Working Paper

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The Commission's Green Paper on the Future Common European Asylum System

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The European Commission's recently released Green Paper on the future of the Common European Asylum System is due to kick-start the process of asylum policy integration called for by the Heads of Government and State in 1999. The Paper is to be welcomed not only for giving definition to the integration process but also for eliciting discussion about a policy area in which decision-making has traditionally been low-key and undemocratic. Nevertheless, the thematic structure and approach of the Paper are open to critique. After situating the Green Paper in the process of asylum policy integration, this paper examines the principle points of debate raised by the Green Paper along with the issues it neglects.

The Green Paper in context: the development of the CEAS

In 1999, with all the fanfare befitting a *fin de siècle* portent, the EU's Heads of Government and State (HOGS) announced that the EU would embark on the building of a common European asylum system (CEAS). Their so-called Tampere Programme did not, however, specify what this meant. Two years earlier they had put their names to the Amsterdam Treaty, which, whilst conferring on the European Community considerable competencies in the area of asylum policy, also carefully prescribed their exercise until 2004. The Community's asylum activities were, for example, to include the agreement of common minimum standards for the reception of asylum-seekers as well as for the qualification of refugees and the procedures by which claims were to be assessed. The HOGS' 1999 pronouncements repackaged these projected measures as the foundations of a common asylum system, setting the bounds of the CEAS' initial development while leaving the question of its end-state open.

Beyond these loose quantitative parameters, the Tampere Programme also elaborated on the qualitative character of the EU's intervention in migration policy: since 1997, the express motivation for EU activity in asylum policy had been to set a "level playing field", in which no member state would offer significantly lower asylum standards than its EU-partners and thus deflect asylum applicants to its more generous neighbour states – a kind of institutionalised solidarity between the member states. The Tampere Conclusions complemented this central aim:

➢ by reiterating the normative legal basis of asylum activity in Europe and the HOGS' commitment to "the Geneva Refugee Convention and other relevant human rights instruments". This came as a response to concern that harmonisation between the member states would not in fact occur on the basis of solidarity, but rather at a lowest-common-denominator level below these legal standards.

> ➤ by introducing socioeconomic concerns into migration policy cooperation which required a response more than mere immigration restriction. The HOGS thus called for attention to be paid to issues of immigrant integration, anti-discrimination and legal economic immigration.

> ➤ by reinforcing the HOGS' commitment to foreign and development policy priorities within migration policy. This meant acting in solidarity with third states as well as elaborating migration policies in the joint interests of the EU and countries of origin and transit.

A stocktaking of the 'foundations' of the CEAS

After its introduction into the political wild, commentators did not afford this catalogue of high-sounding aims very high survival chances—a reaction largely borne out by hindsight:

In quantitative terms, although the measures called for at Tampere were duly agreed upon, the timetable for their adoption proved too ambitious. The difficult negotiation of the first wave ended long behind schedule in December 2005 with the asylum procedures directive—a measure that still had many loose ends to tie up. Moreover, the progress achieved under the first wave was subject to the additional criticism that the quantitative focus had been on the harmonisation of domestic legislative frameworks. This kind of harmonisation was all very well, but it had occurred without consideration of the practical situation on the ground in the member states. There, the implementation of the legislative measures might actually prove impossible because of a dearth of facilities and resources.

In qualitative terms, the picture was rather bleaker: Solidarity between the EU-15 (and from 2004, EU-25) was in relatively short supply. Many analysts suggest that the burden for dealing forced migration falls disproportionately to the southern and eastern member states—a fact cemented by mechanisms like the Dublin-II system for identifying the member state responsible for assessing asylum claims made in the EU. Moreover, it was almost exclusively these peripheral states that signed up to standards higher than those already in place in their respective national legislations. They complain that, although it was better resourced states like Germany that pushed them to sign up to standards more in line with theirs, they have received little help in applying these standards, despite the disparity in their resources and infrastructure from the EU norm. The 'hard' mechanisms for burden-sharing, like the European Refugee Fund (ERF), remained inadequate.

NGOs warned that, despite the improvement to the rules in these peripheral states, the legal standards adopted were below par. Progressive elements, such as the recognition of non-state actors in the new EU regulations on asylum claims and a sensitivity to gender issues, remained the exception rather than the rule. Harmonisation was at a lowest-common-denominator level, at least amongst those northern and western member states with more advanced systems. Much activity took place on

the basis of the tenet that high legal and administrative standards in asylum policy equates to a loss of executive control over migration. The rights afforded applicants in the asylum procedures directive were accordingly slim.

Although some effort was expended on dealing with the socioeconomic issues of migration in a constructive manner, the results were hardly earth-shattering. 2004 saw the elaboration of principles for the integration immigrants; however, this catalogue remained until 2007 the zenith of activity in this area and a triumph for the art of political speak. Moreover, the question of the integration of asylum-seekers and those recognised as in need of international protection was marginalised even in this limited debate, with other categories of immigrant forming the focus of attention. Work on the 'external', or foreign policy, dimension of asylum polity advanced more quickly, but without a clear sense of direction.

The Green Paper and its institutional environment

The marked propensity during the first wave to neglect issues of implementation, to (1) privilege concerns of effective migration restriction over legal-normative questions, to (2) favour the agenda of a ribbon of member states stretching from Britain, through France, Belgium, the Netherlands to Germany and Austria, as well as to (3) subordinate socioeconomic and foreign policy concerns to the imperative of migration control can in large part be put down to the make up of the Justice and Home Affairs Council. This Council constellation dominated policy-making during this period and did not apparently hold dear the priorities which its members had sketched out for the HOGS' approbation at Tampere in 1999.

This body or, perhaps more accurately, decision-making "scaffolding" largely consists of national interior ministers and their officials, who in some cases were deemed to have facilitated agreement at the European level by minimising consultation with those at the national level in charge of implementation as well as with their counterparts in social and economic ministries. Agreements were frequently reached in low-key fora away from the influence of NGOs or the institutionally marginalised Parliament, let alone the European Court of Justice. Discussions were dominated by that ribbon of member states which has been able to use the conditionality process of EU enlargement to exert their migration interests at the expense of new member states as the EU has expanded to the south and east, but which also enjoy a certain weight thanks to their resources and considerable experience in dealing with immigration problems.

The Green Paper arrives to a very different environment than that in which the foundations of the CEAS were forged. Those bodies charged with implementing EU policy have become more active, as witnessed by the increased exertions of the German *Bundeslaender*. Institutional alterations have also reinforced those agendas articulated at Tampere but in large part unrealised. The European Parliament now enjoys co-decision rights over almost all aspects of asylum policy, pushing for legal-normative

concerns to be recognised. The European Commission enjoys a sole right of initiative, and is—at least formally—in a better position to promote marginalised socioeconomic and foreign policy priorities.

In its 35 targeted questions and 4 thematic chapters, the Paper picks up on the qualitative legal-normative, socioeconomic and foreign policy *foci* elaborated at Tampere, either affording them a chapter of their own, or considering them as a sub-issue of another. The question of implementation, neglected at Tampere, is also taken up, as is the imperative of effective migration control. The Commission's Green Paper seeks to fill in the quantitative queries left open by the Tampere Programme, eliciting debate on the parameters for the second wave. These quantitative issues have so far received little treatment, despite the calls made by the HOGS at the Hague in 2004 for a single European asylum procedure and single status for those recognised as in need of international protection.

The questions of the Green Paper: missing the point?

The Green Paper's targeted questions are broadly separated into quantitative and qualitative questions. However, not only do many of the qualitative questions avoid the heart of the matter, their separation from the quantitative dimension is artificial.

Quantitative issues

It is precisely the quantitative dimension that requires the most qualitative discussion, demanding as it does a clear idea of the fundamental rationale behind cooperation. Yet those questions in the Green Paper that are most concerned with fathoming the quantitative parameters for the second wave (i.e. those of the chapter "legislative instruments") are largely free from any thoughts of its qualitative rationale, be this to foster solidarity and legal-normative goals, improve the socioeconomic state of the Union or to function as a regional unit in the global migration context. In the absence of this debate, the parameters of cooperation will remain ambivalent, and the often unspoken priorities of effective migration restriction and broader European policy—whether of a pro-integrationist or eurosceptic bent—will likely define the degree of asylum cooperation achieved.

This is already apparent in the Green Paper and the existing quantitative agenda, where the issue of establishing an Asylum Support Office has been brought up: The Commission Unit charged with asylum policy is small and frequently overloaded, upsetting the effectiveness of policy. As a result, the duo of Sarkozy and Schaeuble tried, at the G6 meeting between the interior ministers of the EU's six largest states in the second semester of 2006, to jumpstart the debate on the creation of European administrative structures to support the asylum work of the Commission and member states. Its presentation in the G-6 framework to the EU's largest members prefigured the fissures that it induced: whilst the EU's smaller

member states, particularly those at the eastern and southern borders saw the creation of a strong central body and the resulting steps towards supra-nationalisation as a means to secure their own interests, the larger member states are apparently more sceptical.

The legal-normative agenda

Clearly, quantitative and qualitative elements cannot be *completely* separated, and the Green Paper does not attempt this: Although the issue of the fundamental rationale behind cooperation is not broached, the question does arise what further treatment various qualitative agendas could receive—or indeed where existing cooperation could be reversed.

The legal-normative agenda, for one, is apparent in the Green Paper's questioning of the utility of certain mechanisms created in the first wave: The idea of "safe countries of origin" has been the subject of no little controversy on legal-normative grounds, and is one of the above-mentioned loose ends of the procedures directive, existing at a conceptual level rather than the operational level that many of the negotiators had hoped for. The precise constellation of this mechanism, which would allow asylum applicants from states deemed "safe" to be subjected to reduced procedural standards, still remains unclear. It is due to be grappled with in Council under the decision-taking rules laid down by the asylum proce-dures directive—rules which have themselves been the subject of a legal appeal by the European Parliament. A proposal for a list of safe countries, was scuppered by Cabinet-level infighting in the Commission, and is unlikely to be put forward for as long as Franco Frattini remains Commis-sioner for Justice and Home Affairs.

In this case then, the legal-normative agenda is supported by current political realities; yet the agenda is also underpinned by strong arguments that stretch beyond the moral and the politically expedient. Its proponents suggest, for example, that increasing the procedural rights and standards afforded to asylum-seekers can actually increase migration control. They propose that asylum systems become "frontloaded", with improvements to the speed and quality of initial asylum decisions functioning as a means to close down the appeals system as a channel for "bogus" applicants to prolong their stay in the EU. This aspect of the agenda has been champi-oned by the UK, in conjunction with UNHCR. Together, these actors have set up a "Quality Initiative" at the national level, and will again have a chance to expound upon its merits thanks to the Green Paper.

Despite the treatment of these important issues, the heart of the legal-normative agenda is by-passed by the Paper: the question of the desired legal basis of the future CEAS is not treated. That the Paper does not discuss the extension of the European Court of Justice's legal competencies over asylum cases is perhaps unsurprising, since such issues will be dealt with by the negotiators of the EU Reform Treaty. However, it is surprising that there is to be no discussion of the reforms necessary to allow the Court to fulfil new functions without encountering overload. Moreover,

the Paper does not address the legal grey areas of the EU's current activities and in particular its extraterritorial interventions. The greater scope for directly intervening in third countries opened up by the end of the Cold War throws up difficult questions for the scope of application of the Geneva Convention and other pre-1989 legal texts. The question whether such texts apply under maritime law—of core relevance for the EU's efforts to deal with migration flows from North and West Africa—has previously received public attention and is the subject of a recent Commission paper; however, there is growing consensus within the Council that these issues should be dealt with behind closed doors. At this critical stage of norm interpretation, public discussion is required, especially as many member states appear to be taking a restrictive view of the texts' applicability.

The socioeconomic agenda

Likewise in the question of the integration of asylum-seekers and recipients of international protection the heart of the matter—namely the question of the weighting afforded states' own interests in integration efforts—is neglected. This lacuna is problematic because asylum is in large part a normative "Republican" construct, resting on the altruism of host states, their moral conviction and their unselfish adherence to the legal standards to which they have committed themselves. Yet the Green Paper's line of questioning rests primarily on the idea that integration policies should be pursued because of the beneficial effect they can have on the socioeconomic interests of the member states.

Of course this kind of self-interest already strongly informs most member states' policies, with many countries taking a liberal position. The Scandinavian states with comprehensive welfare systems have for example tended to push for asylum-seekers to enjoy early and generous access to the labour market, in order to offset welfare costs. Some southern and eastern member states, whose welfare systems and labour markets are less heavily regulated, have also advocated a more traditional liberal, *laissez-faire* position.

Yet, whilst appeals to states' self-interest might lead to an improvement in standards, it might equally make restrictions to applicants' social and economic rights more acceptable. There are a number of states that still conceive the question of socioeconomic integration primarily in terms of the 'pull factors' that it creates: by offering applicants generous access to welfare systems and labour markets states risk attracting more asylum-seekers than their neighbours with more restrictive positions, thus disrupting the effectiveness of migration control and endangering these socioeconomic structures. Integration may also upset efforts to remove failed asylum-seekers, or to return refugees whose countries of origin are deemed to have stabilised. A clarification of the question of the weighting of states' self-interest in integration policy is an important pre-condition for the coherence of policy of the second-wave.

The foreign and development policy agenda

As in the EU's socioeconomic policies, its activities beyond its borders have been plagued by the question of the weighting of its own interests. The foreign and development policy agenda promotes the idea that the EU should not only be prepared to formulate migration policies in the collective interest of itself and third countries but that it should be prepared to wait some time before its immigration interests are realised. The 'root causes' approach to migration, for example, seeks to overcome the external causes of forced migration *inter alia* through long-term development policy initiatives. Its critics, meanwhile, argue that there is no reason for the EU to compromise its immediate capacity to control immigration in this way. At the polar opposite of the foreign and development policy agenda, then, lies a strand of thinking that the EU should use its external policy tools to sanction third countries which do not control emigration to the EU in good time.

These fault-lines can be found in the questions posed by the Commission but are never articulated. This is not unproblematic: the Commission suggests, for example, that future policies be based upon the experience of the existing Regional Protection Programmes, which are still in a pilot phase. These Programmes support the activities of third countries to control refugees, especially those which may move on to the EU, whilst also seeking to ensure that these refugees contribute to the local economy and society. The Paper does not elicit feedback on what a positive or negative judgment of this experience might be: is a positive outcome that the RPP had an immediate effect upon the levels of secondary movement to the EU in line with EU interests, or that it aided third states' development prospects and *may* in the future have positive implications for the EU's efforts to control immigration?

Burden-sharing

Efforts to foster burden-sharing between the member states have long been disrupted by disagreement about (1.) how to measure the respective burden borne by each member state, and (2.) what mechanisms to use to offset the disparities between the member states in terms of this burden. The Green Paper broadly avoids the first question focussing instead on the second. This may appear contrary since, logically speaking, a solution can only be identified when the problem itself has been defined. In actual fact, the Green Paper's formulators' aversion to dealing with the heart of the matter may actually prove beneficial to the quality of debate in this specific issue, precisely because the heart of the matter is so difficult to grasp in the question of burden-sharing.

The task of defining the burden borne by each state involves such a multitude of factors—all of which can be picked up by self-interested member states keen to show their particular travails—that it can be considered an almost intractable problem, at least insofar as hopes of reaching political agreement are concerned. Against this background, a

prior definition of the mechanisms available to the EU for fostering burden-sharing would give an indication of the aspects of the burden-sharing problematic that the Union is actually in a position to offset. This shifts the focus away from the wrangling over respective burdens, asking instead how the existing and available mechanisms could be tailored to suit relevant aspects of the burden-sharing problematic. Moreover, if the member states remain unclear about just how much of a burden they bear, this appears more conducive to the EU's efforts to foster solidarity as a normative value, since states will be less able to point to their 'fair share'.

The Paper identifies most recognised forms of burden-sharing, including: the legislative policy harmonisation that should remove any disproportionate burdens borne by member states with high standards; hard redistribution measures that directly compensate those member states with high application numbers (the ERF); and 'market mechanisms' in which member states are named and shamed into playing their part or paying others to (for example signing up to the controversial idea of intra-EU resettlement for recognised beneficiaries of international protection). However, it does not take up an important suggestion for a hard quota system recently made (the Maltese proposal that there should be fixed quotas defining the distribution of responsibility for asylum applications in the EU) nor does it treat administrative cooperation as a potential mechanism for burden-sharing, despite the considerable amount of space devoted to administrative questions in the Paper.

Administrative cooperation can constitute a potential means of burden-sharing on the part of those member states with the broadest expertise and deepest pockets, complementing legislative policy harmonisation. Commission-led efforts are already underway to help these states share their expertise with less experienced and poorly equipped member states. By sharing their expertise, and information about the situation in asylum-seekers' countries of origin, these states can help their neighbours to improve their own standards of protection, meaning that resource-rich states' initial costs can be offset in the long run. Indeed, if managed well, this can lead to a situation in which the member states and forced migrants can gain. All the same, this kind of cooperation is anything but apolitical. Not only are some of the larger member states of the north and west wary that their initial costs will by no means be short-term, as resource-poor states do nothing to overcome their dependence upon them for information and expertise, they are also faced with the difficulty of overcoming differing European-wide divergences in the use of information: whilst Germany does not generally make its country of origin accessible to the public, it may share its information with states that do.

The chapters of the Green Paper: misrepresenting the issues?

A structured debate requires the disaggregation of the asylum problematic into sub-themes. Yet, by teezing out interrelated issues, and conjoining others, the four separate chapters of the Green Paper frame the way in

which these issues are dealt with. Thanks to its thematic structure, the Commission's Green Paper will predefine the resulting debate in a number of ways:

Firstly, the questions of solidarity and relations with countries of transit and origin are placed in separate chapters. Solidarity is thus a normative value confined to relations between the member states.

Secondly, the external and internal dimensions are, logically enough, separated. It has been pointed out, though, that debates about the internal dimension may be reduced to irrelevant navel-gazing if access to the EU and CEAS is largely closed off thanks to restrictive measures in the external dimension.

Thirdly, the question of solidarity is separated from the issues of socio-economic integration and the external dimension. Yet, this effectively marginalises emerging aspects of the burden-sharing debate. Solidarity and burden-sharing between the member states are, for example, no longer understood simply in terms of the relative numbers of asylum applicants that member states receive: It is also understood in terms of the difficulties they encounter in socially integrating these applicants. Moreover, member states' participation in external humanitarian inter-ventions has also been reconceived in the broader debate as evidence of burden-sharing in the EU's asylum efforts. Whilst this narrowing down of the themes dealt with may appear desirable in so broad a field as burden-sharing, it also narrows the range of mechanisms considered. One 'market mechanism' of burden-sharing that receives no attention here is that of proactive peacekeeping and external intervention.

Finally, the Green Paper presents the socioeconomic integration of asylum-seekers and successful applicants as a cross-cutting theme in the discussion on the internal dimension of asylum policy. Integration does not merit its own chapter. Yet integration policy is usually considered a policy area relatively distinct from migration policy, and one that requires careful coordination with it. By subsuming into asylum policy the ques-tion of integrating asylum applicants, the Green Paper distinguishes these questions from the EU's broader efforts to develop an integration policy. UNHCR and NGOs such as the European Council for Refugees and Exiles have been critical of the EU's tendency to separate the issue of the integra-tion into two parallel policies - one dealing with 'voluntary immigrants' the other with 'forced migrants'.

The prospects for the CEAS

The Green Paper arrives at a time when the actors in Council are reluctant to engage in a new round of harmonisation of their internal asylum regulations or to consider too ambitious a qualitative agenda. The political wrangling that proved so difficult during the elaboration of the first wave measures may now be further complicated, not least by the increase in the European Parliament's role in policy-making. At the Hague, this cautious mood was reflected in a desire to evaluate the first wave measures before

embarking on the second wave. This projected evaluation was not only politically expedient, relieving as it did the immediate pressure to embark on second-wave measures, it also had a clear functional purpose as regards the purpose and quality of future measures. This evaluation of the 'first wave' measures remains incomplete. Thus, although the Green Paper could scarcely have come much later given the 2010 deadline set by the HOGS in 2004 for the completion of the second wave of the CEAS, its timing is not entirely happy—not merely because it demands a response from actors at a time when many are on their summer holidays. Against this background, it is hardly surprising that the Green Paper retreats from many of the core issues that will actually define the progress and form of the second wave. It is important not to lose sight of these questions though.