape the compulsory allocation system, and cause a **rise in the numbers of homeless people**.

There will always be cases which, due to the person's circumstances or the conditions in the Member State that is actually responsible, necessitate more flexibility in the system. In order to do them justice and avoid human tragedies, **scope for humanitarian action must be retained and responsibility must shift from one Member State to the other when time limits expire**.

At present the Dublin III Regulation not only decides where the person has to remain during their asylum procedure, but also where they have to live after recognition. Only after five years is it possible to obtain a permanent residence permit for the EU and thereby move to another Member State. That increases the pressure on the people to get to the Member State in which they e.g. see the best opportunities for work or education for themselves, in order to be there already while undergoing their asylum procedure. These required lengths of stay, or other requirements, should be considerably reduced. **After being granted asylum, recognised refugees should be granted full freedom of movement**.