

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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The Implementation of the Common European Asylum System

LIBE

EN

2016



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**Policy Department C: CITIZENS' RIGHTS AND CONSTITUTIONAL
AFFAIRS**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

The Implementation of the Common European Asylum System

STUDY

Abstract

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee. It provides an overview of the current implementation of the Common European Asylum System (CEAS) from both a legal and practical perspective. Against the background of large inflows of seekers of international protection, the study covers the CEAS instruments as well as the EU policy responses brought forward in 2015 until May 2016.

ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs and commissioned, supervised and published by the Policy Department for Citizen's Rights and Constitutional Affairs.

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ACKNOWLEDGMENTS

The authors are grateful to Shana KANINDA, Peter O'SULLIVAN, Andrea VONKEMAN (all UNHCR) and Gerald DREVENY (expert) for their advice and participation at the expert workshop on 22.02.2016, as well as to the representatives from governmental and non-governmental organisations and academic experts for their readiness to respond to the interviews.

LINGUISTIC VERSIONS

Original: EN

Manuscript completed in May, 2016

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LIST OF ABBREVIATIONS

- AIDA** Asylum Information Database
- AMIF** Asylum, Migration and Integration Fund
- CEAS** Common European Asylum System
- CIR** Consiglio Italiano per i Rifugiati (Italian Council for Refugees)
- CJEU** Court of Justice of the EU
- COA** Centraal Orgaan opvang asielzoekers (Dutch for: Central Agency for the Reception of Asylum Seekers)
- CoO** Country of Origin
- CRC** Convention on the Rights of the Child
- DCR** Dutch Council for Refugees
- EAM** European Agenda on Migration
- EASO** European Asylum Support Office
- EC** European Commission
- ECHR** European Convention on Human Rights
- ECJ** European Court of Justice
- ECRE** European Council on Refugees and Exiles
- ECtHR** European Court on Human Rights
- EDAL** European Database on Asylum Law
- EMN** European Migration Network
- EP** European Parliament
- EU** European Union
- EUREMA** European Union Relocation Malta
- FRA** Fundamental Rights Agency

| | |
|--------------|--|
| FRAN | Frontex Risk Analysis Network |
| HAP | Humanitarian Admission Programme |
| ICMPD | International Centre for Migration Policy Development |
| ICCPR | International Covenant on Civil and Political Rights |
| IO | International Organisation |
| IOM | International Organization for Migration |
| JAP | Joint Action Plan |
| JHA | Justice and Home Affairs |
| MoI | Ministry of Interior |
| MS | Member State |
| NGO | Non-Governmental Organisation |
| RAU | Risk Analysis Unit |
| SBC | Schengen Border Code |
| SCO | Safe Country of Origin |
| SCIFA | Strategic Committee on Immigration, Frontiers and Asylum |
| SVR | Sachverstaendigenrat deutscher Stiftungen |
| TFEU | Treaty on the Functioning of the European Union |
| UNHCR | United Nations High Commissioner for Refugees |

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EXECUTIVE SUMMARY

The arrival of approximately 1.3 million asylum applicants to Europe in 2015 and its resulting complexities unfolded a “perfect storm”¹ which shook the Common European Asylum System (CEAS) to its very foundation. In summer 2015, the CEAS was catering to the reception and welcoming of everyone who came along the Western Balkan route, while only 6 months later the very same legal instruments seemed to allow the establishment of border fences, the introduction of national upper limits for asylum applications and the proliferation of fast-track return procedures for “irregularly arriving refugees and migrants”. In addition to this, the public debate shifted from welcoming “refugees” and “persons in need of protection”, to objecting to arrivals of “economic migrants” or “illegals”. Policy makers were widely overwhelmed and seemed to remain in a state of shock due to the mass of refugees and migrants transiting or arriving in EU MS.

Following the initial shock, the EU and the EU MS recognised that the CEAS instruments were failing in the face of the sheer number of applicants arriving in certain EU MS. However, the approaches taken by policy makers at EU level and those at national level could not be more different. While the EU stressed that only a European Union acting in solidarity could shoulder the unprecedented mass arrivals, EU MS went in the opposite direction by making unilateral policy decisions: including building fences, introducing upper ceilings, using the wide discretion of the CEAS to create unattractive national asylum systems that deter asylum seekers and showing minimal commitment to solidarity measures.

The state of health of the CEAS

The CEAS instruments provided clear benchmarks for countries acceding to the EU for adapting their asylum systems, which undeniably brought an increased level of harmonisation in applied standards. However, the CEAS is not “common”, in the sense of one EU wide asylum system, nor has it developed into a single “system” used in each EU MS. On the contrary, the Common European Asylum System still consists of 28 different asylum systems, with different actors responsible, different procedures and different results (e.g. recognition rates).

For years, some of the CEAS instruments have been subject to strong criticism. Above all, the Dublin III Regulation is probably the most contested instrument, despite that it is often labelled as the “corner stone” of the CEAS. The Asylum Procedures Directive and the Reception Conditions Directive have often been criticised as too complex leaving too much discretion to EU MS. The Temporary Protection Directive is commonly ignored, although it is supposed to be the EU’s special tool to address mass influx of persons seeking international protection. The recast phase of the CEAS instruments unfortunately did not succeed in addressing those fundamental deficiencies. Thus, opportunities were lost to fundamentally re-consider the CEAS architecture and – in particular – the Dublin System.

The CEAS in the context of increased migratory flows

The CEAS showed its main flaw in 2015 when asylum application numbers doubled compared to the previous year. A system which basically assigns responsibility to the MS located at the external border fails when dealing with inflows that would require solidarity among all the MS. The European Commission responded with an avalanche of legislative proposals and ad hoc measures. New proposals are developed, often before the implementation of earlier measures and on the basis of often partial assessments of the impact of recently adopted recast asylum legislation as the deadlines for transposition only expired less than one year

¹ Spijkerboer, T (2016): Europe’s Refugee Crisis: A Perfect Storm, available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/02/europe%E2%80%99s-refugee>.

ago. Consequently, the policy framework developed under the European Agenda on Migration consists of a mosaic of emergency-driven ad hoc legislation without a coherent vision on the long term. The Council has so far been very selective in its support for measures presented under the European Agenda on Migration and has shown little appetite for swiftly implementing concrete solidarity measures to alleviate the pressure on the EU Member States most directly affected by the increased arrival, thus contributing to, as oppose to addressing, the current solidarity crisis.

In this respect the study recommends (among others) that the European Parliament should:

- *closely monitor the ongoing policy developments and undertake a thorough assessment of its shortcomings and achievements since the increase of flows in 2015;*
- *closely monitor the EU's global obligation to base measures and agreements with third countries in the field of international protection on credible responsibility sharing mechanisms and to make these agreements conditional on compliance with international refugee and human rights law and promote compliance with higher protection standards in the EU asylum acquis as benchmarks; and*
- *stay committed to upholding child protection as an essential principle of the EU migration agenda and an integral part of all EU policies and procedures in both emergency and regular situations, particularly against the background of an increasing number of children arriving accompanied or unaccompanied in EU MS.*

CEAS in the framework of overall EU migration management

Flaws in the asylum system are deeply rooted in a restrictive migration system that is designed to control and limit migratory flows to specific groups, for which instruments on legal admission have been developed. For migrants who do not fall under one of those legal instruments, the asylum system remains an only alternative path towards Europe.

While the CEAS requires renovation of many parts, overall EU migration management is equally in need of reform to address current migration challenges in a more comprehensive way, for example by streamlining the currently scattered EU legal framework.

In this respect the study recommends (among others) that the European Parliament

- *should support the European Commission's Communication towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe (COM(2016) 197 final) regarding the development of "a smarter and well-managed legal migration policy" but should cater to address the reforms in this area independently from repairing the deficiencies of the CEAS.*

Access to protection

Due to the territorial principle (as a precondition to claiming asylum, an applicant needs to be physically present in an EU MS) and in the absence of alternative avenues of protection, the vast majority of refugees depend on resettlement as practically the only safe and legal manner to access protection in Europe. However, in the past EU MS were not overly generous in offering resettlement places. Resettlement is based on a detailed and time consuming selection process and, while often presented as the most appropriate tool to provide access to safety, it also bears the risk that countries can use this instrument to pick and choose their "favourite refugees".

Resettlement is based on voluntary participation by Member States. So far, only a few EU MS have developed a resettlement tradition and the overall pledged numbers remain low. The so far agreed EU resettlement scheme of 22,504 places is almost symbolic in light of global resettlement needs but is certainly a step in the right direction as it aims to involve all

EU MS and associated countries and offers a safe passage to protection for those in need. However, in practice, the implementation of the scheme is disappointing. Until 13 May 2016 only 6,321 persons were resettled to 16 countries, of which 4 are Schengen Associated States.² Moreover, some EU Member States pledged their entire pre-existing national resettlement quota under the 20 July 2015 Council Conclusions, while others pledged part of their pre-existing quota under the scheme.

Against this backdrop the European Parliament should

- *work towards a significant **increase in resettlement capacities**, which will, as indicated in the EC Communication on the reform of the CEAS, enable the EU "to lead by example as well as provide a visible and concrete expression of European solidarity towards the international community". In doing so, the European Union may wish to draw on the Canadian resettlement for Syrian refugees, which involved the resettlement of 25.000 persons within less than three months;*
- *assess further alternative proposals for access to protection as indicated in earlier studies suggesting **private sponsorship programmes, facilitating the wider use of family reunification, a more generous approach towards visa rules, further humanitarian evacuation programmes** or dedicating resources to assess legal and practical preconditions for **processing asylum claims in third countries**.*

Determination of the responsibility for asylum claims

The uneven distribution of asylum applicants across EU Member States has increased, despite 15 years of harmonisation of asylum policies at the EU level. In the absence of an EU-wide asylum system, the Dublin system makes (as a general rule) the first country of entry responsible for processing a claim and providing reception to asylum seekers. To make the system work, coercion has been used to prevent secondary movements to other EU Member States, however this is often not successful. Ultimately, coercive measures to prevent free choice and to address secondary movements are heavily criticised as it turned out to be ineffective, expensive, time-consuming and resulting in human rights violations – thus a burden for all.

There are a number of factors which make some Member States more attractive to asylum seekers than others. The asylum policy of a country may constitute a pull or deterrence factor, but ultimately other (stronger) pull factors are decisive for asylum seekers, such as family and other social ties, language skills, existing past relations with a country and job opportunities. Therefore, a distribution mechanism that aims to address secondary movements in a sustainable way needs to take such priorities of asylum seekers into account.

To further develop transparent and sustainable mechanisms to distribute the responsibility for persons in need of protection equally among EU MS, the study suggests that the European Parliament should

- *promote the replacement of the Dublin System with a responsibility-allocation mechanism that is governed by the principle of solidarity and fair sharing of responsibility, based on a **fair distribution quota**, containing a **mix of solidarity measures** that provide **positive incentives for EU MS** to better act in solidarity;*
- *critically review the Commission's proposal for a recast EURODAC Regulation from 4 May 2016 and particularly **question the proportionality and necessity of another extension of the personal and material scope of the Regulation** and their compatibility with the **key data protection principle of purpose limitation**; the need*

² See COM(2016)360 final, *Third report on relocation and resettlement*, Brussels on 18.5.2016.

for lowering the age for taking fingerprints from 14 to 6 years and the ever increasing authorities being granted access to the data base;

- provide **positive incentives for asylum applicants to refrain from secondary movements**, thereby taking the **asylum seekers preference** into account while **better informing** them of the relocation procedures and providing them with a **limited choice of relocation countries** with a **perspective to obtain mobility rights** within the EU;
- closely **monitor** the implementation of the **emergency relocation mechanism** introduced under the two Council Decisions from September 2015, by specifically taking into account **the replacement of the recognition threshold** (75%) by an initial assessment of the claim (granting access to relocation for founded claims while denying relocation to unfounded claims);
- request from the Commission more **clarity on the functioning of the hotspots**, and their (legal) compliance with the asylum acquis, particularly **the screening processes at hotspots, assessment of special needs**, and closely monitor the respect of the **best interest of the child** during the screening and relocation of children;

Determination of asylum claims

The most complex task relates to the harmonisation of procedural standards bringing together the great variety of legal traditions of individual Member States. It is not surprising that the recast Asylum Procedures Directive allows wide discretion and captures all possible variations of procedural particularities of the different countries. As a result, the Asylum Procedures Directive developed into a complex legal instrument, difficult to understand and even more difficult to implement. While the directive provided a first path of harmonisation by establishing common standards, it did not achieve the goal of developing a “common asylum procedure” which would be applied in all 28 EU MS in the same manner.

Equally, the legal basis for the determination of asylum claims – the qualification directive - leaves room for interpretation in regard to several details. Different recognition rates and unequal use of refugee protection/subsidiary protection are challenges that require further harmonisation. However, it is very unlikely that complete harmonisation and convergence of decision-making on asylum applications in 28 EU Member States will ever be possible. The question is rather what level of harmonisation of individual decision-making is required within the Common European Asylum System.

The discretion left to EU MS has recently also been used by individual EU MS to introduce restrictions as a means of deterrence, for instance, by reducing the duration of residence permits for beneficiaries of international protection, with different durations for refugee status and subsidiary protection status. A similar trend is now emerging with regard to restrictions in the waiting periods for family reunification. The given discretion evidently leads to a race to the bottom.

To respond to the need for more unified procedures, the study suggests that the European Parliament should

- *carefully assess the pros and cons as well as the legal feasibility under the current EU Treaties of the European Commission plans to turn EASO into a European Asylum Agency with a competence in individual decision-making. In particular, the European Parliament should consider the possibility of the **gradual extension of EASO’s mandate** from an **extended mandate** in policy implementation and a strengthened operational role to a mandate which allows the **conduct of screening** functions/ admissibility checks of asylum applicants, to, in the long term, taking over responsibility for **processing***

asylum claims under one single asylum procedure fully based on international and European humanitarian standards with the power to grant international protection status to applicants, **mutually recognised** throughout all EU MS;

- support the Commission reform communication to transfer **the Asylum Procedures Directive and the Qualification Directive into Regulations** (Commission Communication 6 April 2016) while at the same time ensuring that the high standard of asylum procedures, including full respect of legal guarantees, is maintained;
- challenge the Commission's proposal to increase the differences between refugee status and subsidiary protection status and instead promote a **unified status for both refugees and beneficiaries of subsidiary protection**;
- work towards the mutual recognition of refugee status decisions across the EU; and
- promote the development of **procedures to assess and determine the best interests of children**.

Reception & Integration

Reception conditions represent a very difficult field of harmonisation. Standards set by EU law cannot erase the economic differences between EU MS, implying that prospects in some EU MS remain better than in others. As evidenced in the study, the reception conditions vary significantly in EU MS. The shortcomings in the EU reception conditions trigger secondary movements and consequently thwart any distribution mechanisms.

In addition, there are also major challenges in terms of the number of reception places available in EU MS. The challenges are to a significant degree rooted in poor contingency planning by EU MS and the failure to readily adapt to increasing reception needs.

A field which almost completely remains outside the scope of the CEAS is the integration of beneficiaries of international protection. Once a person is recognised as being in need of international protection, there is often very little support available, in particular with sourcing suitable accommodation. In general, support and perspectives for integration vary considerably between EU MS and there is a need to invest in reducing these differences. In addition, integration support is usually offered only after a status has been granted. This is not ideal for the applicant, as procedures often take several years and no integration support is offered in that time thus losing important time.

To tackle both reception and integration, the study suggests that the European Parliament should

- promote investing financial resources in the **establishment of resilient asylum reception systems** in all EU Member States, imposing **contingency planning** in order to enable asylum systems to more efficiently anticipate fluctuations in the number of asylum seekers. Further, a more structural exchange among EU MS should be promoted, **setting standards** and developing tools for the reception of asylum applicants; and
- encourage the European Commission and the Council to take legislative measures for **developing integration measures** based on **standards deduced from good practices of EU MS**.

Child specific conclusions

Children are particularly vulnerable and have a unique set of rights due to their status as minors. As such, the CEAS should ensure that their actions take into account the best interests of children. The proportion of children among arrivals in Europe has been growing in recent months and the number of unaccompanied minors nearly quadrupled in 2015 when

compared to the year before. The chaos on migration routes and in reception systems, children, and particularly unaccompanied minors, are exposed to various risks, including protracted family separation, the risk of being victims of trafficking and exploitation as well as the risk of severe trauma and health problems. Thousands of cases of disappearances have been reported.

In light of the high numbers of children arriving in Europe, *the study suggests that the European Parliament should further promote:*

- *a **comprehensive approach** at EU level for ensuring that the needs and rights of **all migrant children** are specifically identified and addressed, including significantly enhanced EU mechanisms for **transnational cooperation** between Member States and between third countries and Member States, to ensure the best interests of each child are a primary consideration in all actions in their regard. In particular, this should identify and respond to individual needs, address family tracing, prevent and respond to disappearances of children from care, avoid placing children in detention, ensure proper Dublin III and relocation transfers, prevent and respond to trafficking, unite children with relatives where this is in their best interests and establish durable solutions.*

PART I: INTRODUCTION

1. BACKGROUND

In 2015, Europe witnessed migratory movements of persons seeking international protection in a magnitude that had not been seen since World War II.³ Almost 1.3 million first-time applications for international protection were lodged in the 28 EU Member States, around double the amount received the previous year.⁴ Most of the persons entered the EU by sea, particularly through the Eastern Mediterranean Route from Turkey to Greece and consequently travelling overland through the Western Balkan Route towards Central and Northern Europe.

The legal acts forming the Common European Asylum System aimed at guaranteeing a fair and harmonised asylum procedure and providing reasonable reception conditions have been placed under pressure in more than one country. Capacities and national systems have been outrun by the unprecedented numbers of seekers of international protection arriving at European shores. This situation was further aggravated by the fact that the vast majority of applications for international protection have been filed in only a few select countries.

On the EU level, additional measures in the field of asylum have been introduced during 2015, notably the establishment of hotspots as primary reception centres at the external borders and putting an emergency relocation mechanism into effect, distributing asylum seekers from these "hotspots" to other MS. These measures have had varying success in their initial phase and are predominantly hindered by the lack of support and divided opinions amongst EU MS.

The study on the "Implementation of the Common European Asylum System" seeks to provide an accurate picture of the current implementation of the CEAS by EU Member States from both a legal and practical perspective based on the actual experiences of national governments as well as asylum seekers and refugees.

The study is organised as follows:

Part II provides an overview on the historical development of the existing CEAS legal instruments and relevant EU agencies and discusses available EU data on asylum applications. Furthermore, recent measures, both on the EU level in the framework of the 2015 European Agenda on Migration, and the national level in several MS, are presented as the introduction of Part II.

Part III discusses in detail the impact of the refugee crisis on the functioning of the CEAS, dividing the CEAS into three subtopics:

Determination of the responsibility for asylum claims: In the first section the EU legal framework regarding the determination of the responsibility for asylum claims among EU MS is analysed, including the Dublin Regulation, the recently adopted hotspots approach and emergency relocation system based on Art 78 TFEU as well as the EU-Turkey Agreement of

³ However, in post WWII a large share of global displacement was actually concentrated in Europe at a magnitude far beyond the contemporary "crisis": Around 40 million displaced in Europe, excluding IDPs and former forced labourers within Germany, plus some 13 million ethnic Germans expelled from Eastern Europe and estimates for IDPs and forced labourers in Germany of around 11.3 million (See UNHCR (2000): The State of the World's Refugees. 50 Years of Humanitarian Action. Oxford: OUP, online at <http://www.unhcr.org/3ebf9ba80.html>, p.13).

⁴ Eurostat (2016a): Asylum statistics; Data extracted on 2 March 2016. Most recent data: Further Eurostat information, Main tables and Database. Accessed at http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics on 02.04.2016. Note that there is considerable uncertainty on these numbers in the specific context of 2015, where both double counting (e.g. through new applications lodged in another Member State) and undercounting (e.g. through delays between initial registration and initiation of the asylum procedure) has made it extremely difficult to arrive at reasonable estimates of overall arrivals.

18 March 2016 and the EC Communication of 6 March 2016 towards the reform of the CEAS and enhancing legal avenues to Europe.

Determination of asylum claim: This section addresses both procedural questions as well as questions related to the status of refugees/beneficiaries of subsidiary protection, specifically focusing on the implications of mass arrivals. The main EU legal instruments in this section are the Procedures Directive and the Qualification Directive.

Reception of asylum seekers: The third section deals with the reception of applicants for international protection, which has been a key issue in the current crisis. Various MS have recently made amendments to their national asylum legislation by utilising the discretion allowed in the Receptions Directive.

Experiences from eight EU MS (Austria, Bulgaria, Germany, Greece, Hungary, Italy, Spain and Sweden) demonstrate practical challenges in the implementation of the CEAS in light of mass inflows.

Part IV presents the main findings and conclusions of this study, emphasising the deficiencies of the CEAS in dealing with particularly large inflows of asylum seekers.

Part V formulates specific recommendations as to how authorities on the EU and national level could improve the functioning of the CEAS, be it through a better implementation of existing legal acts or through new ideas on how the EU legal instruments for international protection could be shaped.

The present study has been conducted from February until mid-May 2016 with the aim to provide accurate and up to date information on the CEAS and the EU policy framework responding to large scale migration. Evidently this policy area is very fast-moving and under constant revision. The study tried its utmost to take into account the key policy documents and proposals published during the implementation period of the study. The analysed legal documents and proposals represent the status quo of the CEAS and its discussion on EU level as of 20 May 2016.

2. METHODOLOGY

The study was conducted through the use of the following research tools:

Desk research: The refugee and migration crisis has dominated news in most EU MS since 2015. The increasing scale of refugee inflows and the resulting tragedies in the Mediterranean have also generated a large number of reports and proposals from academics, think-tanks, NGOs and other expert institutions. In addition, policy makers have actively searched for appropriate answers to meet the challenges inherent in large-scale influxes.

The desk research reviewed current debates and provided a concise compilation and summary of the state of play. In particular, it formed the basis for further detailed thematic expert exchanges and the interviews with MS stakeholders.

Expert Workshop: On 22.02.2016, project team members and external experts participated in a full-day workshop to discuss and identify key issues regarding the implementation of the CEAS. Participants included research experts from ICMPD, Maastricht University, ELIAMEP, a representative from ECRE, experts from UNHCR, a child protection expert and a representative from an EU MS (asylum policy).

The expert workshop was inspired by group discussions/interactive workshop methods with the aim to solicit "collective" views on certain matters. In particular, the expert workshop was used to generate feedback on preliminary conclusions and recommendations from the desk research.

Case Studies: Eight countries were selected for more in-depth data collection on legal and practical challenges in the implementation of relevant legal standards under crisis conditions. The main criterion for the selection of countries was their level and type of exposure to relevant inflows. Geographical balance and policy relevance were additional criteria. Four categories were distinguished: country of first entry, transit countries, destination (most affected)⁵ countries and less affected countries. The countries selected were:

- **Greece and Italy as the main entry points** to the EU for asylum seekers and migrants. Moreover, with the “hotspot” approach and the emergency relocation scheme, two recent EU measures specifically target these “frontline” states.
- **Bulgaria** as a country which has been experiencing considerable challenges in its asylum system since 2013 and additionally may become further relevant as an alternative entry point from Turkey;
- **Hungary** as a **major transit** country during the recent crisis. Hungary has responded to increased inflows with a variety of controversial decisions;
- **Austria**, as **one of the main** European **destination countries**. While experiencing record levels of asylum applications in 2015, high numbers of migrants and refugees also transited through Austria to Germany, particularly in the second half of 2015;
- **Germany**, as the **main country of destination** for the majority of refugees and migrants entering the EU;
- **Sweden**, as **another major country of destination** with a long track-record of openness towards refugees and a proactive resettlement policy. Recently however, Sweden also introduced less favourable asylum policies to address and better manage the current increasing flows;
- **Spain**, as a less affected “frontline state” on the Southern external borders of the EU.

Interviews with national stakeholders: In the selected countries, semi-structured interviews were conducted during March and April 2016 by telephone with up to 3 experts per country, each representing different types of expertise (government, academia, NGO). The objective of the interviews was to gain an insight into legal and practical implications of the current migration and refugee crisis and their impact on the fulfilment of the CEAS in these countries. The **interview guidelines** included questions on national practices, experiences and opinions regarding the instruments of the CEAS as well as other key issues identified at the expert workshop and through previous desk research.

Each interview documented the personal views of the interviewees on the national situation regarding the implementation of CEAS instruments and the challenges that emerged from the arrival of large groups of migrants and refugees. The interview protocols served as an additional and direct source of new information as well as to corroborate and complement the desk research.

⁵ Major destination countries are often also significant transit countries, for example Austria and Germany.

PART II: STATE OF PLAY - EU AND EU MS POLICY RESPONSES

KEY FINDINGS

- Despite a comprehensive set of instruments, the Common European Asylum was seriously challenged in the context of large scale arrivals of migrants and refugees in 2015 and the beginning of 2016.
- The Common European Asylum System proved ill-equipped for high migratory pressure.
- The lack of a mechanism for the fair sharing of the responsibility of asylum claims among all EU MS was compensated by emergency measures rapidly put in place in response to the “refugee crisis”.
- EU MS responded by introducing unilateral policy responses as a consequence of scepticism and lack of confidence in joint EU actions.
- EU MS responses largely aimed at deterring asylum seekers, through various changes in asylum procedures, reception conditions and increased border controls.
- A race to the bottom among EU MS emerged, making full use of the discretion allowed by the CEAS instruments to transform their national asylum system into the “toughest/least attractive in Europe”.

1. THE COMMON EUROPEAN ASYLUM SYSTEM

It was not until the Maastricht Treaty (1992) that immigration and asylum were formally incorporated into the Treaties although multilateral cooperation outside the community framework had already started some years earlier, and in a more pronounced way, since the mid-1990s. Reflecting geopolitical changes, notably the collapse of communist regimes, and the rise of asylum and irregular migration, the multilateral cooperation focused largely on the issues surrounding irregular migration.⁶ Following the communitarisation of policies on migration and asylum through the Amsterdam Treaty, a first five-year programme – the Tampere programme – was adopted by the European Council. This programme established a roadmap for political priorities. The five-year migration and asylum-related policy programmes were developed within the broader context of the establishment of the area of freedom, security, and justice. These programmes contained a roadmap for political priorities, proposals, and deadlines, rather than strict policy documents.⁷

Since 1999, the EU has been working towards providing a Common European Asylum System (CEAS), which included common rules on the determination of the responsibility for asylum applications (Dublin system), on asylum procedures, on the qualification of applicants for international protection and related rights, and common rules on reception conditions. In addition, there are a number of subsidiary instruments as well as other rules with relevance to the CEAS. The first new instrument adopted under the Tampere

⁶ See Kraler, A. & Rogoz, M. (2011): ‘Irregular migration in the European Union since the turn of the millennium – development, economic background and discussion’, Database on Irregular Migration, Working paper 11/2011, p. 4, available at: http://irregular-migration.net/fileadmin/irregular-migration/dateien/4.Background_Information/4.7.Working_Papers/WP10_2011_Kraler_Rogoz_Europe_IrregularMigration_Dec11_fin.pdf.

⁷ See Collet, E. (2010): ‘The European Union’s Stockholm Program: Less Ambition on Immigration and Asylum, But More Detailed Plans’, Migration Policy Institute, available at: <http://www.migrationpolicy.org/article/european-unions-stockholm-program-less-ambition-immigration-and-asylum-more-detailed-plans>.

programme contained minimum standards for temporary protection which, however have never been used. Following the completion of the first stage of CEAS in 2005, which was based on minimum standards between Member States, in 2013 new rules have been agreed upon (CEAS II). The aim was to ensure that all applicants for international protection are treated equally in a fair system, wherever they apply.⁸ The legal framework of the CEAS II is composed of two Regulations and five Directives while two EU Agencies are of particular relevance for the implementation of the CEAS: the European Asylum Support Office (EASO) and the Border Agency Frontex.

Following several evaluations of the different asylum instruments it became evident that, in spite of the enormous efforts by the EC and EU Member States, the standards of the treatment of asylum applicants in different MS remain highly divergent.

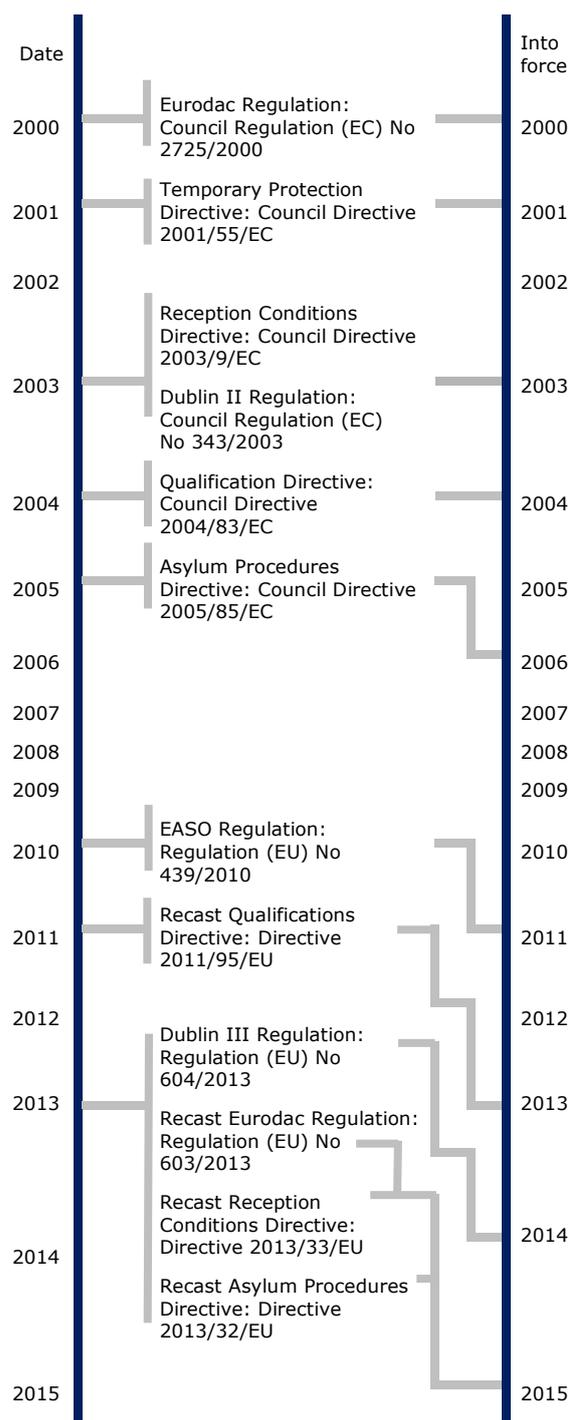
An additional development that had significant influence on the disparities of asylum systems in EU MS was the enlargement of the EU by firstly, 10 new EU MS, followed by Romania and Bulgaria in 2007 and Croatia in 2013. The enlargement brought along an increasing imbalance of economic strengths among the EU MS. It changed the geographical area of the EU significantly and it also showed the weaknesses of the first phase of the CEAS, with its broad definitions of "minimum standards" that allowed for a generous interpretation and ultimately did not, in many ways, allow for a harmonisation of the different asylum systems.

Notwithstanding the efforts in implementing the CEAS, the latest increase in asylum applications clearly demonstrated its limits: the system is not apt to deal with increasing migratory pressure.

⁸ See European Commission: Factsheet; A Common European Asylum System, p 3; at http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf.

1.1. Legal instruments of the CEAS

The current system for the determination of the responsibility of an EU MS for an asylum application is based on the **Dublin III Regulation (No 604/2013)**,⁹ approved in June 2013 and applicable as of 1st January 2014, replacing the former Dublin II Regulation.¹⁰ Like Schengen, the Dublin System has developed outside the Treaty framework and was originally adopted as a Convention. The aim of the convention was to provide clear rules on the determination of the responsibility to assess asylum claims and to prevent ‘asylum shopping’, i.e. the lodging of new applications in different Member States following the rejection in another state. The Dublin Convention was signed on 15 June 1990, entering into force on 1 September 1997 for the first twelve signatories (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom), on 1 October 1997 for Austria and Sweden, and on 1 January 1998 for Finland. While the Convention was only open to accession to member states of the European Communities, Norway and Iceland, non-member states, concluded agreements with the EC to apply the provisions of the Convention in their territories. The Dublin Convention was replaced by the Dublin II Regulation, which was adopted in 2003 and became part of the asylum acquis. Consequently, with the 2004 accession of Estonia, Latvia, Lithuania, Poland, Czech Republic, the Slovak Republic, Hungary, Slovenia, Cyprus and Malta, these additional 10 Member States also joined the Dublin regime. The provisions of the Regulation were extended by an agreement to the non-member states Switzerland and Liechtenstein on 1 March 2008. A protocol subsequently made this agreement applicable to Denmark. With the accession of Bulgaria and Romania in 2007 and Croatia in 2013, three additional EU MS joined the Dublin System.



Against the experiences gained on the functioning of the Dublin system in a mass influx situation as witnessed in 2015/ beginning of 2016 and based on an evaluation of this

⁹ 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).

¹⁰ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

instrument,¹¹ the European Commission's Communication towards a reform of the CEAS and Enhancing Legal Avenues to Europe¹² proposed two possible approaches: either to streamline and supplement the current system with a corrective fairness mechanism or to move to a new system based on a distribution key. The first option was chosen, although some aspects of the second option, including a reference key underpinning the corrective solidarity mechanism, are relied upon as well. The EC tabled on 4th May 2016 a proposal for a recast of the Dublin Regulation.¹³

For an effective implementation of the Dublin Regulation an asylum fingerprint database was established under the EURODAC Regulation (Regulation (EC) No 2725/2000). Irrespective of where asylum seekers submit asylum applications within the EU, their fingerprints are taken and transmitted to the EURODAC central system to compare whether the persons already submitted an application in another country. The first EURODAC Regulation (EC) No 2725/2000 operated from 2003 until 20 July 2015 when the recast EURODAC Regulation became applicable. The recast included changes to reduce the delay of transmission by some MS, to address data protection concerns and to help combat terrorism and serious crime. As part of the reform of the Dublin Regulation, the EC considered it also necessary to reinforce the EURODAC Regulation to mirror and support the changes of the Dublin system. Consequently the EC put forward a proposal for a recast EURODAC Regulation on 4th May 2016, which also includes an extension of EURODAC's purpose, now also "assisting with the control of illegal immigration to and secondary movements within the Union" as well as return of irregularly staying third country nationals.¹⁴

The collapse of the former Yugoslavia and the resulting mass inflow of refugees to various EU Member States triggered the first debate on "burden sharing". In addition, temporary protection was put on the table as a solution to better manage mass inflows, with several EU Member States accepting conflict refugees from the former Yugoslavia under various national temporary protection schemes and outside the asylum procedure. Combined with a general increase of asylum applications, which had already started since the early 1980s, major receiving countries faced mounting backlogs and temporary protection appeared as an instrument to deal with this.

In accordance with Article 63(2)(a) and (b) of the EC Treaty, the EU adopted the **Temporary Protection Directive 2001/55/EC**¹⁵ on 20 July 2001 following the Kosovo crisis in 1999. All Member States (including the UK) take part in this Directive. Ireland, who was not initially

¹¹ European Commission: Evaluation of the Dublin III Regulation; Final report from December 2015; at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf

¹² European Commission's Communication towards a reform of the CEAS and Enhancing Legal Avenues to Europe (COM(2016) 197 final) at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_avenues_to_europe_-_20160406_en.pdf

¹³ 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); COM(2016) 270 final; at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf

¹⁴ Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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, for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast); COM(2016) 272 final; at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/eurodac_proposal_en.pdf

¹⁵ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance on efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12.

bound by it, was included by a Decision in 2003 upon request.¹⁶ All Member States have transposed the Directive. The establishment of the Temporary Protection Directive was considered necessary to address situations where large numbers of displaced persons from a specific country or geographical area cannot return to their country of origin.¹⁷

In the following years the main targets outlined by the Hague Programme focused on the creation of common minimum standards for the **qualification of asylum seekers**, the **reception of asylum seekers** and the **procedures for determining whether a person qualifies for refugee status**. Differences in standards have been argued as an important factor for the uneven distribution of asylum seekers, with asylum seekers particularly targeting host countries that would either be generous with reception benefits, or would be generous with granting some form of protection status.¹⁸

The **recast Qualification Directive 2011/95/EU** has replaced the former Qualification Directive 2004/83/EC.¹⁹ The objective of the recast Qualification Directive is to stipulate the standards for the qualification of third-country nationals as beneficiaries of international protection (refugee status or beneficiaries of subsidiary protection) and the content of international protection (art. 1). The adopted recast Qualification Directive was published in the Official Journal of the European Union on 20 December 2011 and is applicable as of 21 December 2013. The UK, Ireland and Denmark do not take part in the adoption and application of the Qualification Directive 2011/95/EU (recast). The UK and Ireland remain bound by the former Qualification Directive 2004/83/EC.

The **Asylum Procedures Directive 2013/32/EU (recast)** replaced the Asylum Procedures Directive 2005/85/EC.²⁰ The Commission initiated its first proposal to recast this Directive on 21 October 2009²¹ and subsequently in 2011 submitted a modified proposal.²² According to the Commission, the provisions in the Asylum Procedures Directive 2005/85/EC were insufficient and vague which resulted in unfair and inadequate asylum procedures. In a report issued in 2010 on the application of the Asylum Procedures Directive, the Commission acknowledged that the many derogation clauses are a serious concern which causes the wide divergence of the implementation in the Member States.²³ A detailed UNHCR study on the national implementation of the Asylum Procedures Directive 2005/85/EC in several Member States demonstrated wide differences in law and practice.²⁴

¹⁶ Decision 2003/690/EC of 2 October 2003 on the request by Ireland to accept Council Directive 2001/55/EC.

¹⁷ The Temporary Protection Directive has severe temporal limitations; the duration of temporary protection is automatically set to one year and can be prolonged by a maximum of two years (See Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12, art. 4). To date, even with the high numbers of Syrian refugees arrivals to the EU, the Temporary Protection Directive has never been activated.

¹⁸ See Noll, G. (2000): *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague: Kluwer Law International.

¹⁹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004, L 304/12.

²⁰ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005, L 326/18.

²¹ Proposal for Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), Brussels, 21.10.2009, COM(2009) 554 final, 2009/0165 (COD).

²² Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), Brussels, 1.6.2011, COM(2011) 319 final, 2009/0165 (COD).

²³ European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Brussels, 8 September 2010, COM(2010) 465 final, p. 15.

²⁴ UNHCR (2010), *Improving Asylum Procedures Comparative Analysis and Recommendation for Law and Practice*, March 2010.

The **Reception Conditions Directive (recast)**²⁵ replaced the Reception Conditions Directive 2003/9/EC of 27 January 2003²⁶. In a report on the functioning of the Reception Conditions Directive, the Commission determined that the discretion allowed by the Directive in a number of areas, notably the access to employment, health care, level and form of material reception conditions, free movement rights and needs of vulnerable persons, undermines the objective of creating a level playing field in the area of reception conditions.²⁷ Consequently, the Commission proposed amendments to the Reception Conditions Directive. Similar to the case of the Asylum Procedures Directive, reaching an agreement on the recast Reception Directive between the Council and the European Parliament proved to be difficult²⁸ and the agreement was only reached in 2013. The Directive 2003/9 applied to all Member States except Denmark and Ireland. The UK has opted out of the recast directive, but the 2003 Directive continues to apply to the UK.

Child issues within the CEAS

The CEAS instruments apply to children alongside broader child rights obligations deriving from national and international level instruments, including Article 24 of the Fundamental Rights Charter and the UN Convention on the Rights of the Child (CRC) in this field. The CRC has been ratified by all EU Member States and its relevance to the interpretation and application of EU law has been acknowledged by the European Court of Justice in various judgements (including e.g. *European Parliament v. Council of the European Union*, C-540/03). Indeed, there has been an increasing focus in the European courts on the application of child rights obligations in this field, with a number of landmark judgements concerning both the rights of unaccompanied children and children within asylum seeking families.²⁹

The CEAS instruments typically explicitly refer to the Charter and/or the CRC and contain specific provisions concerning children, including generally applicable provisions (such as the application of the best interests' principle in actions that can impact children, a recognition of child specific forms of persecution and restrictions on detention) as well as specific safeguards for unaccompanied children (such as special protection, assistance and representation provisions).³⁰ Proper implementation of these provisions requires considerable further work.

Although the recast instruments are more explicit in recognising the rights of asylum seeking children, there are many issues where it is noted that further clarification is necessary. Significantly, the EU Action Plan on Unaccompanied Minors³¹ noted the "need to ensure that EU legislation is correctly implemented and, on the basis of an impact assessment, evaluate

²⁵ Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast); OJ L 180, 29.6.2013.

²⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31 of 6.2.2003

²⁷ Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; accessed at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0745> on 08.03.2016.

²⁸ A list of different views between the Council and the European Parliament may be found at Peers, S. (2012): 'The EU Directive on Reception Conditions: A weak compromise', Statewatch, July, available at: <http://www.statewatch.org/analyses/no-184-reception-compromise.pdf>.

²⁹ See FRA and Council of Europe (2015): 'Handbook on European law relating to the rights of the child', pp. 161-178, Luxembourg: Publication office of the EU, available at: http://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf.

³⁰ See the Reference Document on EU legal and policy measures concerning unaccompanied children in the CONNECT Project, www.connectproject.eu. Several other EU instruments which can be of relevance to the situation of children outside their countries of origin (including the EU Anti-Trafficking Directive (2011/36/EU), the EU Sexual Abuse Directive (2011/92/EU) and the EU Victims' Rights Directive (2012/29/EU)), have child specific provisions, including, inter alia, procedural safeguards for investigating cases concerning children and providing assistance to them.

³¹ Communication from the Commission to the European Parliament and the Council - Action Plan on Unaccompanied Minors (2010 – 2014); SEC(2010)534.

whether it is necessary to introduce targeted amendments or a specific instrument setting down common standards on reception and assistance for all unaccompanied minors regarding guardianship, legal representation, access to accommodation and care, initial interviews, education services and appropriate healthcare, etc.” Provisions relating to children within families also need further clarification, including provisions on detention and ensuring the best interests of children travelling with parents.

1.2. Relevant EU Agencies

At the institutional level, the **European Asylum Support Office (EASO)** was established based on Regulation (EU) No 439/2010³² of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office. Created in 2010, EASO is tasked with supporting the asylum authorities in EU Member States. EASO provides the employees of the relevant authorities with training and instruction sessions with the aim to contribute to the further harmonisation of asylum processes and results of asylum decisions across EU MS. As a result of the ambition to harmonise the results, EASO compiles reports on the human rights and security situation in the key countries of origin of asylum seekers who arrive in Europe. EASO is additionally involved in early warning and preparedness systems for EU MS that face challenges coping with influxes of asylum seekers. Under EASO’s mandate, the agency is to support EU MS facing particular pressure on the asylum and reception system (Art 8). EASO has become gradually more and more involved in the hotspots approach, supporting asylum authorities in Greece and Italy to register, identify and process asylum applications.

Following the EC, EASO plays a crucial role in the future and is to receive a stronger mandate to play a new policy implementing and a strengthened operational role to facilitate the proper functioning of the CEAS.³³ This is reflected in the EC’s proposal for a Regulation on the European Agency for Asylum on 4th May 2016, which further reinforces EASO’s mandate with regard to monitoring the implementation of EU asylum standards as well as its operational activities.³⁴

Frontex was established by Council Regulation (EC) 2007/2004³⁵ and became operational on 3 October 2005. Frontex’s mission is to support EU MS to implement EU external border controls and to coordinate the cooperation between MS in external border management, while it remains the task of each member state to control its own borders.³⁶ The agency

³² Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office; OJ L 132/11

³³ European Commission’s Communication towards a reform of the CEAS and Enhancing Legal Avenues to Europe (COM(2016) 197 final), p 13; at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_avenues_to_europe_-_20160406_en.pdf

³⁴ Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010; COM(2016) 271 final, at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/easo_proposal_en.pdf.

³⁵ Council Regulation (EC) 2007/2004 (26.10.2004, OJ L 349/25.11.2004) later amended by the Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004. It was last amended by the Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

In addition, Regulation (EU) No 1052/2013 of 22 October 2013, establishing the European Border Surveillance System (Eurosur), specifies “a common framework for the exchange of information and for the cooperation between Member States and the Frontex for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants (‘EUROSUR)’”.

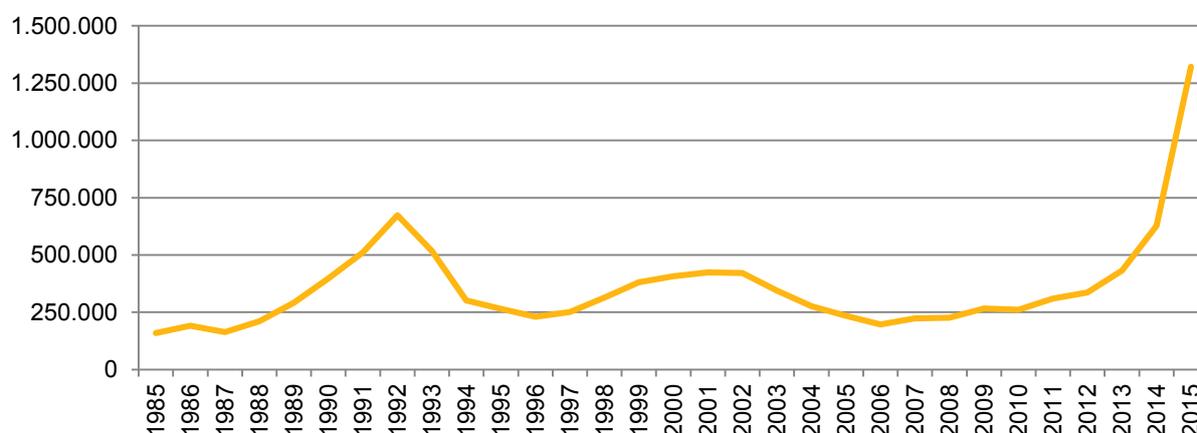
³⁶ See also Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the

assists member states in training national border guards, conducts risk analyses via its Risk Analysis Unit (RAU) and the Frontex Risk Analysis Network (FRAN), conducts research relevant for the control and surveillance of external borders, helps member states requiring technical and operational assistance at external borders and provides member states with the necessary support in organising joint return operations. Following deaths at sea in April 2015, one of the first responses based on the European Agenda on Migration was to task Frontex with conducting the "Joint Operation Triton" to support the Italian authorities in border-control activities in the Mediterranean. Frontex is also one of the key partners supporting Greece and Italy at the newly established hotspots. On 15 December 2015 the European Commission presented its proposal for a new European Border and Coast Guard Agency³⁷ that should replace Frontex, having a stronger role and mandate and forming a European Border and Coast Guard along with national authorities for border management.

2. ASYLUM DYNAMICS IN THE EU

2.1. Flows

Figure 1: Asylum applications in EU-28 from 1985 to 2015



Source: Eurostat, April 2016 (online data code: migr_asyctz and migr_asyappctza)

Historically, the numbers of asylum applications in the EU MS have been subject to large fluctuations. Since 1985, yearly asylum applications in the 28 countries which currently are part of the EU ranged from 150,000 to 400,000 until 2013, with peaks and dips that nevertheless seem minor when compared to the current inflows. In the early 1990's, the outbreak of war in former Yugoslavia resulted in large-scale displacements and a peak of 673,000 asylum applications in 1992. This number was almost matched in 2014 when 628,000 applications for international protection were filed, but was by far surpassed in 2015. According to Eurostat, 1.3 million asylum applications were filed in the EU-28 in 2015,³⁸ double the number of 2014 and more than three times the number of 2013 (432,000).

There are several reasons for the significant increase in asylum applications in 2015. Violent conflicts in Syria and Iraq have been ongoing for several years and are unlikely to be resolved

European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

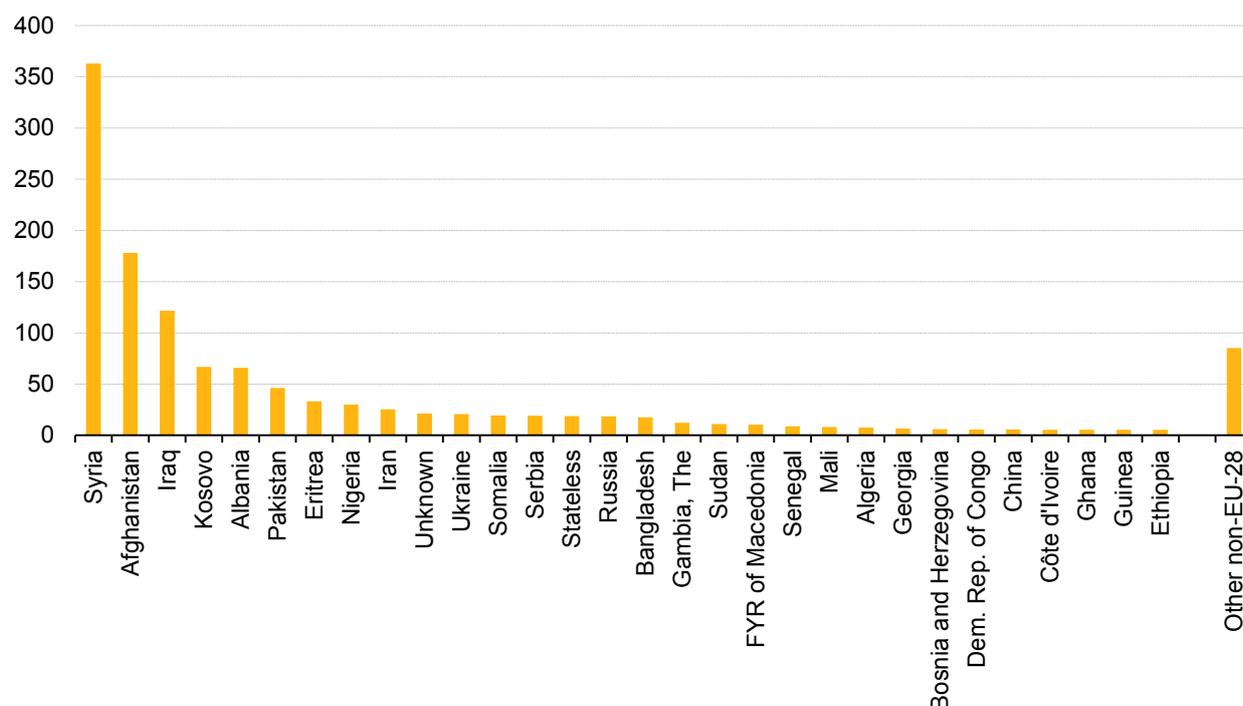
³⁷ Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC; COM(2015) 671 final.

³⁸ Eurostat (2016a): Asylum Statistics, Eurostat Statistics Explained, 20 April, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.

in near future. The situation in the neighbouring countries hosting large numbers of refugees has become increasingly difficult for displaced persons, who see no prospective of succeeding in their overburdened host country. The use of more secure migration routes may also have made migrating more accessible and viable. On the increasingly used Eastern Mediterranean Route, the death toll was significantly lower than on the Central Mediterranean Route, and countries on the West Balkan Route assisted migrants by providing transportation, accommodation and police protection on their journey, creating a less perilous Western Balkans corridor towards Germany in the last months of 2015.³⁹

The main countries of origin were Syria, Afghanistan and Iraq, accounting for more than half of all applications in 2015. Kosovo and Albania ranked 4th and 5th as countries of origin.

Figure 2: Main Countries of Origin 2015 (thousands of asylum applications)



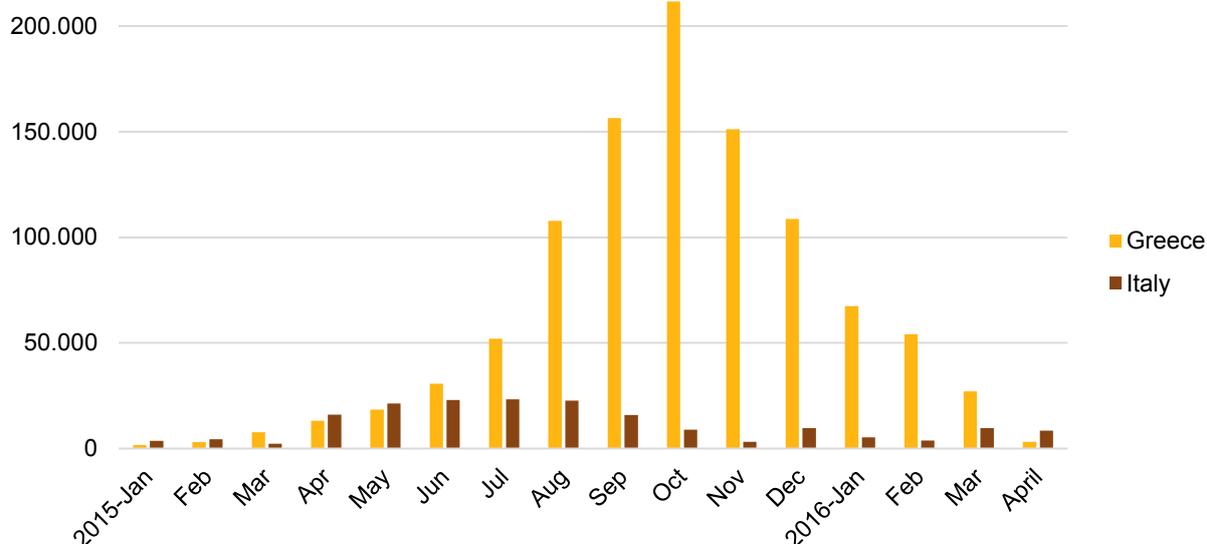
Source: Eurostat, April 2016 (online data code: migr_asyappctza)

The inflows increased significantly in the summer months starting in July, when the number of monthly asylum claims in the EU exceeded 100,000 for the first time. Geographically, the migration route from Turkey through the Aegean Sea to Lesbos, Kos, Samos and other Greek islands was the main entry point to the EU for applicants for international protection in 2015. UNHCR counted the arrival of 862,000 migrants in the Greek islands. The central Mediterranean route to Italy decreased slightly in size with respect to 2014, but was still used by 154,000 persons, around 10% less than the previous year. Still, in October 2015, sea arrivals in both Greece and Italy matched the entire total for 2014, 219,000. Whereas Syrians, Iraqis, and Afghanis primarily used the Eastern Mediterranean Route, the Central Mediterranean Route was dominated by nationals from African countries, with Eritrea, Nigeria and Somalia the main countries of origin.

³⁹ REACH (2015): Situation Overview: European Migration Crisis, Western Balkans, December 2015, accessed at http://www.reachresourcecentre.info/system/files/resource-documents/reach_eu_situation_overview_european_migration_trends_december_2015_5.pdf on 11.04.2016.

In line with long-standing seasonal fluctuations, arrivals decreased during the winter as harsh weather conditions and rough seas make maritime crossings much more risky during this time of the year.⁴⁰

Figure 3: Sea arrivals of international protection seekers



Source: UNHCR⁴¹

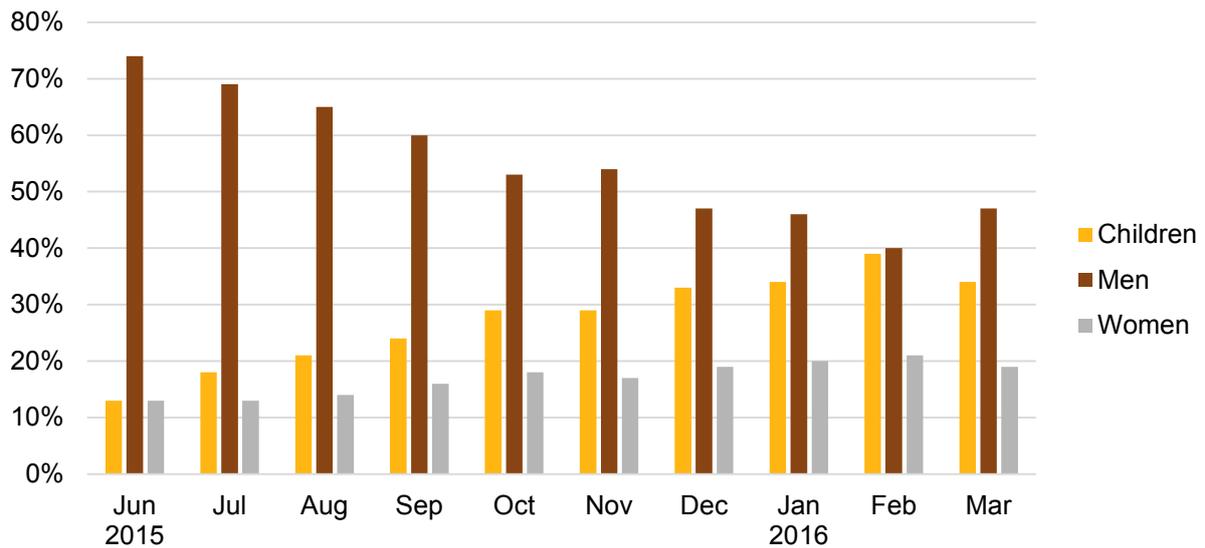
The gender composition of refugee flows entering the EU has changed significantly in recent months (see

Figure 4). Whereas in June 2015, 74% of persons arriving in Greece and Italy were male adults according to UNHCR (2016), this proportion has since decreased to only 40% in February 2016. On the other hand, during the same period the proportion of adult women arriving has increased from 13% to 21% and the percentage of minors has risen drastically, from 13% to 39%. The passage on the Eastern Mediterranean Route has allowed more families to migrate together.

⁴⁰ Frontex (2016): Frontex Risk Analysis for 2016. Warsaw: Frontex, p.48 accessed at http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf on 22.4.2016

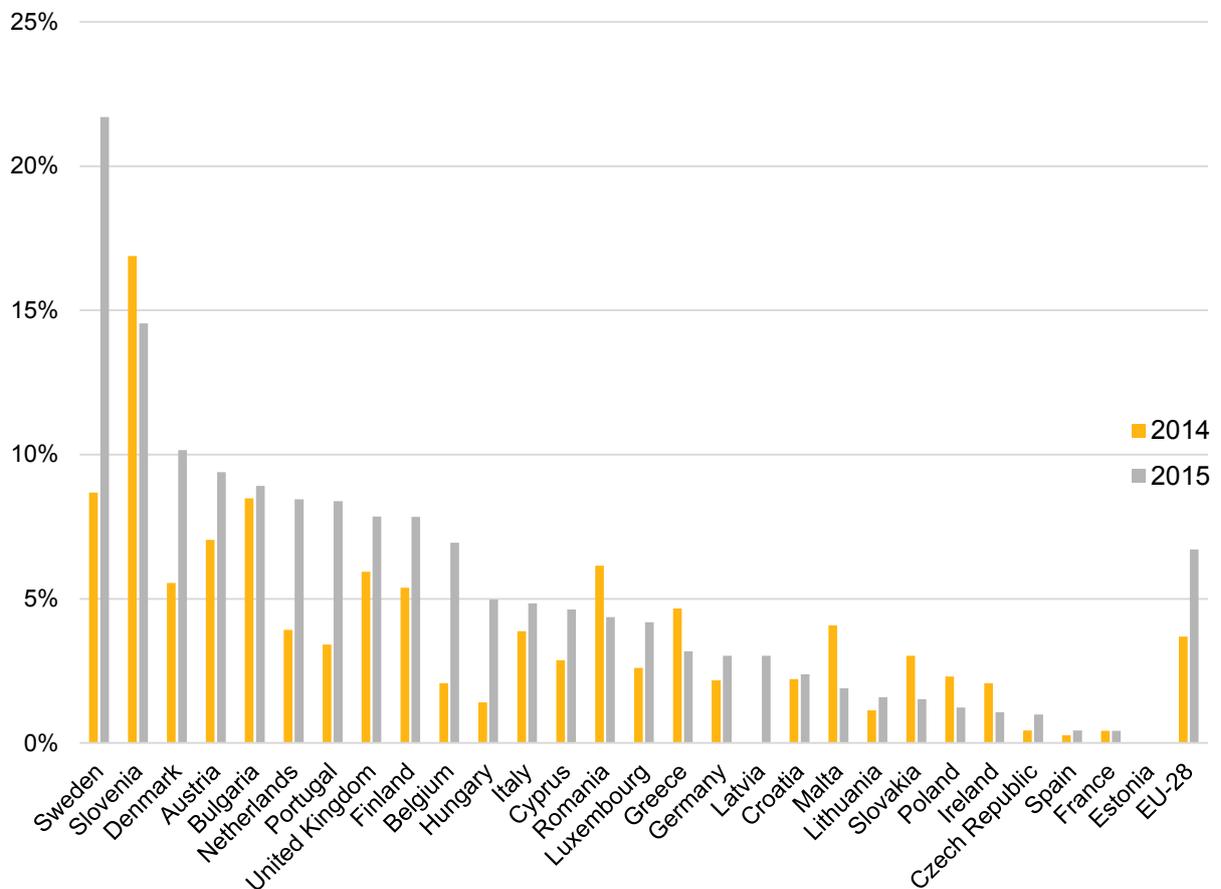
⁴¹ UNHCR Refugees/Migrants Emergency Response – Mediterranean, accessed on 29.04.2016 at <http://data.unhcr.org/mediterranean/regional.php>

Figure 4: Arrivals in Greece and Italy: Breakdown of children, men and women



Source: UNHCR⁴²

Figure 5: Unaccompanied minors as proportion of asylum applicants 2015



Source: Eurostat, April 2016 (online data codes: migr_asyappctza and migr_asyunaa)

⁴² UNHCR (2016c): 'Gender Breakdown of Arrivals to Greece and Italy', available at: <http://data.unhcr.org/mediterranean/download.php?id=1101>.

The number of unaccompanied children seeking international protection in EU MS in 2015 was nearly four times the amount in 2014 and seven times the amount in 2013⁴³. Out of the 88,695 asylum seekers considered to be unaccompanied minors in the EU-28 last year, 75% have filed their application in four MS: Sweden, Germany, Hungary and Austria. Sweden received 35,250 applications from unaccompanied minors (40% of EU-28), of which two thirds were Afghan citizens. In all EU MS, 51% of asylum seekers considered unaccompanied minors were from Afghanistan.

In 2015, 7% of the asylum applications filed in the EU-28 were by unaccompanied children, compared to less than 4% in 2014 (see Figure 5). Particularly affected is Sweden, where 22% of last year asylum applications were filed by unaccompanied minors. In addition, the proportion of unaccompanied minors varies greatly among the main countries of origin: 25% of asylum seekers from Afghanistan are unaccompanied minors, compared to 4% of Iraqi or Syrians asylum seekers.⁴⁴

Limited data is available on children within families of asylum seekers or refugees. Better qualitative and quantitative data on the situation of children is vital, to better identify the type and scope of child specific measures that are needed, including adapted reception capacity and services.

2.2. Findings on data

EU MS provide data on asylum applications and asylum decisions to Eurostat within the framework of Article 4 of Regulation (EC) 862/2007⁴⁵. While some MS promptly supply recent national data to Eurostat, others do not comply with the formal requirements established by the Regulation to provide the data within 2 months after the end of a reference period. Hence, a public comparison of EU wide asylum numbers is possible only after several months of delay.

Eurostat does not only collect MS data on total monthly applications for international protection, but also on the overall number of persons whose applications are still pending at the end of each month and on the granting, withdrawing or rejection of any type of international protection.

To shed some light on the size of the current influx, numbers of applications for international protection are the most widely used indicators. According to updated Eurostat figures on first time applications for international protection in 2015,⁴⁶ the top three destination countries were Germany, Hungary and Sweden. Germany received 441,800 first time applications in 2015, Hungary 174,400, and Sweden 156,100.

The question is, however, to what extent such numbers reflect the reality of reception efforts and capacity needs. Although Hungary registered large numbers of asylum seekers and migrants in the first nine months of 2015, many of the registered applicants probably did not remain in Hungary longer than a few days. The 174,400 applications in 2015 must be

⁴³Data on asylum applications of unaccompanied minors is from Eurostat, April 2016 (online data code: migr_asyunaa and migr_asyappctza)

⁴⁴ Ibid.

⁴⁵ Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32007R0862>

⁴⁶ Eurostat (2016b): First instance decisions by outcome and recognition rates, 30 main citizenships of asylum applicants granted decisions in the EU-28, 4th quarter 2015, Eurostat Statistics Explained, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First_instance_decisions_by_outcome_and_recognition_rates_30_main_citizenships_of_asylum_applicants_granted_decisions_in_the_EU-28_4th_quarter_2015.png.

contrasted with the number of withdrawn⁴⁷ asylum applications in the same period, which amounts to 103,000. Therefore, the number of withdrawn applications in Hungary was 30 times higher than the number of first instance decisions during the previous year (3,420). It can be expected that the remaining applications by absconded applicants will be considered as withdrawn in the coming months. From January to March 2016, another 28,590 applications were withdrawn in Hungary. Hence, in 2015 the total of 174,400 applicants extremely overstates the impact that the refugee crisis had on Hungary and its asylum system. On the other hand, persons being registered as asylum applicants in Hungary absconding and subsequently filing an application in another EU MS will be double-counted and appear in the data on asylum applications of the second receiving state.⁴⁸

On the other hand, according to the UNHCR in 2015 there were more than 862,000 asylum seekers and migrants in Greece, with only 13,197⁴⁹ first time applications received. The relocation mechanism for Greece and Italy, implemented to address a reported emergency situation in these countries, envisages the relocation of 66,400 persons from Greece, six times more persons than the number of registered asylum applicants in 2015.

Germany reported 476,649 asylum applications in 2015, but announced that more than one million persons had entered the country.⁵⁰ The significant difference between these two figures is due to a system that distributes arriving asylum seekers to accommodation facilities in the German *Länder*. Asylum applications are not received on arrival, when the asylum seeker is first registered, but are instead filed several weeks or months after the first registration. Not all arriving persons stay at their assigned accommodation facility and wait for the opportunity to file an asylum application. As there are secondary movements within Germany and to other EU MS, double entries within Germany occur and not all initially registered persons file an application for international protection in Germany. The German MOI announced that 13% of the persons registered at arrival didn't show up at their assigned accommodation facility and subsequently did not file an asylum application.⁵¹ Additionally, the overloaded asylum authorities increased the time span between the arrival at the reception accommodation and the lodging of an asylum application, now taking several weeks or months. Many of those who arrived during the last months of 2015 have actually filed or will file their application for international protection in 2016.

Figures on asylum applications are used in public debate in EU MS as well as for EU policy decision making. Reliable and recent data are essential for the creation of key policy, for example the Relocation Mechanism. This Mechanism is triggered when a crisis situation and extreme pressure on a MS asylum system occurs, resulting from a large and disproportionate inflow of third country nationals. However, a Member State can be exempted from the

⁴⁷ 'Applications withdrawn' means applications for asylum that were withdrawn during the reference period at all instances of the administrative and/or judicial procedure (see Art. 4.1(c) of Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers. "Withdrawn" includes cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1) Asylum Procedures Directive.

⁴⁸ According to Hungarian authorities, 80% of asylum-seekers abscond and leave Hungary, moving west within less than 10 days after the submission of their asylum claim. Press info Hungarian Helsinki Committee 04.03.2015, accessed at <http://helsinki.hu/wp-content/uploads/Asylum-2015-Hungary-press-info-4March2015.pdf>

⁴⁹ According to the Greek Asylum Service 13,197 first time applications were received in 2015. See Greek Asylum Service (2016): 'Asylum Statistics 2015', available at: http://asylo.gov.gr/wp-content/uploads/2016/01/Greek-Asylum-Service-statistical-data-2015_gr.pdf.

⁵⁰ Press release of the German Ministry of Interior: "2015: Mehr Asylanträge als jemals zuvor", 06.01.2016, accessed at <http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2016/01/asylantraege-dezember-2015.html>

⁵¹ Preuß, R. (2016): Flüchtlingspolitik: Behörden können mehr als 130 000 Asylsuchende nicht mehr auffinden, *Sueddeutsche Zeitung*, 29 February, available at: <http://www.sueddeutsche.de/politik/fluechtlingspolitik-mehr-als-jeder-zehnte-asylsuchende-ist-verschwunden-1.2881071>.

Relocation Mechanism, if they are experiencing massive inflows themselves.⁵² Data is further used in this context to establish the distribution quota (the EC-quota assigns a 10%-weight to past asylum applications). Therefore, when comparing numbers, differences in the way the data are collected have to be considered as well as what the numbers really stand for.⁵³

⁵² See Article 9 of Council Decision (EU) 2015/1523 of 14 September 2015 and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁵³ See also ECRE (2015c): 'AIDA: Asylum Statistics in the European Union: A Need for Numbers', AIDA Legal Briefing No. 2', August, available at: <http://www.ecre.org/component/downloads/downloads/1035.html>.

3. EU AND EU MS POLICY RESPONSES

3.1. EU Policy Response

3.1.1. European Agenda on Migration

On 13 May 2015, the European Commission presented its **European Agenda on Migration**⁵⁴, setting out a comprehensive approach for improving the management of migration in all its aspects. While the Agenda has been planned before, it got influenced by incidents in the Mediterranean, where 800 people drowned as their vessel sank on their way from Libya to Italy, elevating the death toll at sea to 1,700 persons in 2015. The agenda set, among other initiatives, interventions in the area of resettlement and relocation (**first implementation package**). In light of the deaths at sea, the focus of the Agenda lay on the Central Mediterranean Migration Route.

Two dramatic incidents pushed European leaders to accelerate the search for adequate responses: In late August 2015, 71 dead bodies were found in a lorry in Austria;⁵⁵ a few days later images of a young boy washed ashore on the Turkish coast after a boat capsized received widespread attention.⁵⁶ Both incidents happened amidst high numbers of migrants moving through the Western Balkans on their way to the EU.

In response, on 9th September 2015 the EC presented the **second implementation package**, which included a wide range of actions, plans and legislative proposals. The particular migratory pressure faced by some countries at the EU external borders led to a proposal for the relocation of 120,000 applicants for international protection from Greece, Italy and Hungary, in addition to the original 40,000 relocation places envisaged in the first implementation package.⁵⁷ The countries benefitting from relocation were reduced to only Greece and Italy, as Hungary disagreed with the provisional measures in the area of international protection.⁵⁸

3.1.2. Emergency Relocation Mechanism

On the basis of the Commission's initiative, a **Council Decision on relocating from Greece and Italy** 40,000 persons in clear need of international protection was adopted on 14 September 2015,⁵⁹ which was complemented on 22nd September by an additional Council

⁵⁴ COM (2015) 240 final.

⁵⁵ See NBC News 71 Dead Refugees Found in Truck on Austria Highway, from 28.08.2015 at <http://www.nbcnews.com/storyline/europes-border-crisis/71-dead-refugees-found-truck-austria-highway-officials-n417536> accessed on 13.04.2016.

⁵⁶ See Reuters: Troubling image of drowned boy captivates, horrifies, from 02.09.2016 accessed at <http://www.reuters.com/article/us-europe-migrants-turkey-idUSKCN0R20IJ20150902> on 13.04.2016.

⁵⁷ The second implementation package contained two distinct proposals for the relocation of asylum seekers as a mechanism for an emergency response:

1) The Proposal for a Council Decision on provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary (plus Annexes) is based on Article 78(3) TFEU. Article 78(3) TFEU provides for a specific legal basis to deal with emergency situations, which can only be triggered if a sudden inflow of third country nationals creates a certain threshold of urgency and severity in the Member States' asylum system.

2) Proposal for amending the Dublin Regulation (No 604/2013) by introducing a permanent crisis relocation mechanism, which may be triggered if an EU MS is confronted with a crisis situation jeopardising the application of the Dublin system. The proposal foresees the same key elements as the emergency measure proposed under Art 78(3) TFEU and amends the Dublin Regulation (No 604/2013) (COM(2015) 450 final)

⁵⁸ See Statements for the Council Minutes on Draft Council Conclusions from 22.09.2015, 3411th meeting of the Council of the European Union (JUSTICE AND HOME AFFAIRS), held in Brussels on 22 September 2015; 12144/15; accessed at <http://data.consilium.europa.eu/doc/document/ST-12295-2015-INIT/en/pdf> on 17.03.2016

⁵⁹ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1523&from=EN>

Decision on the relocation of 120,000 asylum-seekers from Greece and Italy.⁶⁰ As a consequence, the relocation scheme foresees an overall relocation of 160,000 persons, 39,600 from Italy and 66,400 from Greece, with the remaining 54,000 places unallocated, due to Hungary's rejection of the mechanism.⁶¹ In this context, the Commission's Communication on next operational steps in EU-Turkey cooperation in the field of migration⁶² prepared the necessary steps for a proposal to transfer some of the commitments under the existing relocation decisions, notably all or part of the currently unallocated 54,000 places, to the implementation of the EU-Turkey agreement.⁶³

The relocation mechanism is based on two Council Decisions:

- **Council Decision (EU) 2015/1523** of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece
- **Council Decision (EU) 2015/1601** of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

These two Council Decisions establish a temporary and exceptional relocation mechanism over the period of two years from the frontline member states of Italy and Greece to other member states for persons in clear need of international protection.

In essence, the two Council Decisions contain the same fundamental elements of relocation, but there are some differences:⁶⁴

| Council Decision (EU) 2015/1523 of 14 September 2015 | Council Decision (EU) 2015/1601 of 22 September 2015 |
|---|---|
| <ul style="list-style-type: none"> • Relocation of 40,000 | <ul style="list-style-type: none"> • Relocation of 120,000 |
| <ul style="list-style-type: none"> • Voluntary commitment | <ul style="list-style-type: none"> • Specific numbers set out in an Annex to the Decision (based on quota)⁶⁵ |
| <ul style="list-style-type: none"> • Focus on Italy: 24,000 relocations from Italy vs 16,000 relocations from Greece | <ul style="list-style-type: none"> • Focus on Greece: 50,400 from Greece vs 15,600 from Italy, remaining 54,000 to be allocated at a later stage |
| <ul style="list-style-type: none"> • Lump sum for relocation country of EUR 6,000 per person; no lump sum for Greece and Italy | <ul style="list-style-type: none"> • Lump sum of EUR 6,000 for relocation country • 500 for Greece/ Italy per relocated person |

⁶⁰ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, accessed at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1601&from=EN>

⁶¹ Under Article 4(2) of Council Decision (EU) 2015/1601 as of 26 September 2016, 54,000 out of 120,000 applicants should be relocated from Italy and Greece, to the territory of other Member States unless by that date, pursuant to Article 4(3), the Commission makes a proposal to allocate them to another beneficiary Member State(s) confronted with an emergency situation characterised by a sudden inflow of persons.

⁶² COM(2016) 166 final.

⁶³ Proposal for a Council Decision amending Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; COM(2016) 171 final. Accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160321/provisional_measures_area_international_protection_benefit_italy_and_greece.pdf on 11.03.2016.

⁶⁴ See Peers, S. (2015): 'Relocation of Asylum-Seekers in the EU: Law and Policy', EU Law Analysis, 24 September, available at: <http://eulawanalysis.blogspot.co.at/2015/09/relocation-of-asylum-seekers-in-eu-law.html>.

⁶⁵ Slovakia, Romania, Hungary and the Czech Republic voted against the mandatory quota but were overruled by majority vote.

| | |
|--|--|
| <ul style="list-style-type: none"> • Temporary suspension from implementation.⁶⁶ | <ul style="list-style-type: none"> • Temporary suspension from implementation. • MS may request temporary suspension of 30% of allocated relocation places.⁶⁷ |
|--|--|

Due to the increase in the number of asylum applications, both Sweden and Austria requested a temporary suspension of their obligations under the Relocation Decisions. Whereas the Commission tabled proposals for the temporary suspension of Sweden’s and Austria’s obligations under the Relocation Decisions, only Austria currently benefits from a temporary suspension of the relocation of up to 30 % of applicants allocated under Council Decision (EU) 2015/1601. As a consequence, Austria has a one year suspension for the relocation of 1,065 persons.⁶⁸

3.1.3. Permanent Crisis Relocation Mechanism

When tabling the European Agenda on Migration, the European Commission announced that the triggering of the emergency response system under Article 78(3) TFEU will be the precursor of a lasting solution.⁶⁹ Thus, the second implementation package of the European Agenda on Migration as of September 2015 also contains a **proposal for amending the Dublin Regulation** (No 604/2013) by **introducing a permanent crisis relocation mechanism**, which may be triggered by delegated acts adopted by the EC if an EU MS is confronted with a crisis situation jeopardising the application of the Dublin system. The proposal foresees the same key elements as the emergency measure proposed under Art 78(3) TFEU and amends the Dublin Regulation (No 604/2013) and shall ensure that the Union has at its disposal a robust crisis relocation mechanism to structurally deal with situations of crisis in the asylum area in an effective manner.⁷⁰

In contrast, the proposal for a new Dublin Regulation tabled on 4th May 2016 contains a similar mechanism which, however, introduces an **automatic fairness mechanism**. This mechanism is triggered automatically if the number of asylum applications submitted in an EU MS exceeds 150% of the number for which the responsibility has been designated according to a reference key (based on weighting equally 50% the size of the population and the total GDP of a Member State). In the explanatory memorandum to the proposal from 4th

⁶⁶ Sweden made use of the suspension of both Council Decisions. See the respective Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Council Decision (EU) 2015/1523 and Article 9 of Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece from 15.12.2015; COM(2015) 677 final, accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/proposal_establishing_provisional_measures_in_the_area_of_international_protection_for_the_benefit_of_sweden_en.pdf on 04.03.2016

⁶⁷ Austria made use of this request – see Proposal for a COUNCIL IMPLEMENTING DECISION on the temporary suspension of the relocation of 30% of applicants allocated to Austria under Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece from 10.2.2016; COM(2016) 80 final. Accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/council_implementing_decision_20160210_en.pdf on 03.02.2016

⁶⁸ See European Commission, Second report on relocation and resettlement, COM(2016) 222 final, p. 3. For the respective proposals, see European Commission, *Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Council Decision (EU) 2015/1523 and Article 9 of Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, COM(2015)677 final and *Proposal for a Council Implementing Decision on the temporary suspension of the relocation of 30% of applicants allocated to Austria under Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, COM(2015) 677 final.

⁶⁹ COM (2015) 240 final, p4.

⁷⁰ COM (2015) 450 final.

May 2016, the EC clarifies, that it could consider to withdraw the September proposal, depending on the results of discussion on the 4th May 2016 proposal.⁷¹

3.1.4. EU-Turkey Joint Action Plan and Statement

As a part of the cooperation with third countries (under the external dimension of the CEAS) and in order to address the crisis created by the situation in Syria in a coordinated effort, on 15 October 2015 the EU and the Republic of Turkey agreed on an **action plan** to establish cooperation in supporting Syrians under temporary protection and for a joint approach to managing migration.⁷² On 29 November 2015, at the meeting of the heads of states or governments with Turkey, the Joint Action Plan (JAP) was activated.⁷³ Under the JAP, Turkey committed itself to ensuring that asylum seekers are registered; to facilitate access for Syrians under temporary protection to public services; to strengthen the interception capacity of the Turkish Coast Guard and to prevent irregular migration. On the other side, the EU committed itself to mobilising funds to support Turkey with Syrians under temporary protection; to support existing Member State and EU resettlement schemes and programmes; to support Turkey in strengthening its capacity to combat migrant smuggling; cooperation between EU Member States and Turkey in organising joint return operations to countries of origin of irregular migrants and to offer financial assistance to support Turkey in meeting the requirements for Visa Liberalisation. The Commission adopted a **Recommendation for a voluntary humanitarian admission scheme with Turkey** for a rapid, efficient and voluntary scheme enabling the humanitarian admission of persons in need of protection displaced by the conflict in Syria into Turkey.⁷⁴

Under the Dutch presidency the so-called **"Merkel"** or **"Samsom Plan"**⁷⁵ received significant attention, which at its core suggests classifying Turkey as a safe third country by Greece, and thereby allowing for accelerated processes and swift return of irregular migrants and rejected asylum seekers to Turkey. In return, European countries would commit themselves to resettling a significant number of refugees from Turkey. The Plan was the basis for the **EU-Turkey statement of 18 March 2016**,⁷⁶ which entered into force only 2 days later, on 20 March 2016.⁷⁷ According to the action, a Voluntary Humanitarian Admission Scheme with Turkey will be only activated once the irregular crossings between Turkey and the EU have come to an end, or at least substantially reduced.⁷⁸

⁷¹ 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); COM(2016) 270 final; p 5; at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf.

⁷² European Commission (2015a): 'EU-Turkey joint action plan', Fact Sheet, 15 October, available at: http://europa.eu/rapid/press-release_MEMO-15-5860_de.htm.

⁷³ European Council: Meeting of the EU heads of state or government with Turkey, 29/11/2015 accessed at <http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/29/> on 13.04.2016.

⁷⁴ Commission Recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey; Strasbourg, 15.12.2015; C(2015) 9490; at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/commission_recommendation_for_a_voluntary_humanitarian_admission_scheme_with_turkey_en.pdf accessed on 13.04.2016.

⁷⁵ Interview with de Volkskrant: Nederland wil vluchtelingen 'per kerendeveerboot' terugsturen naar Turkije at <http://www.volkskrant.nl/politiek/nederland-wil-vluchtelingen-per-kerende-veerboot-terugsturen-naar-turkije~a4233530/> accessed on 11.03.2016.

⁷⁶ European Council: EU-Turkey statement, 18 March 2016 accessed at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> on 13.04.2016.

⁷⁷ Ibid, point 1.

⁷⁸ Ibid, point 4.

3.1.5. The Commissions' Communication towards the reform of the CEAS

The European Commission presented a communication outlining its approach for the reform of the CEAS on 6 April 2016.⁷⁹ According to the Commission, "there are significant structural weaknesses and shortcomings in the design and implementation of the European asylum and migration policy".⁸⁰ Five priorities should address the weaknesses and shortcomings of the CEAS:

- Firstly, the communication proposed to reform the Dublin system by either supplementing the system with a "corrective fairness mechanism" or by replacing it with a new system for allocating asylum applications across EU MS based on a distribution key. The proposal for a new Dublin Regulation, which was published only 1 month later on 4th May 2016 reflects the EC's preference for an approach which does not question fundamentally the principles underlying the current Dublin system and introduces an automatic corrective allocation mechanism.
- Secondly, it proposed to reinforce the Eurodac System expanding its purpose beyond assisting in determining the Member State responsible for examining an asylum application, another priority which was already 1 month later translated into a new EURODAC proposal published on 4th May 2016.
- The third priority referred to further harmonise the CEAS rules through replacing the Asylum Procedures Directive and the Qualification Directive by regulations in order to establish a single common asylum procedure and uniform status for refugees and beneficiaries of subsidiary protection and further modifications of the recast Reception Conditions Directive.
- The fourth priority encompassed a number of predominantly punitive measures to prevent secondary movements of asylum seekers.
- And, finally the communication also envisaged an extended mandate for EASO, with a more dominant role in policy implementation and a strengthened operational role. The proposal for a European Asylum Agency replacing the EASO Regulation was also proposed by the EC on 4th May 2016. It extends the Agency's mandate by enhancing practical cooperation and information exchange, including the operation and management of the corrective allocation mechanism; ensuring greater convergence in the assessment of protection needs across EU MS, including through reviewing the situation in designated safe countries of origin included in an EU common list; developing operation standards on the implementation of EU law; monitoring and assessing the implementation of the CEAS; and providing increased operational and technical assistance to MS.

Besides the reform proposals that directly address the CEAS, the reform also covers considerations and suggestions for extending legal pathways for asylum seekers concentrating on intensifying the EU's approach towards resettlement and investigating further into other initiatives such as private sponsorship.

Finally the reform proposal also suggests changes of instruments aiming at smarter and well-managed legal migration policy, such as a more attractive Blue Card; attracting innovative

⁷⁹ European Commission: Communication from the Commission to the European Parliament and the Council towards a reform of the Common European Asylum System and enhancing legal avenues to Europe; Brussels, COM(2016) 197 final; accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_venues_to_europe_-_20160406_en.pdf accessed on 13.04.2016

⁸⁰ Ibid, p2.

entrepreneurs to the EU; and by better making use of its existing instruments targeting different categories and skills of third country nationals.

The Communication envisages another comprehensive reform of the asylum acquis only shortly after the conclusion of the second phase of legislative harmonisation and while many Member States have still not fully transposed the asylum instruments, the Commission has launched several infringement procedures against Member States in the area of asylum. From the Communication it is apparent that the EC's priorities are to address continuing divergences between EU Member States' practices by reducing the room for discretion under the recast directives as well as to prevent secondary movements of asylum seekers and refugees between Member States. In this regard, it is striking that the objective of establishing high standards of protection, clearly established in the 2014 expired Stockholm Programme, is nowhere re-endorsed in the Communication. Instead, further harmonisation of Member States' practices relating to legally questionable safe country concepts and regular review and cessation of protection is clearly prioritised. In addition, the intended further differentiation between refugee and subsidiary protection status and the rights attached⁸¹ represents a u-turn vis-à-vis the impetus of reforms in the second phase of harmonisation and the objective to further align both protection statuses.⁸² In this regard, the Commission's communication seems to reflect the recent national trends towards more restrictive measures and national-interest-driven asylum policies described in section 3.2. of this study, than to provide a forward-looking vision on how to strengthen the protection system within the EU.

3.1.6. Child specific focus

Recently, regarding the situation of asylum seeking children, several EU policy frameworks have played a central role in generating a range of practical measures and support from the agencies of Member States, as well as increased funding for regional projects in the field. Most prominent among these was the EU Action Plan on Unaccompanied Children (2010-2014), the implementation of which is currently under evaluation. The EU Child Rights Agenda⁸³ and the EU Anti-Trafficking Strategy⁸⁴ also contained important child protection provisions. The Strategy promoted the development of EU guidelines on child protection systems, which are discussed in the Commission's Reflection Paper on coordination and cooperation on such systems.⁸⁵ The European Parliament has adopted several important resolutions emphasising the application of child rights and child protection safeguards, including the European Parliament Resolution on the situation of unaccompanied children, the European Parliament resolution adopted in November 2014 to mark the twenty-fifth anniversary of the UN CRC which notes the need for child protection to be the leading principle for unaccompanied children, and the recent European Parliament resolution on a holistic approach to migration which contains a chapter on children.⁸⁶

⁸¹ See COM (2016)197 final, p. 10.

⁸² See recast Qualification Directive, recital 39.

⁸³ Communication from the Commission to the European Parliament, the Council, the European Economic and social committee and the Committee of the Regions - An EU Agenda for the Rights of the Child; COM/2011/0060 final accessed at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52011DC0060>.

⁸⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and social committee and the Committee of the Regions - The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 http://ec.europa.eu/home-affairs/doc_centre/crime/docs/trafficking_in_human_beings_eradication-2012_2016_en.pdf

⁸⁵ European Commission - 9th European Forum on the rights of the child; Coordination and cooperation in integrated child protection systems; Reflection paper accessed at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/rights_of_the_child_2015_reflection_paper.pdf

⁸⁶ European Parliament (2013): The situation of unaccompanied minors in the EU - European Parliament resolution of 12 September 2013 on the situation of unaccompanied minors in the EU (2012/2263(INI)) at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-387>

Currently, the Commission Communication on the State of Play on the European Agenda for Migration⁸⁷ noted that the agenda “put a particular emphasis on the need to protect children and to follow up on the Action Plan on Unaccompanied Minors (2010-2014)”. While the Communication promises “to employ a comprehensive approach for the protection of children throughout the migration chain”, which amongst others, includes “priority for the vulnerable and in particular unaccompanied minors” in the relocation process and “fully integrating child protection and child safeguarding into the hotspots”, both the actual implementation on the ground as well as the impetus of the reform agenda seem to suggest that child rights are in tension with the objective to regain control over migration flows which underpins the proposals and new instruments.

Ongoing work within the Commission and the EU agencies on strengthening how the best interests of the child, and how child protection systems are applicable to all child migrants, should take on significant further impetus and prominence in the coming months.⁸⁸

⁸⁷ 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, 10 February 2016, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_en.pdf.

⁸⁸ See EASO ongoing work on guidance on the best interests of the child. See also 2016 Funding on rights of the child and violence against children – Rights, Equality and Citizenship 2016 Annual Work Programme: http://ec.europa.eu/justice/grants1/programmes-2014-2020/files/rec_awp_2016/rec_awp_2016_annex_en.pdf. See also the imminent publication of the Commission report on the evaluation of the EU Action Plan on unaccompanied minors.

3.2. EU Member States Policy Response

Introduction

On the national level, several EU member states initiated amendments to their asylum legislation in the last few months. In most cases, these changes meant tightening legislation and restricting the rights of asylum seekers.

In the absence of an effective, quick and unified European response, several unilateral MS responses have been observed. EU MS have adopted extraordinary measures like high-security fences and tougher border controls to secure both external EU and internal Schengen borders, with the result of diverting migrant flows through other routes.

Furthermore, due to the possibility of adjusting reception conditions and rights related to the granting of refugee or subsidiary protection status according to the minimum requirements defined by the CEAS instruments, EU MS partly engaged in a race to the bottom, introducing several measures which attempted to decrease the attractiveness of the respective MS for asylum seekers. It remains questionable whether measures like cutting financial benefits or restrictions on family reunification have an impact on the number of asylum seekers coming to the EU and their distribution among MS.

Among the countries which have implemented or are planning to implement major restrictive modifications to their asylum legislation and border policies are Austria, Denmark, Germany, Hungary and Sweden. Additionally, France implemented border controls in response to the terrorist attacks in Paris on November 13, as some of the perpetrators had entered as refugees.⁸⁹

In the following section, selected policy measures by EU MS in the fields of border controls, family reunification, resident status of beneficiaries of international protection, and material reception conditions are discussed. Due to the ongoing discourse in many MS, this selection of policy responses does not claim to encompass all legal or policy changes in the EU MS.

Map 1: Main routes during 2015 and possible alternative routes



Source: Financial Times (09.03.2016) available at <http://www.ft.com/intl/cms/s/0/f5418000-e5f3-11e5-bc31-138df2ae9ee6.html#axzz42V3I6XzX> on 10.03.2016

⁸⁹Le Monde, 14/11/2015. Available at: http://www.lemonde.fr/societe/article/2015/11/14/la-france-va-fermer-ses-frontieres-une-possibilite-exceptionnelle-rendue-possible-par-les-regles-de-schengen_4809529_3224.html

Border Controls

In response to a rising number of refugees and migrants transiting through Western Balkan states on their way to the EU, a number of EU and associated countries reintroduced border controls. Eight countries (Austria, Germany, Slovenia, Hungary, Sweden, Norway, Denmark, Belgium) introduced Schengen border controls based on Article 25 Schengen Border Code (SBC) (events requiring immediate action) and Articles 23/24 SBC (foreseeable events).⁹⁰ With the announcement of the closed Balkan Route⁹¹, the countries along this route intended to give a clear signal, that they will do as much as is needed to further discourage asylum seekers and irregular migrants to pass through. While during most of 2015 the borders were open and people were waived through in an organised way, the flows were later restricted to specific nationalities (mainly those from countries fulfilling the eligibility threshold for relocation (i.e. above 75% recognition rate, thus Syria, Iraq and Eritrea)) and are now closed completely, first by Austria, introducing a yearly cap of 37,500 applicants as well as a daily cap⁹², and since the beginning of March 2016 Croatia and Slovenia also closed their borders.

While the measures certainly had their impact on the flows, leaving hardly anyone in reception places along this well-established route, the situation in Greece is getting tenser, leaving asylum seekers and migrants stuck there. Evidently one can only speculate which route will be opened to exit or circumvent "bottleneck Greece". The central Mediterranean route is already being utilised. A detour via Albania across the Adriatic to Italy or further North via the Black Sea to Romania or even Ukraine and further through Poland are not unlikely.

However, remembering the triggering incidents for the development of the European Agenda on Migration, the deaths at sea and the abandoned lorry in Austria, and the following strong commitment to fight smuggling, it must be very clear that all unilateral decisions of preventing access will ultimately lead to new, more expensive and more dangerous routes, leading to further deaths.

⁹⁰ Annexes to the Communication from the Commission to the European Parliament, the European Council and the Council - Back to Schengen - A roadmap, COM(2016) 120 final from 4.3.2016 http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap-annexes_en.pdf

⁹¹ See (among others) Tweet by Council President Tusk from 09.03.2016 saying: "Irregular flows of migrants along Western Balkans route have come to an end. Not a question of unilateral actions but common EU28 decision" at <https://twitter.com/eucopresident/status/707543984890060800?lang=de>; the euobserver from 07.03.2016: "EU leaders to declare Balkan migrant route closed" at <https://euobserver.com/migration/132569>; the Guardian from 09.03.2016: "Balkan countries shut borders as attention turns to new refugee routes" at <http://www.theguardian.com/world/2016/mar/09/balkans-refugee-route-closed-say-european-leaders> accessed on 30.03.2016.

⁹² In the framework of the Austrian Asylum summit in Vienna on 20 January 2016 the federal state, the Länder, the cities and the municipalities of Austria agreed to reduce the asylum influx to Austria to not overburden Austria. As a consequence a yearly cap (sometimes referred to as "point of reference" – "Richtwert") of 1.5% of the Austrian population within 4 years is planned, separated in the following way: 37.500 in 2016, 35.000 in 2017, 30.000 in 2018 and 25.000 in 2019. See Bundeskanzleramt: Asylgipfel am 20. Jänner 2016 - Gemeinsame Vorgangsweise von Bund, Ländern, Städten und Gemeinden, at <https://www.bka.gv.at/DocView.axd?CobId=61858> on 30.03.2016. The upper cap has been highly criticised by civil society and stakeholders in Austria as well as by the EC (see Reuters from 18.02.2016: "Austria sticks to migration cap despite EU legal warning" at <http://www.reuters.com/article/us-europe-migrants-austria-commission-idUSKCN0VR10A>) However, based on the concept of upper limits, the Austrian parliament adopted an amendment to the Asylum Law on 27 April 2016 which delegates the power to the government to determine if the influx of asylum applicants exceeds the capacities of Austria in such a way that it constitutes „a threat to public order and internal security". Should the government in agreement with the parliament establish such a threat by decree, asylum applications can only be submitted at the border. Applicants will not have the right to remain on the territory and can be rejected and returned to their country of entry on 'safe third country' grounds. The law is to enter into force as of June 2016. (see the adopted legal amendment at: https://www.parlament.gv.at/PAKT/VHG/XXV/BNR/BNR_00305/fname_529048.pdf).

Family reunification

The Family Reunification Directive 2003/86/EC grants family members of refugees the right to join their relatives in the EU country where they are residing, in order to protect the family unit and ease the integration of refugees. Persons whose asylum procedure is ongoing or who have obtained another protection status such as subsidiary protection are not covered by this Directive.

Nevertheless, many EU MS allow for family reunification of beneficiaries of subsidiary protection. During recent months, provisions granting beneficiaries of subsidiary protection the right of family reunification have been partly restricted. In several countries, such as Austria, Denmark, Finland, Germany and Sweden, amendments to the corresponding laws have been discussed or already adopted and are expected to enter into force during 2016, creating obstacles for the family reunification of persons granted asylum or subsidiary protection status. Recognised refugees may need to fulfil certain requirements (stable and regular income and/or housing) in order to be able to reunite with their family if they do not make an application for family reunification within three months of recognition of status.

The envisaged changes in national legislations also affect beneficiaries of subsidiary protection, who are not formally covered by the scope of the Family Reunification Directive but had in the past been granted the same favourable conditions as refugees in a large number of Member States. Typically, the legal changes may include a waiting period before having access to family reunification and/or the application of the requirements applied to other third country nationals, namely proving stable and regular income and housing.

Table 1. Selected MS policy responses in the area of family reunification

| Country | Legal changes | Family reunification | |
|------------------|-------------------------------|--|---|
| | | Refugee Status | Subs. Protection Status |
| AT ⁹³ | In Parliament | If application occurs three months after recognition: proof of housing, income, insurance required | Waiting period raised to 3 years after being granted status (previously: one year) |
| DE ⁹⁴ | Entered into force March 2016 | No changes | A waiting period of two years is introduced. |
| BG ⁹⁵ | No changes | Yes | Yes |
| SE ⁹⁶ | In Parliament | Possible when the refugee has a reasonable prospect of obtaining permanent residence after three years | Will not have the right to family reunification while on temporary residence permit |
| IT ⁹⁷ | Entered into force 2014 | Requirements of income and housing is no longer requested | Requirements of income and housing is no longer requested |

⁹³ Interview, AT/G/1

⁹⁴ Written answer to interview questionnaire, DE/G/1.

⁹⁵ Interview, BG/N/1

⁹⁶ Interview, SE/G/1; the bill can be accessed in Swedish at: <http://www.regeringen.se/contentassets/c8a2c65d34534a0a9de7eab1169ab1d9/slutlig-lagratsremiss-begransningar-uppehallstillstand.pdf>

⁹⁷ Interview, IT/G/1; Legislative Decree no. 18/2014, available at: <http://www.gazzettaufficiale.it/eli/id/2014/03/07/14G00028/sq%20>.

| | | | |
|-------------------|------------|--|---|
| EL ⁹⁸ | No changes | Yes | No |
| HU ⁹⁹ | No changes | Within 6 months after status granted exemption from requirements | Requirements (housing, income) have to be fulfilled |
| ES ¹⁰⁰ | No changes | Yes | Yes |

Status of beneficiaries of international protection

Table 2. Selected MS policy responses regarding granting of residence permits

| Country | Legal changes | Protection/Residence permits | |
|-------------------|-------------------------|--|---|
| | | Refugee Status | Subsidiary Protection Status |
| AT ¹⁰¹ | In Parliament | Asylum status is reviewed after three years and can be rescinded if grounds for asylum no longer applicable (previously permanent) | No changes (temporary protection for one year, afterwards two years, then unlimited) |
| SE ¹⁰² | In Parliament | Temporary residence permit for three years (previously: permanent) | Temporary residence permit for one year initially (previously: permanent) |
| IT ¹⁰³ | Entered into force 2014 | No changes (residence permit 5 years) | Residence permit extended from 3 to 5 years |
| HU ¹⁰⁴ | In Parliament | Review of status after three years (previously: indefinite residence permit) | Review of status after three years (previously: after five years) |
| ES ¹⁰⁵ | No changes | Residence permit for five years (renewable) | Residence permit for five years (renewable) |
| DE ¹⁰⁶ | No changes | Residence permit for 3 years, then settlement permit unless revocation of residence permit | Residence permit for one year, extension for 2 years, settlement permit after 5 years |

⁹⁸ Interviews, EL/G/2 and EL/O/1

⁹⁹ Interview, HU/N/1

¹⁰⁰ Interview, ES/A/1

¹⁰¹ Interview, AT/G/1

¹⁰² Interview, SE/G/1

¹⁰³ Interview, IT/G/1; Legislative Decree no. 18/2014, available at: <http://www.gazzettaufficiale.it/eli/id/2014/03/07/14G00028/sg%20>.

¹⁰⁴ AIDA Asylum Information Database, March 2016, accessed at <http://www.asylumineurope.org/news/15-03-2016/hungary-new-reform-undercut-reception-conditions-asylum-seekers#sthash.HISKLFKb.dpuf>.

¹⁰⁵ Interview, ES/A/1; Dublin Project: National Report Spain (2012), accessed at: http://www.dublin-project.eu/dublin/content/download/6185/75266/version/1/file/Rapport_Spain_WEB.pdf.

¹⁰⁶ Written answer to interview questionnaire, DE/G/1

Material reception conditions

Furthermore, cuts in the provision of material reception conditions have been proposed to decrease asylum attractiveness and to deter migrants from arriving. This is the case in Hungary, where payment of pocket money for asylum seekers will be ceased,¹⁰⁷ or in Germany, where legislators voted in favour of a shift from cash to in-kind allowances for asylum seekers.¹⁰⁸ In Denmark, the amendment to the Danish Aliens Act which received widespread attention because of its provision that allows search and seizure of asylum seekers' valuable assets, and also included a reduction of financial benefits for asylum seekers.¹⁰⁹

¹⁰⁷ AIDA Asylum Information Database, March 2016, accessed at <http://www.asylumineurope.org/news/15-03-2016/hungary-new-reform-undercut-reception-conditions-asylum-seekers#sthash.HISKLFKb.dpuf>

¹⁰⁸ Asylverfahrensbeschleunigungsgesetz, published on 23.10.2015: [http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//%255B@attr_id=%27bgbl115s1789.pdf%27%255D#_bgbl_%2F%2F*\[%40attr_id%3D%27bgbl115s1722.pdf%27\]_1446543764324](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//%255B@attr_id=%27bgbl115s1789.pdf%27%255D#_bgbl_%2F%2F*[%40attr_id%3D%27bgbl115s1722.pdf%27]_1446543764324)

¹⁰⁹ The original proposal from December 10 2015, which was further amended and adopted by the Danish Parliament on 3 February 2016, is available at: http://www.ft.dk/RIpdf/samling/20151/lovforslag/L87/20151_L87_som_fremsat.pdf

PART III: THE IMPACT OF THE REFUGEE CRISIS ON THE FUNCTIONING OF THE CEAS

1. DETERMINATION OF THE RESPONSIBILITY FOR ASYLUM CLAIMS

KEY FINDINGS

- The pressure to achieve rapid and tangible results in regaining control of the refugee influx puts compliance with European and international standards at stake.
- Data used by the EU and individual MS as a basis for policy making fail to provide an adequate picture of the situation. In addition, there are serious data quality and transparency issues.
- Should return to Greece under Dublin be reinstated as of June 2016, the Dublin system and the relocation measures will result in physical transfer of applicants into two opposite directions.
- Relocation inherits all the flaws of the Dublin system, especially the elements of coercion, physical transfer and time consuming processes of determining the MS responsible.
- The hotspots regime raises legal concerns with regards to standards set in the Reception Conditions Directive.
- The hotspots regime raises concerns with regards to guarantees deriving from the Asylum Procedures Directive.
- The failure to seize previous opportunities to reform the CEAS has exacerbated the impact of the crisis.

1.1. Introduction

It is generally undisputed that the primary responsibility for protecting and assisting asylum seekers and refugees lies at the national level with the host state.¹¹⁰ However, the 1951 Convention relating to the Status of Refugees acknowledged in its preamble that 'the granting of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation.' Before a treaty framework in the area of migration and asylum had been developed at the European level, its leaders gathered to consider the development of a system of allocating responsibility for asylum claims in the early 1990s. The objective of these initiatives was to prevent "asylum shopping" with the aim to reinforce the primary responsibility of one state. A first discussion on fair distribution was then closely connected with events that triggered higher numbers of refugee flows, which, at that time, mainly affected Germany with more than 460,000 applications in 1994.¹¹¹

¹¹⁰ UNHCR (1998): Executive Committee of the High Commissioner's Programme; Forty-ninth session; International Solidarity and Burden Sharing in all its aspects – national, regional and international responsibilities for refugees, p3; at <http://www.refworld.org/pdfid/4a54bc2f0.pdf> accessed on 03.03.2016

¹¹¹ For a more detailed discussion and summary of the debate on responsibility-sharing and different distribution models that were proposed in the past, see Wagner, M. & Kraler, A. (2015): 'An Effective Asylum Responsibility-Sharing Mechanism', ICMPD Asylum Programme for Member States Thematic Paper, available at: http://research.icmpd.org/fileadmin/Research-Website/Publications/working_papers/ICMPD_TP_Responsibility_Sharing_Update2015.pdf.

Until 2009, the Treaty Establishing the European Community directed the EU legislative bodies to adopt measures 'promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees'.¹¹² In the Lisbon Treaty, this article was repealed and replaced by the new Article 80, requiring that 'the principle of solidarity and fair sharing of responsibility, including its financial implications' govern all policies enacted under Articles 77 through 79 (regulating border checks, asylum and immigration).¹¹³ Article 80's prominent use of the term indicates that, whatever 'solidarity' means, it is intended as the governing principle of the Common European Asylum System (CEAS).¹¹⁴

1.2. Instruments for distribution of asylum seekers

Under the current EU law there is no specific instrument dedicated solely to the distribution of asylum seekers. However, the CEAS is based on a system for determining the responsibility of an EU MS, broadly referred to as the Dublin system. Due to increasing flows in 2015, the emergency relocation system for intra-EU solidarity emerged in the context of the implementation of the European Agenda on Migration (EAM). Additionally, the Commission sought to achieve greater coherence of effort amongst all Member States with respect to resettlement. The financial perspective of implementation of these schemes is regulated under the Asylum, Migration and Integration Fund.¹¹⁵

This section will present the instruments that currently regulate the distribution of, and responsibility for, asylum claims among EU MS and further outline the main elements of each of the instruments, identifying their challenges and flaws in particular, in the context of the current situation of large-scale influx.

1.2.1. Dublin III Regulation¹¹⁶

KEY FINDINGS

- The application of the Dublin Regulation is highly **dependent on the correct implementation of the instruments of the CEAS** in EU MS. This particularly applies to the Reception Conditions Directive and the Asylum Procedures Directive. The functioning of the Dublin Regulation is intertwined with questions of solidarity, responsibility sharing, financial support under the AMIF, practical cooperation measures and the involvement of EASO, aimed at remedying the causes of its suspension.¹¹⁷
- Dublin does **not offer a fair distribution** mechanism. On the contrary, if it were to be applied as designed, it would place disproportionate pressure on MS at the EU external borders, although in practice this has not materialised even under non-crisis conditions, until the "closure of the Balkan route" in March 2016.
- Importantly, the Dublin system has never worked properly, generating only a relatively small number of requests for Dublin transfers when compared to the total number of

¹¹² Treaty Establishing the European Community, OJ C 325, Article 63(2)(b) (pre-Lisbon Treaty).

¹¹³ The Treaty of Lisbon amending the Treaty Establishing the European Union and the Treaty Establishing the European Community, 13 December 2007 ('Lisbon Treaty'), C306/1, Article 65.

¹¹⁴ McDonough, P. & Tsourdi E. L. (2012): 'Putting solidarity to the test: assessing Europe's response to the asylum crisis in Greece', UNHCR, New Issues in Refugee Research, Research Paper No. 2, 31, January, available at: <http://www.unhcr.org/4f269d5f9.pdf>.

¹¹⁵ Established by Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, L 150/168.

¹¹⁶ 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).

¹¹⁷ Mouzourakis, M. (December 2014): 'We Need to Talk about Dublin' Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union, Refugee Studies Centre, accessed at <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf> on 01.03.2016, p 13

applicants who have presumably first entered through another Member State. Compared against the number of accepted requests, there is an even lower number of physical transfers. It appears that the system is inefficient, ineffective and costly.

- Dublin proved to be a particularly inadequate tool to address a situation of large scale arrivals at the EU external borders.
- The Commission's proposal for a recast Dublin Regulation from 4 May 2016 institutionalizes a reactive emergency driven approach as opposed to a solidarity based and pro-active allocation that is applied from the beginning.

1.2.1.1. Main elements of the Dublin System

Against the backdrop of unilateral and unpredictable 'safe third country' practices, a common mechanism was deemed necessary in order to ensure that an asylum application would rapidly be processed by a country in the EU to prevent applicants from being perpetually shifted from one state to another.¹¹⁸

The Dublin system emerged out of the need to have a system in place for determining the responsibility of an EU MS for an asylum claim. The system thus aims to:

- **preventing asylum seekers being shuffled between states** by applying clear criteria for the determination of responsibility of an EU MS;
- **preventing multiple asylum applications** by making one country responsible for an asylum application;
- **preventing asylum-shopping** by providing clear indications which country is responsible, irrespective of the asylum seekers preference;
- offering a **hierarchy of criteria for determining the responsible country** as well as the procedural steps to determine responsibility under the Dublin rules; and
- allocating, as the last in the hierarchy of criteria, the responsibility for asylum applications to the Member State responsible for the applicant's first entry into the common area, in practice this being the **first country of entry**.

Dublin is **supported by the Eurodac Regulation**, (mostly) providing the evidence for the application of some of the criteria under the hierarchy.

1.2.1.2. Challenges of the Dublin System

The Dublin Regulation has been the most contested element of the CEAS. Some described it as the corner stone of the CEAS and others claimed it is the main reason for its failure. Certainly, the Dublin system has generated multi-faceted debates. The perspective of asylum seekers and their human rights situation vis-à-vis the Dublin system has been subject to intense policy and academic debate. Scholars¹¹⁹ and advocacy organisations¹²⁰ have

¹¹⁸ Mouzourakis, M. (December 2014): 'We Need to Talk about Dublin' Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union, Refugee Studies Centre, accessed at <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf/> on 01.03.2016, p 17.

¹¹⁹ See Noll, G. (2000): *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague: Kluwer Law International; Byrne, R. (2002): 'Future Perspectives: Accession and Asylum in an Expanded European Union', in R. Byrne, G. Noll & J. Vedsted-Hansen(eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union*, 373-422, The Hague – London: Kluwer Law International; Guild, E. (2006): 'The Europeanisation of Europe's Asylum Policy', *International Journal of Refugee Law* 18(3-4): 630-651.

¹²⁰ See ECRE (2008) *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008, Brussels. Accessed at <http://www.ecre.org/topics/areas-of-work/introduction/134.html> on 16.03.2016.; UNHCR (2009) 'Comments on the European's Commission Proposal for a recast of the Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for

concentrated on the impact of the Regulation on applicants and their fundamental rights to liberty, private and family life, and non-refoulement. Landmark rulings of the European Court of Human Rights (ECtHR) in *MSS v Belgium and Greece* (2011) and the Court of Justice of the European Union (CJEU) in *NS v Secretary of State for the Home Department* significantly influenced the implementation of the Dublin system and were widely discussed.¹²¹ Rights-based critiques of the Dublin Regulation have therefore addressed a substantial part of this debate.¹²² At a practical level EU MS policy makers are not fully satisfied with the system,¹²³ while at the EU level studies commissioned by the EC similarly highlighted a number of flaws in the Dublin System.¹²⁴ Among the flaws highlighted, the following may be mentioned:

Concept of the Dublin System: The Dublin regime was developed roughly 25 years ago for a smaller group of more homogeneous countries, in terms of economic and social conditions. Since then, the composition of the Dublin countries changed: initially launched by 12 participating countries, it now involves 31, which are arguably far more heterogeneous in a number of aspects. While the composition of Dublin participating countries changed, the Dublin system did not develop further in the same manner: after two revisions, it still works on the principle that an asylum claim should be dealt with by only one state, based on a hierarchy of criteria for determining the responsible country. Secondary movement is only one of the consequences challenging the “spirit” of the Dublin Regulation.¹²⁵

The element of **coercion** is also challenged by states and asylum seekers to circumvent responsibilities under Dublin. States can avoid taking fingerprints to prevent responsibility. Asylum seekers’ can attempt to avoid registration at designated reception facilities by using the services of smugglers, or take riskier routes to pass ‘under the radar’ to reach the desired destination or by damaging fingerprints to avoid having their biometric data registered.¹²⁶

Non transfers under the Dublin system: at various times transfers under the Dublin system have been suspended as limited reception capacities led to the conclusion that some countries’ asylum systems are not able to hold up the reception and processing standards formulated in legal acts by EU law. With respect to Dublin transfers to Greece, the CJEU

examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (“Dublin II”) (COM(2008) 820, 3 December 2008) and the European Commission’s Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008) available at <http://www.refworld.org/pdfid/49c0ca922.pdf> accessed on 16.03.2016; ECRE (2013a): ‘Dublin II Regulation: Lives on Hold’, European Comparative Report, February, available at: <http://www.ecre.org/component/downloads/downloads/701.html>; Jesuit Refugee Service Europe (2013): ‘Protection Interrupted: The Dublin Regulation’s Impact on Asylum Seekers’ Protection’, DIASP project report, June, available at: http://www.jrs.net/assets/publications/file/protection-interrupted_jrs-europe.pdf.

¹²¹ Costello, C. (2012): ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’, *Human Rights Law Review* 12(2): 287-339; Den Heijer, M. (2012): ‘Joined Cases C-411 & 493/10 *NS v Secretary of State for the Home Department* and *ME v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, Judgment of the Court (Grand Chamber) of 21 December 2011*’, *Common Market Law Review* 49: 1735-1754; Moreno-Lax, V. (2012): ‘Dismantling the Dublin System: *MSS v Belgium and Greece*’, *European Journal of Migration and Law* 14(1): 1-31.

¹²² Mouzourakis, M. (December 2014): ‘We Need to Talk about Dublin’ Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union, Refugee Studies Centre, accessed at <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf> on 01.03.2016.

¹²³ Interviews: EL/G/1, DE/G/1, SE/G/1, AT/G/1

¹²⁴ European Commission (2016): Evaluation of the Implementation of the Dublin III Regulation; DG Migration and Home Affairs; Final report from 18.03.2016; the study has been prepared by ICF International; available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf

¹²⁵ Interviews: EL/G/1, DE/G/1, SE/G/1, AT/G/1

¹²⁶ Interviews: HU/N/1, ES/A/1

clarified that the effective operation of the Dublin system requires the swift reparation of 'systemic deficiencies' in national asylum systems.¹²⁷

The **effectiveness** of the Dublin system: The Dublin system lacks credibility due to its lack of effectiveness. From 2009 to 2013, there was an average of 55,000 outgoing Dublin requests. While 73 % of the outgoing requests were accepted, 26 % of these requests resulted in the physical transfer of a person from one EU country to another (on average, about 14,000 persons annually).¹²⁸ The proportion of outgoing requests corresponded, on average, to about 15% of the number of registered asylum applicants¹²⁹ while the proportion of physical Dublin transfers in the EU was about 4% of applicants.¹³⁰ The effectiveness of Dublin is also questioned when analysing bilateral flows between specific EU MS: in 2013, for example, Germany made 281 transfers to Sweden, while Sweden transferred 289 asylum seekers to Germany.¹³¹ The net-transfer thus resulted in only 8 transfers, while logistics and costs arose for 562 transfers.

The Dublin system is, after all, criticised for its poor **efficiency** as it only establishes the responsibility of a Member State for processing an asylum claim without addressing the merits of the claim itself within a long, tedious and often failing procedure.¹³² It is difficult to imagine that the results of such a procedure could possibly balance the **costs**¹³³ and necessary resources of the EU MS concerned, not to mention the human cost of waiting for the determination of the responsibility for assessing an asylum claim.

Child respective challenges

Judgements from both the Court of Justice of the EU and the Strasbourg Court have had the impact of restricting transfers of both unaccompanied children and children within families under the Dublin system.¹³⁴ Generally, both ECtHR and the CJEU rulings conclude that best interest considerations mean that children should be allowed to remain in the Member State in which they are present and the need for detailed and reliable information providing individual guarantees on reception conditions before transfers of families with children. The

¹²⁷ N.S. v. United Kingdom and M.E. v. Ireland (N.S. and M.E.); Joined Cases N.S. v. Secretary of State for the Home Department (C-411/10) and M.E., A.S.M., M.T., K.P., E.H. (C-493/10). 2011. C-411 and C-494, Grand Chamber of the Court of Justice of the European Union.

¹²⁸ EASO (2015a): 'Annual Report on the Situation of Asylum in the EU 2014', July, p. 34, available at: http://www.bfa.gv.at/files/berichte/EASO_Annual_Report_2014.pdf.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Williams, R. (2015) "BEYOND DUBLIN", A Discussion Paper for the Greens/EFA in the European Parliament, p 9; http://www.greens-efa.eu/fileadmin/dam/Documents/Policy_papers/Beyond_Dublin_paper_final.pdf, accessed on 17.03.2016. However, it should be well noted that the Dublin Regulation is also the only intra-EU system for family reunion, and as such those cases may indeed have been based on family reunion reasons.

¹³² Interview, DE/G/1; Garlick, M. & Fratzke, S. (2015): 'EU Dublin Asylum System Faces Uncertain Future after Ruling in Afghan Family's Case', 15 April, available at: <http://www.migrationpolicy.org/article/eu-dublin-asylum-system-faces-uncertain-future-after-ruling-afghan-family%E2%80%99s-case> last accessed on 4 March 2016. In this respect the Tarakhel decision additionally put a burden on Dublin procedures as it reduced the scope for states to apply Dublin in an automatic, unquestioning way, requiring additionally to take the applicant's individual circumstances into account and thus making the Dublin procedure more complex. See also Mouzourakis, M. (December 2014): 'We Need to Talk about Dublin' Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union, Refugee Studies Centre, accessed at <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf> on 01.03.2016, p 13.

¹³³ As regards to the factor "costs", see also Williams, R. (2015): Beyond Dublin A Discussion Paper for the Greens/EFA in the European Parliament, p 10; see also European Parliament (2010): 'What System of Burden-Sharing between Member States for the reception of asylum seekers?', Study for the LIBE Committee written by Matrix, available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/419620/IPOL-LIBE_ET%282010%29419620_EN.pdf.

¹³⁴ See, in particular, the Queen on the application of MA and Others v. Secretary of State for the Home Department C-648/11 and Tarakhel v. Switzerland, No 29217/12.

Council and the Parliament failed to reach an agreement on the Commission proposal¹³⁵ intended to bring in line Article 8 of the Dublin III Regulation with the respective jurisprudence (MA & Others judgment of the Court of Justice of the EU, C-648/11) on the situation of unaccompanied children who have no family members or relatives within the EU.

The Dublin III Regulation contained enhanced obligations for family reunion opportunities. However, neither the Regulation itself nor the Implementing Regulation ensures that the general provisions of the Regulation can be applied effectively in practice. The absence of detailed rules on procedures (for example, establishing family relations) and specific mechanisms necessary for effective cross-border cooperation have meant that Dublin claims and transfer procedures are frequently both lengthy and complicated for children,¹³⁶ and have thus been identified as contributing to the disappearances of unaccompanied children from care.¹³⁷ Moreover, the potential of these new provisions to provide for the transfer of children from precarious situations at the borders of the EU to reunite with family members has not been fulfilled.

1.2.1.3. *Dublin and large scale arrivals*

In the course of the summer months of 2015, when high numbers of people arrived at the EU's external border countries, the flaws of the Dublin system became even more visible, as evidenced by several observations:

Following the flows and main entry points to the EU in the course of 2015, the strict application of the Dublin Regulation would have meant that Greece was responsible for a significant number of approximately 860,000 claims from persons who arrived on their shores. Italy would have been responsible for a significant number of the 170,000 persons who arrived in 2015. Evidently, such a system is neither sustainable nor fair, particularly considering that the main destination country for most of the applicants is neither Greece nor Italy.

In contrast, of the overall 1.3 million first-time applications for international protection registered EU-wide, Italy received 'only' 84,085 applicants (i.e. about 50% of the total number of arrivals reported by UNHCR in Italy in 2015), while Greece received 13,205 applicants (i.e. 1.3% of the total number of arrivals in Greece in 2015).¹³⁸

Due to Dublin's structural deficiencies and the lack of an immediate joint EU response, EU MS who were most affected by the large-scale influx, started to widely ignore the Dublin system by waiving through persons who did not explicitly request asylum in their territory. First, Hungary became overburdened by asylum applications to the point that it stopped taking back applicants who had crossed into other EU MS from Hungary as of 23 June 2015.¹³⁹

¹³⁵ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family members legally present in a Member State; COM(2014) 382 final; at http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/examination-of-applicants/docs/commission_proposal_to_amend_the_dublin_regulation_en.pdf.

¹³⁶ Interviews; SE/G/1 and DE/G/1

¹³⁷ See project findings in CONNECT: Identifying good practices in, and improving, the connections between actors involved in reception, protection and integration of unaccompanied children in Europe, available at: <http://www.connectproject.eu/>; See also SUMMIT report: Best practices and key challenges on interagency cooperation to safeguard unaccompanied children from going missing, available at: http://missingchildreneurope.eu/Portals/0/Docs/report_SUMMIT%20-%20Safeguarding%20Unaccompanied%20Migrant%20Minors_1mrt.pdf; IOM: 'PRUMA: Promoting Family Reunification and transfer of Unaccompanied Minor Asylum Seekers (UMASs) under the Dublin Regulation', available at: http://www.italy.iom.int/index.php?option=com_content&task=view&id=287&Itemid=90.

¹³⁸ Eurostat (2016a): Asylum Statistics, Eurostat Statistics Explained, 20 April, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics

¹³⁹ Interview, HU/N/1. In fact, the application of the Dublin system has never stopped. See also: "Defying EU, Hungary suspends rules on asylum seekers; Reuters. at <http://uk.reuters.com/article/uk-europe-migrants-austria-hungary-idUKKBN0P31ZB20150623> accessed on 04.03.2016.

Germany applied the sovereignty clause with regard to applicants who could prove that they entered Germany between September 4 and October 20 2015 via Austria/Hungary and in general with regard to applicants from Syria from August 24, 2015 to October 20, 2015.¹⁴⁰

On 2 September 2015, a Czech Republic police spokeswoman announced that the practice of detaining and returning Syrian citizens who had filed an asylum application in Hungary and subsequently moved to Czech Republic would be dismissed and instead, Syrians could choose to either file an asylum application in the Czech Republic or leave the country for another within seven days.¹⁴¹ Slovenia, Croatia and Austria let thousands of people cross their territory on their way to Germany, with only a smaller percentage requesting asylum in those countries. While the practice of waiving through has received little discussion for the second half of 2015, the Commission strictly condemned this practice in its communication on 04.03.2016.¹⁴² Ultimately, the countries along the Western Balkan Route took their fates into their own hands and declared that "irregular flows of migrants along the Western Balkans route have now come to an end"¹⁴³ setting an end to the wave-through approach, reinstalling stepped-up exit controls at the border between Greece and Macedonia in order to avoid Schengen-internal border controls.¹⁴⁴

As indicated above, several decisions of the European Court of Human Rights, the Court of Justice of the EU as well as national Courts revealed systemic deficiencies regarding full access to the asylum system and the provision and quality of reception capacity in different EU MS.¹⁴⁵ Consequently, Dublin transfers to Greece, and some transfers to Italy and Hungary¹⁴⁶ were stopped. In October, the Commission recalled that since 2010-11, Member States had not been able to undertake Dublin transfers to Greece¹⁴⁷ despite significant support provided to the Greek asylum system since the suspension of transfers ordered by the MSS ruling in January 2011. However, in February 2016 the Commission adopted a

¹⁴⁰ Interview DE/G/1. See also the German Federal Office for Migration and Refugees (BAMF) on Twitter: "#Dublin-Verfahren syrischer Staatsangehöriger werden zum gegenwärtigen Zeitpunkt von uns weitestgehend faktisch nicht weiter verfolgt." https://twitter.com/bamf_dialog/status/636138495468285952; and: "Germany: Halt on Dublin procedures for Syrians". AIDA Asylum Information Database accessed on 11.04.2016 at <http://www.asylumineurope.org/news/24-08-2015/germany-halt-dublin-procedures-syrians>

¹⁴¹ "Czech Republic will stop detaining Syrians on way to Germany". Reuters, accessed at <http://uk.reuters.com/article/uk-europe-migrants-czech-syrians-idUKKCN0R21OM20150902> on 04.04.2016

¹⁴² The Commission clearly stated its opinion that "[t]he wave-through approach is incompatible with Schengen and Dublin rules and encourages secondary movements and should be stopped. It also undermines the functioning of the relocation scheme, and it is thus one of the reasons for the poor implementation of the relocation decisions up to now. Therefore, stopping the wave-through approach in a coordinated way is a requirement for the functioning of the Schengen and Dublin systems, as well as the relocation scheme." See Communication from the Commission to the European Parliament, the European Council and the Council: Back to Schengen - A Roadmap accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap_en.pdf on 05.03.2016

¹⁴³ Statement of the EU Heads of State or Government, 07.03.2016; http://www.consilium.europa.eu/press-releases-pdf/2016/3/40802209668_en_635930097600000000.pdf

¹⁴⁴ Communication from the Commission to the European Parliament, the European Council and the Council: Back to Schengen - A Roadmap accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap_en.pdf on 05.03.2016

¹⁴⁵ See: European Court of Human Rights (ECtHR): M.S.S. v Belgium & Greece, January 2011; Court of Justice of the EU (CJEU): NS vs UK, C-411/10; ECtHR: Tarakhel v. Switzerland, Application no. 29217/12; Federal Administrative Court of Austria (VwGH): Ra 2015/18/0113 bis 012011

¹⁴⁶ On 2nd of March, the Swedish Migration Service suspended Dublin transfers to Hungary following two court decisions. The Court considered that asylum seekers who had entered Hungary via Serbia would be unable to obtain international protection in Hungary due to the changes to Hungary's asylum laws in 2015. This was in particular, due to accelerated asylum procedures and the designation of Serbia as a safe third country, with the accompanying risk of refoulement and treatment contrary to Article 3 ECHR – see EDAL (2016): Sweden: Migration Board suspends Dublin transfers to Hungary, 2 March, available at: <http://www.asylumlawdatabase.eu/en/content/sweden-migration-board-suspends-dublin-transfers-hungary>.

¹⁴⁷ Communication from the Commission to the European Parliament, the European Council and the Council on Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration, COM(2015) 510 final of 14 October 2015.

Recommendation listing concrete steps needed to bring Greece back into the Dublin system¹⁴⁸ and reiterated the goal of applying Dublin to Greece by June 2016.¹⁴⁹

Finally, the emergency relocation scheme was introduced with the aim to make Dublin work again. It remains questionable whether these two systems can efficiently work next to each other without aggravating the already existing deficiencies of the Dublin system. The Dublin system is no mechanism for fair distribution and in fact it never was intended to be. As it is the Commission's intention to swiftly re-introduce Dublin returns to Greece (see point above) those will be conducted under Dublin in parallel to relocations from Greece¹⁵⁰, apparently in opposite directions. In addition, secondary movements will be tackled by Dublin to return relocated persons, who did not stay in the country of relocation.

Attempting to maintain the controversial Dublin system can therefore be regarded as a distraction from the central task of building and sustaining an effectively functioning asylum system at the national level or finding a more efficient mechanism of assigning responsibility for asylum claims.¹⁵¹ Scholars have suggested "scrapping the current regulation and establishing a mechanism for reallocating asylum claims in a way that improves rather than worsens the distribution".¹⁵² However, instead of replacing the Dublin system by a new mechanism to determine the responsibility for asylum claims, the EC opted for the first option included in the Commission's CEAS reform Communication. In the proposed recast Dublin Regulation presented on 4th May 2016 the EC confirmed the EU mantra on the Dublin system as the "cornerstone of the CEAS"¹⁵³, and tabled a proposal which simply streamlined and supplemented the current, highly deficient system with a corrective fairness mechanism.

Mechanism for a fair allocation in times of high numbers of asylum seekers

In parallel to the emergency relocation system, the European Commission also proposed a permanent crisis relocation mechanism that triggers in crisis situations¹⁵⁴ which represents a derogation from the criteria that allocates responsibility within the Dublin regulation.¹⁵⁵ The proposal is thus an attempt to structurally deal with crisis situations in any Member State generated by large and disproportionate inflow of persons. The inflow must manifest "extreme pressure, even on a well prepared asylum system".¹⁵⁶ The proposal is based on the same principles as the "emergency relocation" system¹⁵⁷, thus the same distribution key is applied and only prima facie refugees (i.e. those nationalities with 75% recognition rate) are eligible for relocation.

The permanent relocation mechanism has so far not been adopted and the EC indicated that it could consider withdrawing the proposal depending on the discussion on the proposed

¹⁴⁸ Commission Recommendation addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013 (C(2016) 871 of 10 February 2016

¹⁴⁹ Communication from the Commission to the European Parliament, the European Council and the Council: Back to Schengen - A Roadmap accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap_en.pdf on 05.03.2016

¹⁵⁰ Also applicable for Italy.

¹⁵¹ Garlick, M. & Fratzke, S. (2015): 'EU Dublin Asylum System Faces Uncertain Future after Ruling in Afghan Family's Case', 15 April, available at: <http://www.migrationpolicy.org/article/eu-dublin-asylum-system-faces-uncertain-future-after-ruling-afghan-family%E2%80%99s-case> last accessed on 4 March 2016.

¹⁵² Hatton, T. (2013): 'Refugee and Asylum Migration', in A. F. Constant & K. F. Zimmermann (eds.), *International Handbook on the Economics of Migration*, 453-469, Cheltenham: Edward Elgar.

¹⁵³ 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); COM(2016) 270 final; p 4 and 8; at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf.

¹⁵⁴ COM(2015) 450 final, p2.

¹⁵⁵ Ibid, p 6.

¹⁵⁶ Ibid, Art 33a/5, p 20.

¹⁵⁷ See the following section 1.2.2 on the emergency relocation mechanism.

recast Dublin Regulation as presented on 4th May 2016. Following the Communication towards a **reform of the CEAS and enhancing legal avenues to Europe**,¹⁵⁸ the Commission introduced an **automatic fairness mechanism** in its proposal for the recast of the recast Dublin Regulation.¹⁵⁹ In principle the approach is similar as laid out in the September proposal for a permanent crisis relocation mechanism, but there are some significant differences:

- The proposed recast Dublin Regulation is triggered automatically if an EU MS faces an asylum influx, which exceeds 150% as identified in the reference key.
- The reference key is now based on only two criteria, with equal 50% weighting, the size of the population and the total GDP. The September proposal was based on a quota calculated by weighting population and GDP (40% each), the unemployment rate (10%) and the number of asylum applications received over the five preceding years on average (10%).
- All new applications could benefit from relocation after an admissibility check and not only those with a threshold above 75% recognition rate as indicated in the September proposal. However, all applicants declared inadmissible or examined in an accelerated procedure (including on the basis of the application of the safe country concept or security grounds) are excluded from allocation.
- As a financial solidarity tool the proposal for the recast Dublin Regulation suggests a solidarity contribution of 250,000 EUR per applicant, which is to be paid by the MS which temporarily does not take part in the corrective mechanism. The solidarity contribution is to be paid to the MS taking over responsibility for examining those applications. In contrast, the September proposal foresaw a significantly lower contribution of 0.002% of the GDP to cover assistance supporting the efforts undertaken by all other Member States. The contribution was to be allocated to the AMIF.

1.2.1.4. Dublin transfers and reception conditions

Reception conditions have been a prominent subject in court decisions concerning Dublin transfers. In *Tarakhel vs Switzerland*¹⁶⁰ the ECtHR requires Member States to obtain individualised guarantees for sufficient reception conditions to certain groups in Italy prior to the Dublin transfer.¹⁶¹ The Federal Administrative Court of Switzerland in December 2015 decided that the guarantee for sufficient reception conditions has to be up-to-date in order to be individualised for the applicant's needs.¹⁶²

More recently, several national courts have decided that asylum seekers cannot be returned to Hungary due to the lack of assurances of appropriate care, such as medical facilities, or appropriate housing for families or unaccompanied minors. Due to these reception capacity problems Germany, Austria, Sweden, Luxembourg¹⁶³ and recently Finland¹⁶⁴ have suspended transfers to Hungary.

¹⁵⁸ COM(2016) 197 final, pp 7,8.

¹⁵⁹ 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); COM(2016) 270 final; p 5; at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf.

¹⁶⁰ ECtHR, *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014.

¹⁶¹ AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p. 38.

¹⁶² *Ibid*, p. 39.

¹⁶³ ECRE (2016): Case law fact sheet: Prevention of Dublin Transfers to Hungary, p. 11.

¹⁶⁴ See Finnish Supreme Administrative Court ruling against Dublin III returns to Hungary due to 'systemic flaws' in asylum procedures and reception conditions (see KHO: 2016: 53 of 20 April 2016 accessed at <http://www.kho.fi/fi/index/paatoksia/vuosikirjapaatokset/vuosikirjapaatos/1461070950098.html>)

1.2.1.5. *Proposed reform of the Dublin III Regulation*

The EC's Communication towards a reform of the CEAS and enhancing legal avenues to Europe,¹⁶⁵ presented two possible options: either to streamline and supplement the Dublin system with a corrective fairness mechanism or to move to a new system based on a distribution key. Unfortunately the EC opted for the first option in its proposal for a recast Dublin Regulation presented on 4 May 2016.¹⁶⁶ Accordingly solidarity is only triggered once a country is disproportionately affected by an influx of asylum seekers defined by an influx of 150% compared to the reference key. As such the proposal institutionalizes a reactive emergency driven approach as opposed to a solidarity based and pro-active allocation that is applied from the beginning.

The proposal however, does not only suggest new regulations for the allocation of responsibility in case a Member State receives disproportionate numbers of asylum applications, but it also suggests amendments which should streamline the Dublin system: before conducting the Dublin procedure the country where the application has been submitted, needs to conduct an admissibility procedure, basically checking whether the safe third country or the safe country of origin rules could be applied; time limits have been changed; take back requests are proposed to be replaced by "take back notifications"; and, among further changes, the discretionary clause for MS has been significantly limited in scope. The proposal further links obligations of asylum seekers with sanctions for non-compliance which aim at preventing secondary movements, such as fast track procedures and exclusion from reception conditions. One of the few areas where the proposal contains more protective provisions from a fundamental rights perspective is the proposed extension of the definition of family members, which includes also siblings and is not restricted anymore to family ties already existing in the country of origin.

Along with the Dublin recast proposal, the EC also presented a proposal for a recast of the EURODAC Regulation.¹⁶⁷ Since its creation, the purpose and scope of EURODAC has been significantly broadened. It was originally intended to assist in the detection of multiple asylum applications and unauthorised entry and strictly restricted access to the data by immigration authorities. The 2013 recast already extended the scope of access to the EURODAC database for law enforcement agencies. The latest recast proposal broadens its material scope and purpose even further. Fingerprints and facial images of asylum seekers, irregularly entering migrants and irregularly staying migrants shall be taken, the proposed fingerprinting age is lowered from 14 to 6 years, the storage period is extended and the access to the data will no longer be restricted to immigration authorities; police and public prosecutors, and agencies such as Europol, it will even be partially shared with third countries for return purposes. Such huge amount of personal data stored with an ever expanding list of authorities provided access to the data requires a fair balance between the competing public interests and the protection of rights of a highly vulnerable group.

¹⁶⁵ COM(2016) 197 final, pp 7,8.

¹⁶⁶ 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); COM(2016) 270 final; at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf.

¹⁶⁷ Proposal for a Regulation of the European Parliament and the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 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], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast); COM(2016) 272 final, at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/eurodac_proposal_en.pdf.

Both proposals are guided by the principle of coercion, manifesting the principle that asylum seekers shall have no say in the allocation to a specific country and executing this principle with further coercive measures. The proposal therefore blatantly ignores the abundance of reports documenting the fundamental deficiencies and structural shortcomings of the Dublin system. Instead of finally replacing the Dublin system with a system of fair responsibility-sharing, the proposal once more opts for quick fix solutions to make the “corner stone” of the CEAS survive.

1.2.2. Emergency Relocation Mechanism

KEY FINDINGS

- Relocation offers support to overburdened EU MS in an emergency situation in the **spirit of solidarity**.
- Relocation in its current setting enjoys **little support by EU MS**.
- The **eligibility threshold** for relocation of those with the 75% EU-wide recognition rate:
 - results in a class system of refugees depending on their country of origin, irrespective of their individual claims, thus depending on an ill-defined new category of applicants “in clear need of international protection”;
 - hampers the relocation process in Italy, as a limited number of persons arriving in Italy belong to one of the eligible nationalities;
 - relocates undisputed cases while the more complex cases remain in already overburdened EU MS at external borders.
- The **slow relocation process** leads to a loss of trust in the system, triggering absconding and withdrawal of relocation applications.
- Like Dublin, the relocation system builds on **coercion**, raising similar issues as the Dublin system.
- The relocation system is a **temporary** emergency scheme and not a permanent distribution scheme.
- Relocation may run **at the expense of resettlement** places (also due to the mandatory scheme for relocation).
- The emergency relocation system emphasises **physical movement** of asylum seekers as the primary solidarity option. Alternative solidarity measures are less pronounced.
- The relocation and the Dublin system are based on the presumption of “trust” that EU MS ensure sound and appropriate reception conditions.¹⁶⁸ If Courts ruled that return to the responsible state is not appropriate because of **‘systemic deficiencies’ in national asylum systems** under the Dublin system, this may also cause similar problems for any other mechanism for the determination of the responsibility for asylum claims.

The European Agenda on Migration defines relocation as a distribution of persons in clear need of international protection among Member States.¹⁶⁹ It is an *intra-EU* process, a “burden

¹⁶⁸ Carrera, S. & Guild, E. (2015): ‘Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU’, *CEPS Policy Brief*, No. 334, October, available at: <https://www.ceps.eu/system/files/PB334%20RefugeeRelocationProgramme.pdf>.

¹⁶⁹ EC (2015): A European Agenda on Migration; COM (2015) 240 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 13.05.2015; p 15.

sharing" exercise with the purpose of sharing the responsibility of receiving asylum seekers and refugees among Member States of the EU.¹⁷⁰ Relocation is thus an expression of intra-EU solidarity with those MS at the EU external borders as they receive a high number of refugees due to their geographic position.¹⁷¹

The intra-EU solidarity which led to relocation can be traced back to a period of intense strain on southern Member States dealing with mass arrivals of irregular migrants. In 2009, Cyprus, Greece, Italy and Malta highlighted their asylum and migration situations, and – together with Spain – addressed their concerns to the EU by adopting a Joint Communiqué, which called for "responsibility-sharing" among EU MS and the relocation of refugees from their territories.¹⁷²

As a first practical application of intra-EU-relocation the EU Relocation Malta (EUREMA) project provided an organised framework for preparing and implementing relocation. The project also provided funding for participating countries. EUREMA (phase I)¹⁷³ was the first such project involving several Member States for the relocation from Malta of persons in need of international protection.¹⁷⁴

Unlike the relocation scheme proposed under the European Agenda on Migration, relocation under the pilot project EUREMA was conducted solely on a voluntary basis. The voluntary nature was also one that most respondents of the participating states stressed and recommended for the future during the evaluation of EUREMA.¹⁷⁵ Unlike the current emergency relocation scheme, the EUREMA project relocated already recognised refugees.¹⁷⁶

1.2.2.1. Main elements of the relocation scheme

The emergency relocation scheme is based on Council Decisions 2015/1523 and 2015/1601 from September 2015 with the following key elements:

- The relocation is conducted **from Italy and Greece**¹⁷⁷ to other EU MS¹⁷⁸.
- The first Council Decisions (2015/1523) is **voluntary** (40,000 places), the second Council Decision(2015/1601) includes a **mandatory relocation quota**¹⁷⁹(120,000 places).
- It entails a temporary derogation of Article 13(1) of the Dublin Regulation as well as of the procedural steps, including the time limits laid down in Article 21, 22 and 29 of the

¹⁷⁰ EC (2009): Commission Communication to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme, COM (2009) 447 final. See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0447:EN:NOT> access on 06.06.2015. See also Perrin, D. & McNamara, F. (2013): 'Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames', Robert Schuman Centre for Advanced Studies, Know Reset Research Report 2013/03, p. 34, available at: <http://www.migrationpolicycentre.eu/docs/Know-Reset-RR-2013-03.pdf> on 06.06.2015.

¹⁷¹ See European Resettlement Network at: <http://www.resettlement.eu/page/resettlement-relocation-or-humanitarian-admission-we-explain-terminology>.

¹⁷² Falzon, N. (2011): 'Southern EU MS publish Joint Communiqué II on their asylum/migration concerns', EASO Monitor, 21 April, available at: <http://easomonitor.blogspot.fr/2011/04/southern-eu-ms-publish-joint-communication.html>.

¹⁷³ In the first phase of EUREMA (2011) 10 EU countries participated and relocated 227 beneficiaries of international protection from Malta. The second phase (2012) foresaw 256 places pledged by 15 EU MS. Nevertheless, many of those relocations were also based on bilateral agreements between the relocating country and Malta.

¹⁷⁴ EASO (2012): 'EASO Fact Finding Report on Intra-EU Relocation Activities from Malta', July 2012, p. 1, available at: <https://easo.europa.eu/wp-content/uploads/EUREMA-fact-finding-report-EASO1.pdf>.

¹⁷⁵ EASO (2012): 'EASO Fact Finding Report on Intra-EU Relocation Activities from Malta', July 2012, p. 17, available at: <https://easo.europa.eu/wp-content/uploads/EUREMA-fact-finding-report-EASO1.pdf>.

¹⁷⁶ Ibid.

¹⁷⁷ Following the decision of Hungary to not be included as a beneficiary of relocation, the previously dedicated 54,000 relocation places for Hungary are currently free and may be distributed between Greece and Italy or be dedicated to other EU MS facing similar pressure of increasing influx.

¹⁷⁸ Denmark and the UK opted out according to Protocols 21 and 22 to the Treaties. Greece and Italy are beneficiaries of relocation and are thus equally not considered in the relocation quota. The EU Associated Dublin countries Iceland, Norway, Liechtenstein and Switzerland are to take part.

¹⁷⁹ The mandatory quota was opposed by Hungary, Slovakia, Romania and the Czech Republic.

Dublin Regulation. It does not absolve Member States from applying the other criteria, in particular the family provisions.

- Relocation is based on a **distribution key**, taking into account GDP and population size (40% weighting for each) as the primary determinants, whereas the unemployment rate and number of asylum applications received in the past are weighted as 10% each, but capped in order to not exceed 30% of the GDP and population size effect.
- There are two preconditions for relocation:
 - The person must **apply** for asylum either **in Greece or in Italy**, thereby establishing the (preliminary) responsibility of those two countries in accordance with the Dublin Procedure (Art 3/1), and
 - The person must come from a country which the EU wide **recognition rate is 75%** or higher according to the latest available Eurostat Quarterly Report (Art 3/2), which – based on the latest available Eurostat data (4th quarter of 2015) – currently applies to Burundi, Central African Republic, Eritrea, Costa Rica, Saint Vincent and the Grenadines Bahrain, Iraq, Maldives, Syria, and British overseas countries and territories.¹⁸⁰ Nationals of these countries are likely to be in need of international protection.
- The relocation process is supported by the **hotspot approach** (see below) for facilitating access and registration.
- For financial support, the Member State of relocation receives EUR 6,000 and Italy/ Greece receive a lump sum of EUR 500 for each person relocated (Art 10).

The Council Decisions 2015/1523 and 2015/1601 describe the **relocation procedure which includes** the nomination of liaison officers from EU Member States to Greece and Italy and operational support of EASO. Member States should indicate their relocation capacities at 3 month intervals and may only retain the right to refuse to accept the relocation of an applicant if there are reasonable grounds for regarding him or her as a danger to their national security or public order or where there are serious reasons for applying the exclusion provisions set out in Articles 12 and 17 of Directive 2011/95/EU. The relocated person has no say in determining the relocation country.

1.2.2.2. Challenges of the relocation system

The relocation scheme was introduced on short notice at a time when EU Member States were in a state of shock over the incidents in the Mediterranean and along the Western Balkan Route. It is doubtful whether the scheme would otherwise have found an agreement among EU MS. The consequences, however, are visible in the implementation and the rather slow response of EU MS to actively participate and implement relocations from Greece and Italy.

More than half a year after the launch of the relocation scheme, the following challenges can be noted:

¹⁸⁰ First Report on the Implementation of Relocation and Resettlement, pp 6; available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160316/first_report_on_relocation_and_resettlement_en.pdf.

Concept of the relocation scheme

- The relocation scheme of Council Decision 2015/1601 is based on a mandatory quota, which was opposed by Slovakia, Romania, Hungary and the Czech Republic, who voted against the Decision.¹⁸¹
- The asylum applicants have no choice regarding the relocation country, although specific qualifications and characteristics of the applicants, such as their language skills and demonstrated family, cultural or social ties are taken into account in the matching exercise.¹⁸²
- The emergency quota is not conceptualised as an instrument that evens the distribution of asylum seekers among EU MS: rather than “filling up” countries’ theoretical quota and making the overall distribution more equal, applicants are relocated on top of spontaneous arrivals, thus further exacerbating the unequal distribution.¹⁸³
- Solidarity within the EU is primarily focused on relocation, i.e. physical transfer of persons eligible. Other measures of solidarity, particularly financial responsibility-sharing were not considered.¹⁸⁴

Efficiency of relocation and low response by EU MS

- Out of the 24 EU MS¹⁸⁵ defined as destination countries for relocation only 19 EU MS have relocated individuals from Greece and Italy as of 18.05.2016.¹⁸⁶
- Article 9 additionally provides the possibility of suspension of participation in the relocation scheme if a Member State faces an emergency situation characterised by a sudden inflow of nationals of third countries. To date, such provisional measures were proposed by the Commission upon request from Sweden¹⁸⁷ and Austria¹⁸⁸. With the partial dropping out of Austria and Sweden, the list of “relocation states” is shrinking.

¹⁸¹ Slovakia and Hungary additionally filed a legal action with the Court of Justice of the EU asking the Court to annul the Council Decision of 22 September 2015 (see Groendijk K. (2015) Hungary’s appeal against relocation to the CJEU: upfront attack or rear guard battle? At <http://eumigrationlawblog.eu/hungarys-appeal-against-relocation-to-the-cjeu-upfront-attack-or-rear-guard-battle/>).

¹⁸² Interview, EL/N/1

¹⁸³ Countries already “over-performing”, such as Sweden (+409% more applications than the quota would suggest), Austria (+229%), Germany (+99%), Finland (+86%) or Bulgaria (+75%) (calculated on the basis of Eurostat data from 2015), would take another burden through the relocation mechanism, rendering the distribution of asylum seekers among all EU MS even more unbalanced.

¹⁸⁴ The Commission proposal for Council Decision (EU) 2015/1601 of 22 September 2015 included a financial contribution to the EU budget of an amount of up to 0,002% of the GDP as financial compensation in case a Member State can temporarily not participate in the mandatory solidarity mechanism (see Art 4/2 at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/proposal_for_council_decision_establishing_provisional_measures_in_the_area_of_international_protection_for_it_gr_and_hu_en.pdf). This provision, however, did not appear anymore in the adopted Council Decision.

¹⁸⁵ Denmark is not bound by the relocation mechanisms while the UK has opted out. Greece and Italy are beneficiary countries.

¹⁸⁶ Member States' Support to Emergency Relocation Mechanism (Communicated as of 18 May 2016) accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf on 19.05.2016.

¹⁸⁷ Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Council Decision (EU) 2015/1523 and Article 9 of Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece from 15.12.2015; COM(2015) 677 final.

¹⁸⁸ Proposal for a COUNCIL IMPLEMENTING DECISION on the temporary suspension of the relocation of 30% of applicants allocated to Austria under Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece from 10.2.2016; COM(2016) 80 final.

- After 8 months of implementation, the EC reported 1,568 relocations as of 18.05.2016.¹⁸⁹ At the current pace, it would take 68 years to relocate all 160,000 asylum-seekers covered by the two Council Decisions.
- So far, the relocation mechanism did not prove adequate to effectively relieve the pressure on Greece and Italy. While in both countries high arrivals are continuously reported, the emergency relocation does not match its pace.¹⁹⁰ If the process continues to be slow, eligible asylum seekers are likely to take control of the situation and continue their journey to destination countries, while those not eligible are still likely to try to circumvent registration to avoid return. Since the closure of the Western Balkan route in the beginning of March 2016, the Commission reported a significant increase of the number of asylum applicants in Greece (300 persons per day), suggesting that the number of eligible persons for relocation may rapidly increase.¹⁹¹
- The Commission's own evaluations so far suggest that the high level of uncertainty surrounding the relocation procedure and the lack of information for asylum seekers are among the reason why large numbers of relocation applicants have not shown interest, absconded from the relocation procedure or withdrew their application at an initial stage.¹⁹²

Narrow definition of beneficiaries for relocation

- The eligibility threshold of 75% recognition rate intends to avoid the need to return relocated persons whose asylum applications were ultimately rejected. However, the profile of applicants in Italy is far more heterogeneous.¹⁹³ Only 33% of arrivals in Italy originated from one of the eligible countries in 2015 (approximately 45,000 persons from Eritrea, Iraq and Syria), making Italy responsible for the remaining 67% (approximately 95,000) of applicants.
- In addition, the 75% threshold leads to the perception that only nationals from those countries should be granted access to EU MS, while others are increasingly considered as "economic migrants" notwithstanding that they may equally have qualified claims and have rather high recognition rates even if the average recognition rate is below 75%.¹⁹⁴ Citizens from countries such as Somalia (recognition rate of 59%), Afghanistan (57%), Sudan (57%), Iran (55%), Guinea (37%)¹⁹⁵ are increasingly considered and treated as not being in need of international protection, let alone others with even lower recognition rates. Such tendencies are already reported at hotspots (see below on hotspots) and at the borders along the Balkan route, where only Syrians, Iraqis and partly Afghans were

¹⁸⁹ Member States' Support to Emergency Relocation Mechanism (Communicated as of 18 May 2016) accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf on 19.05.2016.

¹⁹⁰ Interview, EL/N/1

¹⁹¹ See COM (2016) 165 final, First Report on relocation and resettlement, p. 6.

¹⁹² As of February 2016, in Greece 123 relocation applicants have absconded and 88 withdrew their application since the start of the scheme. Report from the Commission to the European Parliament and the Council - Progress report on the implementation of the hotspot approach in Greece; COM(2016) 141 final, p.10; accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_20160304_progress_report_on_the_implementation_of_the_hotspots_in_greece_en.pdf on 07.03.2016.

¹⁹³ Interview, IT/N/1

¹⁹⁴ Interview, IT/N/1

¹⁹⁵ Eurostat (2016b): First instance decisions by outcome and recognition rates, 30 main citizenships of asylum applicants granted decisions in the EU-28, 4th quarter 2015, Eurostat Statistics Explained, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First_instance_decisions_by_outcome_and_recognition_rates_30_main_citizenships_of_asylum_applicants_granted_decisions_in_the_EU-28_4th_quarter_2015.png.

allowed to cross for some time (see the practices of border procedures in November, December 2015 and January 2016 in countries along the WB route).¹⁹⁶

- The eligibility criteria can unfairly burden Greece and Italy as the cases which can be processed in fast track procedures (prioritised as manifestly founded applications) are distributed among EU MS with often well-equipped and resourced asylum systems, while those cases which demand more processing time (complex cases or nationalities with low recognition rate) remain in already overburdened countries with a largely under-resourced systems.

Relation to other instruments

- The relocation scheme adds a new form of determining the responsibility of a Member State. It determines the responsibility according to countries' capacities based on an established quota and not according to the geographic location of a country. As such, the main contribution of the relocation scheme is to derogate temporarily from the guiding rules under the Dublin system.¹⁹⁷ However, when transfers to Greece under the Dublin system once again become fully reinforced, Greece may face returns from EU MS. In addition to this, persons eligible for relocation can be relocated from Greece, while new arrivals from Turkey may face return under the EU-Turkey Statement.
- The numeric targets for relocation (160,000) versus resettlement places (20,000) seem disproportionate if compared to the numbers of refugees in refugee producing regions.
- Relocation places may come at the expense of resettlement¹⁹⁸ and vice versa. In the past, Sweden noted its priority to be a resettlement country from non-European countries rather than a relocation country from EU MS which are obligated to comply with European and international standards of refugee protection.¹⁹⁹ In the framework of the EU-Turkey agreement, 54,000 non-allocated relocation places under the second Council Decision on relocation of 22 September will now be used for the implementation of the resettlement component of the 1 for 1 principle. It should be noted that, whereas relocation is mandatory for Member States for the 120,000 places under the aforementioned Council Decision 2015/1601, resettlement is strictly on a voluntary basis.

Child specific focus

Relocation of unaccompanied children who are particularly vulnerable has not initially been prioritised as required by Article 6 of Council Decisions 2015/1523 and 2015/1601.

The way in which the best interest of children is addressed within the relocation scheme is yet to be established, with EASO currently working on guidance to establish this. A central question will be the extent to which child protection actors are involved in assessing their

¹⁹⁶ Particularly see below the critics on the selection practise in hotspots in Italy or the fact that countries along the Western Balkan route denied access to asylum seekers from countries other than Syria, Iraq and Eritrea to their territory (see among others Hasselbach, C. (2015): 'UNHCR: Balkan states turning away 'economic migrants'', Deutsche Welle, 21 November, available at: <http://www.dw.com/en/unhcr-balkan-states-turning-away-economic-migrants/a-18866765>.)

¹⁹⁷ Carrera, S. & Guild, E. (2015): 'Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU', *CEPS Policy Brief*, No. 334, p. 5, October, available at: <https://www.ceps.eu/system/files/PB334%20RefugeeRelocationProgramme.pdf>.

¹⁹⁸ EASO (2012): 'EASO Fact Finding Report on Intra-EU Relocation Activities from Malta', July 2012, p. 12, available at: <https://easo.europa.eu/wp-content/uploads/EUREMA-fact-finding-report-EASO1.pdf>.

¹⁹⁹ See Perrin, D. & McNamara, F. (2013): 'Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames', Robert Schuman Centre for Advanced Studies, Know Reset Research Report 2013/03, p. 38, available at: http://www.migrationpolicycentre.eu/docs/Know-Reset-RR-2013-03.pdf_on_06.06.2015; This tendency was also noted by the European Resettlement Network with respect to the EUREMA practise: Some European resettlement countries allocated places for intra-EU relocation from their annual resettlement quota. They thus provided long-term protection for refugees from Malta while reducing the overall number of places available for refugees resettled from outside the EU (European Resettlement Network).

situation. The Commission's First Report on relocation and resettlement²⁰⁰ also notes "the reluctance of Member States" to accept relocation of unaccompanied children.

1.2.3. Hotspots²⁰¹

KEY FINDINGS

- The establishment of the hotspots proceeded **slowly**.
- The legal basis for hotspots is controversial and unclear.
- The **relation** of the hotspots regime **with CEAS instruments** (Asylum Procedures Directive and Reception Conditions Directive) lacks clarity.
- Hotspots are yet **not fully developed** and **lack monitoring** and inclusion of IO and NGOs.
- Hotspots may well develop into a **bottleneck** with large numbers of applicants versus limited numbers of resources to quickly process registration and screening.

1.2.3.1. Main elements of the hotspots approach

As a part of the European Agenda on Migration, the Commission proposed in May 2015 to develop a Hotspot approach.²⁰² Under the hotspots approach the European Asylum Support Office (EASO), EU Border Agency (Frontex), the EU Police Cooperation Agency (Europol) and the EU Judicial Cooperation Agency (Eurojust) should work on the ground with the authorities of the frontline Member State (i.e. Greece and Italy).²⁰³ The hotspots approach is described as a measure of support offered to frontline MS to "fulfil their obligations under EU law and swiftly identify, register and fingerprint incoming migrants. The work of the agencies will be complementary to one another". To this end, individual "ports" are designated hotspots, where first reception facilities are set up for the above-stated purposes. According to a Commission factsheet, the hotspot approach "will also contribute to the implementation of the temporary relocation schemes proposed by the European Commission on 27 May and 9 September: people in clear need of international protection will be identified in frontline Member States for relocation to other EU Member States where their asylum application will be processed".²⁰⁴ The responding reference in the Council Decisions on relocation is to be found in Articles 7 and 8 referring to "increased operational support to accompany the relocation measures".

While the actual features of individual hotspots remain somewhat unclear, hotspots should serve multiple purposes:

- to provide operational **support** to countries under pressure;
- to conduct swift **identification, registration and fingerprinting** of arriving migrants;

²⁰⁰ See: COM(2016) 165 final at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0165>

²⁰¹ On the hotspots approach see also European Parliament (2016): "On the frontline: the hotspot approach to managing migration", Study for the LIEBE Committee, written by Neville, D, Sy S., Rigon, A, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU%282016%29556942_EN.pdf.

²⁰² Communication from the Commission "A European Agenda on Migration" (COM(2015) 240, 13 May 2015). The use of the phrase "hotspot approach" underpins that hotspots were above all to be understood as a concept rather than as physical locations and receptions.

²⁰³ See European Agenda on Migration at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf accessed on 03.03.2016.

²⁰⁴ See Fact Sheet on Hotspots Approach at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf accessed on 03.03.2016.

- to function as a **filter mechanism to determine protection needs** among mixed migration flows;
- to **support the relocation and return process**.

National authorities are supported in various tasks by relevant EU Agencies according to their portfolio, as shown below:

| Institution | EL/IT | Supported by EASO | Supported by Frontex | Supported by Europol/ EUROJUST |
|------------------|---|--|--|---|
| Task at hotspots | <ul style="list-style-type: none"> • Reception and reception of non-relocation cases • Return | <ul style="list-style-type: none"> • Registration of asylum seekers • Preparation of the case file | <ul style="list-style-type: none"> • Registration migrants • Fingerprinting migrants • Debriefing migrants on routes to Europe • Gather information on migrant smugglers • Pre-return assistance • Coordinate return flights | <ul style="list-style-type: none"> • Collect information to dismantle migrant smuggling networks |

1.2.3.2. Challenges of the hotspots system

The hotspots approach is designed to support border countries, which are the first facing the pressure of migration and refugee flows with tasks that can be outsourced to other stakeholders like EASO and Frontex. EU MS are to assign staff to these agencies to provide the required support at frontline countries. While it is still too early to assess the hotspot approach as such, some challenges in its conceptualisation appear to be evident:

- Hotspots lack a clear legal basis and purpose: While hotspots are often described as pure registration centres, they are often also seen as a key instrument for implementing the relocation scheme. Hotspots as physical locations and reception facilities lack a clear legal basis in Italy, while in Greece it is only with law 4375/2016 which entered into force on 03.04.2016 that a reference to hotspots was introduced in asylum legislation.^{205, 206}
- Important details still need to be clarified, for example, the length of time migrants and asylum seekers are required to spend at hotspots, or whether any restrictions of movement are applied.²⁰⁷
- In Italy, hotspots are not new facilities, but a rebranding of existing reception centres - following some minor refurbishment, and with a much bigger role played by European agencies such as Frontex and EASO.²⁰⁸
- Frontline states are in fact "assisted" to better handle the full extent of their responsibilities under the existing Schengen and Dublin arrangements. The success of the hotspot approach as defined by the Commission - "fingerprinting [...] all migrants" - will also

²⁰⁵ The law can be accessed at: http://www.asylumineurope.org/sites/default/files/resources/nomos_4375-2016.pdf (accessed on 21.04.2016). See also AIDA: Greece: asylum reform in the wake of the EU-Turkey deal - See more at: <http://www.asylumineurope.org/news/04-04-2016/greece-asylum-reform-wake-eu-turkey-deal> accessed on 21.04.2016.

²⁰⁶ Interviews, IT/N/1 and EL/G/2

²⁰⁷ With the implementation of the EU-Turkey statement, the hotspots on Greek islands have been turned into closed centres in which migrants are effectively detained.

²⁰⁸ D'Angelo, A. (2016): 'Migrant crisis? The Italian hotspot approach is not a solution, but it has been politically effective', Middlesex Minds, 26 February, available at: <http://mdxminds.com/2016/02/26/migrant-crisis-the-italian-hotspot-approach-is-not-a-solution-but-its-politically-effective/>.

exponentially increase their responsibilities and at the same time contribute to making the disproportionate share of asylum applications for “frontline Member States inherent in the Dublin system, a reality”.²⁰⁹

- While the need for a thorough registration of all arriving migrants remains undisputed, the registration, screening, reception and processing of such a large group of arrivals as witnessed in 2015 in Greece, and to a lesser extent in Italy, would not only pose significant challenges to border states but to every country. In fact, countries with well-functioning asylum and reception systems such as Germany reported huge difficulties in organising an orderly reception of applicants in the context of mass arrivals during 2015.²¹⁰ From January till 20 May 2016, UNHCR reported 155,989 arrivals in Greece,²¹¹ which meant the need to register, screen and accommodate an average of 1,106 persons per day at the five hotspots foreseen.
- Several human rights associations have denounced the hasty methods used to separate ‘real’ asylum seekers from those who are ‘just’ economic migrants, taking the 75% threshold as the guiding measurement for assessment.²¹² Evidently such a practice is in clear violation of the right to asylum as outlined in the Charter of Fundamental Rights Article 18.
- Reports by Italian lawyers and pro-immigrant groups raise significant problems with respect to migrants' rights and practices beyond conformity with international standards. Among the problems identified²¹³ NGOs report:
 - a lack of timely access to information about the possibility to apply for international protection (often provided only in Italian and with no access to UNHCR or NGOs prior to the procedure);²¹⁴
 - arbitrary distinction between asylum seekers and migrants based on nationality leading to blanket denials of access to the asylum procedure for certain nationalities (e.g. Senegal, Nigeria or Gambia) given an expulsion order (or *Respingimento differito* – “pre-detention order”);²¹⁵
 - Use of coercion to conduct fingerprinting.²¹⁶
- The nature of the hotspot work in Greece has significantly changed after the adoption of the EU-Turkey statement. The hotspots approach is now changing its scope of work: The provision of information on the relocation scheme in the Hotspot is suspended for migrants arriving after 20 March.²¹⁷

²⁰⁹ Maiani, F. (2016): ‘Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?’, *EU Migration Law Blog*, 3 February, available at: <http://eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/>.

²¹⁰ See BR: Chaos bei der Flüchtlingsregistrierung from 6.12.2015 at <http://www.br.de/radio/b5-aktuell/sendungen/der-funkstreifzug/registrierung-fluechtlinge-100.html> accessed on 05.03.2016; Preuß, R. (2016): Flüchtlingspolitik: Behörden können mehr als 130 000 Asylsuchende nicht mehr auffinden, *Sueddeutsche Zeitung*, 29 February, available at: <http://www.sueddeutsche.de/politik/fluechtlingspolitik-mehr-als-jeder-zehnte-asylsuchende-ist-verschwunden-1.2881071>.

²¹¹ UNHCR: Refugees/Migrants Emergency Response - Mediterranean - 20.05.2016 at <http://data.unhcr.org/mediterranean/country.php?id=83>.

²¹² Interview, IT/A/1

²¹³ D’Angelo, A. (2016): ‘Migrant crisis? The Italian hotspot approach is not a solution, but it has been politically effective’, *Middlesex Minds*, 26 February, available at: <http://mdxminds.com/2016/02/26/migrant-crisis-the-italian-hotspot-approach-is-not-a-solution-but-its-politically-effective/>.

²¹⁴ Interview, IT/A/1

²¹⁵ Interview, IT/A/1

²¹⁶ Interview, IT/A/2

²¹⁷ Report from the Commission to the European Parliament, the European Council and the Council - Second report on relocation and resettlement; COM(2016) 222 final, p4.

Child specific challenges

- It is not clear what specific processes are in operation at hotspots to address the situation of children. Certain “threshold” issues, such as age assessment and establishing the status of a child as unaccompanied, require careful processes which can take time. The extent to which registration processes are, or can be, used to prevent family separation or ultimately to restore family links is unclear. It is also unclear what basic child safeguarding processes exist at hotspots, what child protection actors are involved and the extent to which the risks of trafficking and exploitation of children are adequately addressed. Reception conditions which are adapted for families with children, and special facilities for unaccompanied children also need to be fully developed to ensure that the hotspot approach does not conflict with the rights of children.²¹⁸

1.2.4. Resettlement

KEY FINDINGS

- Resettlement is a protection and a global solidarity tool.
- Resettlement is an appropriate instrument to provide safe passage for vulnerable persons to EU MS.
- Resettlement of persons from host countries outside the EU is used as a trade-off against keeping irregular migrants from moving to EU MS.
- The ratio of 20,000 resettlement places to 160,000 relocation places does not sufficiently reflect current needs.

1.2.4.1. Main elements of the resettlement scheme

According to UNHCR, resettlement is one of three durable solutions for refugees (beside “repatriation” and “local integration”). It is intended for those who can neither be returned to their country of origin due to an ongoing risk of persecution within the foreseeable future, nor be adequately integrated in their respective host country. Resettlement is thus considered a **protection tool**.

Resettlement is also seen as an expression of **international solidarity** with countries that are affected by large-scale influx, most notably in the regions around the conflict area. This already derives from the Preamble of the 1951 Refugee Convention which refers to the need for cooperation to solve the contingency of states which are unduly burdened as a result of geographical proximity to the country of origin of refugees – thus referring to “burden sharing” as a means of solidarity. In that sense resettlement can be seen to constitute a solution to the plight of the country of refuge rather than to refugees.²¹⁹

Humanitarian Admission refers to countries that admit groups from vulnerable refugee populations in third countries to provide temporary protection on humanitarian grounds. As a complement to States’ traditional resettlement programmes, humanitarian admission may be used for an identified refugee population in an extremely insecure or vulnerable situation and in need of urgent protection. It is an expedited process that can enable large numbers of refugees to depart rapidly.²²⁰

²¹⁸ Interview, EL/N/1

²¹⁹ Zieck, M. (2013): The 1956 Hungarian Refugee Emergency, an Early and Instructive Case of Resettlement, p 3, accessed at <http://amsterdamlawforum.org/article/view/314> on 15.03.2016.

²²⁰ European Resettlement Network, *Resettlement, relocation or humanitarian admission?! We explain the terminology...*, available at: <http://www.resettlement.eu/page/resettlement-relocation-or-humanitarian-admission-we-explain-terminology>; See also Commission Recommendation of 15.12.2015 for a voluntary humanitarian

Resettlement is currently conducted upon unilateral decisions of EU MS participating in resettlement schemes with UNHCR or through developing their own humanitarian protection programmes. In June 2015²²¹ the Commission proposed a European Resettlement Scheme which was adopted by the Council in July 2015.²²² The Commission flagged that – if deemed necessary – this one-time pledge may be followed up by a binding and mandatory legislative approach beyond 2016.²²³ The Commission indicated in the Communication on the reform of the CEAS²²⁴ the need to build on the existing initiatives. A proposal for a structured EU resettlement programme is pending.

The resettlement programme provides a legal and safe pathway to enter the EU and may contribute to reducing the push of persons in need of protection to resort to criminal networks of smugglers and traffickers and to undertake dangerous journeys.²²⁵ The Commission's recommendation²²⁶ for the EU-wide resettlement scheme for 22,000 displaced persons from the Middle East, North Africa and the Horn of Africa to Europe aimed at combating the loss of lives at Sea²²⁷ thereby reiterating the proclaimed need to ensure safe and legal access to the Union asylum system.²²⁸

The baseline for the distribution of the 22,504 resettlement places constituted a distribution key which takes into account the size of population (40%), the total GDP (40%), the average number of spontaneous asylum applications in addition to the number of resettled refugees per 1 Million inhabitants over the previous five-year-period (10%) and the unemployment rate (10%). Following this distribution key, the EC listed in the annex to the Agenda on Migration the different countries, the percentage following the distribution key and the number of persons to be resettled (see **Table 3**: Overview Resettlement in the EU below).

For the resettlement scheme, the EC dedicated an extra EUR 50 million of funds in 2015 and 2016 to increase the amounts available under the Union Resettlement Programme, set out in Article 17 of the Asylum, Migration and Integration Fund (AMIF) Regulation.²²⁹ The AMIF fund provides a lump sum of EUR 6,000/10,000 per resettled person.

Resettlement has a number of potentially helpful features, particularly in the current search for credible solutions:

admission scheme with Turkey at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/commission_recommendation_for_a_voluntary_humanitarian_admission_scheme_with_turkey_en.pdf

²²¹ Commission Recommendation of 8.6.2015 on a European resettlement scheme; C(2015) 3560 final at http://ec.europa.eu/dgs/home-affairs-e-library/documents/policies/asylum/general/docs/recommendation_on_a_european_resettlement_scheme_en.pdf

²²² Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection; Brussels, 22 July 2015 (OR. en) 11130/15 ASIM 62 RELEX 633 accessed at <http://data.consilium.europa.eu/doc/document/ST-11130-2015-INIT/en/pdf> on 03.03.2016.

²²³ European Commission (2015b): A European Agenda on Migration; COM (2015) 240 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 13.05.2015, p5

²²⁴ Communication from the Commission to the European Parliament and the Council towards a reform of the Common European Asylum System and enhancing legal avenues to Europe; COM(2016) 197 final.

²²⁵ See Factsheet on relocation and resettlement dated 04.03.2016 accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/relocation_resettlement_20160304_en.pdf on 04.03.2016.

²²⁶ COMMISSION RECOMMENDATION of 8.6.2015 on a European resettlement scheme; Brussels, 8.6.2015 C(2015) 3560 final

²²⁷ European Commission (2015b): A European Agenda on Migration; COM (2015) 240 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 13.05.2015, p 20.

²²⁸ Point 8 and 10, European Parliament Resolution, 29 April 2015, 2015/2660(RSP).

²²⁹ Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC

- It may contribute to reducing irregular and unsafe trips by proposing safe access to protection;
- It may contribute to counteracting smuggling.
- It may reduce security concerns upfront by limiting uncontrolled access to the EU.
- It could contribute to making flows predictable with the possibility to adapt and better plan resources.

Complementary to resettlement, several initiatives have been taken by different Member States, all with the aim of providing safe access to the EU for a specially selected group of persons. These initiatives include:

- humanitarian admission programmes,
- visa facilitation,
- student programmes,
- facilitated family reunification, and
- private sponsorship.²³⁰

Some of the initiatives operate closely in line with the resettlement scheme, e.g. in close cooperation with UNHCR for supporting the selection process in the region.

The Commission reported that 17 countries (Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Liechtenstein, Lithuania, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom) resettled 6,321 persons based on information made available by MS as of 13 May 2016.²³¹ However, the report remains unclear as to whether the numbers reported by MS were in fact resettlement cases under the respective scheme. From the documentation provided in the footnotes of the report, it seems that EU MS reported all national resettlement or humanitarian admission programmes.

In addition, many of the currently discussed initiatives are, to some extent, based on the resettlement approach: In 2014, the Austrian Minister of the Interior put forward a "Save-Lives" initiative. A core element of this was to provide safe passage for refugees from the region of origin to European destination countries.²³² The recent EU-Turkey statement includes resettlement commitments, but only as a trade-off for Turkey taking responsibility for other migrants and potential asylum seekers returned from Greece.²³³

1.2.4.2. *Challenges of the EU resettlement scheme*

- The resettlement programme must be of significant scope to have an impact. Although the 20,000 resettlement places foreseen under the EU resettlement programme is a major

²³⁰ The International Catholic Migration Commission (ICMC) proposes to combine all these channels under one umbrella, namely "humanitarian admission". See Fischer, L. & Hueck, P. (2015): '10% of refugees from Syria: Europe's resettlement and other admission responses in a global perspective', ICMC Report, June, available at: http://resettlement.eu/sites/icmc.ttp.eu/files/10%25%20of%20Refugees%20from%20Syria_compressed_LR.pdf.

²³¹ The number encompasses both resettlement under the 20 July 2015 Conclusions and under the "1:1 mechanism" with Turkey (in application since 4 April 2016), see European Commission: ANNEX 3 to the Communication from the Commission to the European Parliament, the European Council and the Council - third report on relocation and resettlement; COM(2016) 360 final; at http://ec.europa.eu/dqs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160518/communication_third_report_on_relocation_and_resettlement_annex_3_en.pdf on 25.04.2016.

²³² See Council of the European Union; Note from the Austrian Delegation to Strategic Committee on Immigration, Frontiers and Asylum (SCIFA): EU resettlement initiative – "Save Lives" – Discussion paper at http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/18_resettlement_save_lives/18_resettlement_save_lives_en.pdf.

²³³ See below, more details on the "Merkel Plan", the EU/Turkey Action Plan and the EU-Turkey Statement.

improvement compared to just under 5,000 places offered on average by EU countries between 2010 and 2015²³⁴, the numbers pale in comparison to the 85,000 resettlement places planned by the United States for the fiscal year 2016,²³⁵ demonstrating credible proof of solidarity for countries shouldering the vast majority of refugees, the neighbours of crisis countries.

- The relation between the initially adopted 20,000 resettlement places compared to 160,000 relocation places does not take into account and reflect real global needs.
- As there are inherent risks in resettlement, states may use this instrument to pick and choose "their clients" by, at the same time, significantly restricting spontaneous arrivals, a tendency that is observed particularly in the case of Australia.²³⁶
- Resettlement may be introduced to the detriment of processing asylum applications inside Europe.²³⁷
- Resettlement may be used as a trade off with third countries in exchange for taking responsibility for specific groups of asylum seekers (e.g. non-Syrian asylum applications, irregular migrants etc.), such as in the case of the EU-Turkey Statement.
- Little transparency: In its latest report on resettlement, the Commission reports 6,321 persons resettled as of 13 May 2016, under 20 July 2015 Conclusions and under the "1:1 mechanism" with Turkey (in application since 4 April 2016).²³⁸ However the numbers reported by EU MS seem to date back to earlier resettlement or resettlement-like schemes.
- Resettlement and relocation may well develop at the expenses of each other.
- Resettlement cannot replace spontaneous arrivals.

²³⁴ See table 3, below. See also European Parliament (2013): 'Comparative study on the best practices for the integration of resettled refugees in the EU Member States' written by Papadopoulou, A. et al.; at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474393/IPOL-LIBE_ET\(2013\)474393_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474393/IPOL-LIBE_ET(2013)474393_EN.pdf) (29.4.2015).

²³⁵ See <http://www.state.gov/r/pa/pl/249076.htm> , accessed on 29.4.2016. With the EU-Turkey agreement (see below) the scope of the resettlement programme is considerably increased.

²³⁶ ABC (2016): 'Refugee Council accusing Australia of 'cherry-picking' Syrian refugees for resettlement'. Accessed at <http://www.abc.net.au/news/2016-03-31/australia-'cherry-picking'-syrian-refugees-says-refugee-council/7289918>, 29.4.2016

²³⁷ See European Resettlement Network: Intra EU-relocation accessed at <http://www.resettlement.eu/page/intra-eu-relocation> (29.04.2016).

²³⁸ See Communication from the Commission to the European Parliament, the European Council and the Council – third report on relocation and resettlement; COM(2016) 360 final, 18 May 2016, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160518/communication_third_report_on_relocation_and_resettlement_en.pdf.

Table 3: Overview Resettlement in the EU and associated states

| | Resettlement | | | | | | | | | | | | Resettlement and other paths for Syrian Refugees since 2013** | | Resettlement per Quota (EC Agenda on Migration)**** | |
|----------------|------------------------------|---------------------------|-----------|-----------|-------------------------------|---|-----------------------------|------|------|------|------|------|---|----------------|---|-------------------|
| | Types of resettlement* | | Status** | | | | Numbers of resettlements*** | | | | | | Numbers | Programme Type | | |
| | Resettlement-Programme (R-P) | Resettlement-Ad Hoc (R-A) | Temporary | Permanent | granted before/ upon arrival; | (expedite) status determination AFTER arrival | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | | | | Total 2010 - 2015 |
| Austria | | 2010 | | | | | 0 | 0 | 0 | 0 | 390 | : | 390 | 1.900 | HAP | 444 |
| Belgium | Since 2013 | 2009, 2011 | | x | | x | : | 25 | 0 | 100 | 35 | : | 160 | 475 | resettlement | 490 |
| Bulgaria | | | | | | | : | : | 0 | 0 | 0 | : | 0 | | | 216 |
| Croatia | | | | | | | : | : | : | 0 | 0 | 0 | 0 | | | 315 |
| Cyprus | | | | | | | 0 | : | : | 0 | 0 | : | 0 | | | 69 |
| Czech Republic | since 2008 | 2005, 2007, 2010 | | x | | x | 40 | 0 | 25 | 0 | 0 | 0 | 65 | 70 | resettlement | 525 |
| Denmark | since 1978 | None | x | | x | | 495 | 515 | 470 | 515 | 345 | : | 2.340 | 390 | resettlement | 345 |
| Estonia | | | | | | | 0 | 0 | 0 | 0 | 0 | : | 0 | | | 326 |
| Finland | since 1985 | none | | x | x | | 545 | 585 | 730 | 675 | 1090 | : | 3.625 | 1.900 | resettlement | 293 |
| France | since 2008 | since 1948 | | x | | x | 360 | 130 | 100 | 90 | 450 | : | 1.130 | 1.000 | HAP/resettlement | 2.375 |
| Germany | since 2012 | 2009 | x | | hum status (less rights) | | 525 | 145 | 305 | 280 | 280 | 510 | 1.535 | 20.000 | HAP | 3.086 |
| | | | | | | | | | | | | | | 21.216 | ind. sponsorship | |
| Greece | | | | | | | : | 0 | 0 | 0 | 0 | : | 0 | | | 323 |
| Hungary | since 2012 | None | | | | | : | 0 | 0 | 0 | 10 | 5 | 10 | 30 | resettlement | 307 |
| Ireland | since 1998 | None | | x | x | | 20 | 45 | 50 | 85 | 95 | : | 295 | 610 | resettlement | 272 |
| Italy | None | 2007, 2010 | | | | | 55 | 0 | 0 | 0 | 0 | 95 | 55 | 1.400 | resettlement | 1.989 |
| Latvia | | | | | | | 0 | 0 | 0 | 0 | 0 | : | 0 | | | 220 |
| Lithuania | | | | | | | : | 0 | 5 | 0 | 0 | 5 | 5 | | | 207 |
| Luxembourg | | 2009 | | | | | 5 | 0 | 0 | 0 | 30 | 45 | 35 | 60 | resettlement | 147 |
| Malta | | | | | | | 0 | 0 | 0 | 0 | 0 | : | 0 | | | 121 |
| Netherlands | since 1984 | none | x | | | x | 430 | 540 | 430 | 310 | 790 | : | 2.500 | 500 | resettlement | 732 |
| Poland | | 2011 | | | x | | : | : | 0 | 0 | 0 | 0 | 0 | 900 | resettlement | 962 |
| Portugal | since 2007 | 2006 | | x | | | 35 | 30 | 15 | 0 | 15 | : | 95 | 48 | resettlement | 704 |
| | | | | | | | | | | | | | | 70 | scholarship | |
| Romania | since 2008 | None | x | | | x | 40 | 0 | 0 | 0 | 40 | : | 80 | 40 | | 657 |
| Slovakia | | | | | | | 0 | 0 | 0 | 0 | 0 | : | 0 | | | 319 |
| Slovenia | | | | | | | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | | 207 |
| Spain | since 2012 | since 1978 | x | | x | | : | : | 80 | 0 | 125 | : | 205 | 130 | resettlement | 1.549 |
| Sweden | since 1950 | None | | x | x | | 1790 | 1620 | 1680 | 1820 | 2045 | 1850 | 8.955 | 2.700 | resettlement | 491 |
| United Kingdom | since 2004 | none | | x | x | | 720 | 455 | 1040 | 965 | 785 | 1865 | 3.965 | | Vuln persons relocations scheme | 2.309 |
| | | | | | | | | | | | | | 0 | | | |
| Iceland | | | x | | x | | 5 | 0 | 10 | 0 | 10 | 15 | 25 | 75 | | |
| Liechtenstein | | | | | | | : | 0 | 0 | 0 | 5 | : | 5 | 25 | resettlement | |
| Norway | | | x | | x | x | 1095 | 1270 | 1230 | 955 | 1285 | 2375 | 5.835 | 9.000 | resettlement | |
| Switzerland | | | | | | | 0 | 0 | 0 | 0 | 0 | : | 0 | 3.500 | Hum Visa/resettlement | |
| | | | | | | | | | | | | | | 8200 | temp ext fam reunification + visas | |
| | | | | | | | | | | | | | | 4700 | | |
| | | | | | | | 6165 | 5360 | 6170 | 5795 | 7825 | 6770 | 31.310 | 66.039 | | 20.000 |

The table combines information retrieved from *Kranjci and Suter (2015), **European Resettlement Network; ***Eurostat (Resettled persons by age, sex and citizenship Annual data (rounded) [migr_asyresa]); ****EC (2015)

1.2.5. EU-Turkey Statement

KEY FINDINGS

- The EU-Turkey statement was highly controversial among legal scholars and advocacy groups due to a number of legal uncertainties.
- The Statement combines resettlement measures with readmission actions.
- The Statement flipped the purpose of hotspots in Greece, turning them from a preparatory screening instrument in view of relocation to a registration and detention centre for irregular migrants pending their return to Turkey.

1.2.5.1. Main elements of the EU-Turkey Statement

The main purpose of the EU Turkey Statement, agreed between the European Council and Turkey on 18 March 2016, was “to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk”.²³⁹ The Statement combines readmission and resettlement measures as well as financial pledges for Turkey and the option for visa liberalisation, thus containing the following elements:

- to return all new irregular migrants crossing from Turkey to the Greek islands with the cost of this covered by the EU;
- to resettle, for every Syrian readmitted by Turkey from the Greek islands, another Syrian from Turkey to the EU Member States, within the framework of the existing commitments (so called “1:1” scheme);
- to accelerate the implementation of the visa liberalisation roadmap with all Member States with a view to lifting the visa requirements for Turkish citizens by the end of June 2016;
- to speed up the disbursement of the initially allocated 3 billion Euros to ensure funding of a first set of projects before the end of March and decide on additional funding for the Refugee Facility for Syrians;
- to prepare for the decision on the opening of new chapters in the accession negotiations as soon as possible, building on the October 2015 European Council conclusions;
- to work with Turkey in a joint endeavour to improve humanitarian conditions inside Syria; which would allow for the local population and refugees to live in areas which are more safe.²⁴⁰

Between 4 to 20 April, 325 persons who entered Greece from Turkey irregularly were returned to Turkey²⁴¹, while a total of 117 Syrian nationals were resettled from Turkey to the EU (to Germany, Finland, Lithuania, the Netherlands and Sweden).²⁴²

The resettlement part of the deal will be based on the commitments of EU MS from July 2015 of 22,504 places (out of which 16,200 places were still free as of 18.05.2016²⁴³). In addition to this, the Commission proposed to dedicate the unassigned 54,000 places from Council Decision 2015/1601 to this initiative, resulting in 70,800 overall resettlement places.

²³⁹European Council: EU-Turkey statement, 18 March 2016 accessed at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> on 13.04.2016.

²⁴⁰ Ibid

²⁴¹Communication from the Commission to the European Parliament, the European Council and the Council – first report on the progress made in the implementation of the EU-Turkey Statement; COM(2016) 231 final, p 4.

²⁴² Communication from the Commission to the European Parliament, the European Council and the Council – third report on relocation and resettlement; COM(2016) 360 final, p 8; at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-360-EN-F1-1.PDF>.

²⁴³ Ibid, p 2

no clear benefit in following the route offered by smugglers,²⁵¹ it will not limit spontaneous arrivals. Instead, it is likely to force asylum seekers to take new, more expensive and more dangerous routes.²⁵²

- In a remarkable announcement,²⁵³ UNHCR suspended some of its activities in Greece due to the conditions at the "hotspots" on the Greek islands. In particular, UNHCR highlighted the transformation of hotspots into detention facilities and the new policy of systematic detention under the EU Turkey Statement as a reason for withdrawal. Systematic detention was also criticised by the Council of Europe.²⁵⁴
- The Justice and Home Affairs Council Meeting of 21.04.2016²⁵⁵ also showed the limited commitment of EU MS. The conclusions only indicated the need "to speed up" the implementation of the EU-Turkey Statement of 18 March and, in particular, the resettlement of Syrian refugees from Turkey and to accelerate the relocation of asylum seekers from Greece and Italy, according to the Council decisions of September 2015 instead of concrete resettlement (and relocation) pledges.

Despite the criticism, European leaders see such agreements as a suitable practice to stem the flows: The Italian Minister of the Interior, referring to the EU Turkey Statement, has called for the European Union to reach an agreement with African States to provide economic aid in return for taking back their citizens "and preventing new flows".²⁵⁶

In this context, it is worth highlighting another model of returning irregular migrants on the spot: the practice of "hot returns" that Spain is implementing in its North African exclaves Ceuta and Melilla. The ongoing practice of apprehending migrants who successfully passed the border fence between Morocco and Spain and returning them to Morocco without granting them the opportunity to file a formal application for international protection was given a legal basis through an amendment to the controversial Law on Citizen Security in March 2015.²⁵⁷ Although offices of the Spanish asylum authority have been established in Ceuta and Melilla, only Syrian nationals have had access and the opportunity to file a formal asylum application.²⁵⁸ While the EC criticised the "hot returns" approach in October 2014 as a "violation of EU legislation",²⁵⁹ this perception has since changed: In January 2016, the EC approved the compatibility of the 'special procedure for Ceuta and Melilla' with Directive 2008/115/EC (Return Directive).²⁶⁰

²⁵¹ European Council: EU-Turkey statement, 18 March 2016 accessed at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> on 13.04.2016.

²⁵² Latest evidence of the development of new – more dangerous – routes, is another shipwreck, causing an estimate of 500 deaths on 20 April 2016. See UNHCR: Massive loss of life reported in latest Mediterranean tragedy; News Stories, 20 April 2016 at <http://www.unhcr.org/57178bcf6.html>.

²⁵³ UNHCR: UNHCR redefines role in Greece as EU-Turkey deal comes into effect - Briefing Notes, 22 March 2016 at <http://www.unhcr.org/print/56f10d049.html>.

²⁵⁴ Council of Europe (2016): The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016; Doc. 14028, p 5; at <http://semantic.pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnVvcveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMjYxMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGlicGFjZS5uZlZlZlVWVWFJZi1XRC1BVC1YUwYUERGlnhzbA=&xsltparams=ZmlsZWlkPTIyNjEy>

²⁵⁵ Outcome of the Council Meeting 3461st Council meeting Justice and Home Affairs; Brussels, 21 April 2016, p7.

²⁵⁶ Council of Europe (2016), p11; Europe: Italy pleads for Greek-style push to return its migrants from 04.04.2016, at <http://www.ft.com/intl/cms/s/0/664e52c8-fa4e-11e5-8e04-8600cef2ca75.html#axzz46YBkWuXK>.

²⁵⁷ CEAR (2015). Annual Report 2015; available at: <http://www.cear.es/publicaciones-elaboradas-por-cear/informe-anual-de-cear/>

²⁵⁸ Interview, ES/A/1

²⁵⁹ Letter from Commissioner Malmström to Spanish Minister of Interior Fernandez Diaz, 24.10.2014; available at: <http://marinaalbiol.org/wp-content/uploads/2014/11/Carta-Malmstrong-a-Jorge-Fernandez.pdf>

²⁶⁰ Answer to a parliamentary question given by Mr Avramopoulos on behalf of the Commission on 20.01.2016. Available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-010830&language=MT>.

2. THE DETERMINATION OF ASYLUM CLAIMS

2.1. Introduction

In 2015, 1.3 million persons applied for international protection in the EU Member States.²⁶¹ Those who qualify for international protection (refugee status or subsidiary protection) and which procedural standards apply to asylum seekers in the EU lies at the heart of the CEAS. The objective is: that every asylum seeker should have access to the procedure and to an individual examination of their asylum claim according to equal standards. The outcome of the asylum application should not be dependent on the Member State who carried out the examination procedure. However, the Commission Communication of 6 April 2016 underlined again that in practice recognition rates vary, sometimes widely, between Member States.²⁶² There is also a lack of adequate convergence in the decision to grant either refugee status (to be accorded to persons fleeing persecution) or subsidiary protection status (to be accorded to persons fleeing the risk of serious harm, including armed conflict) for applicants from a given country of origin. This divergence has likewise encouraged secondary movements, as have variations in the duration of residence permits and access to social assistance and family reunification.²⁶³

2.2. Instruments for the determination of asylum claims

The relevant instruments for the determination of asylum claims in the EU encompass the recast Qualification Directive 2011/95/EU²⁶⁴ and the recast Asylum Procedures Directive 2013/32/EU.²⁶⁵ The recast Qualification Directive is applicable from 21 December 2013 and the new rules on asylum procedures as enshrined in the recast Asylum Procedures Directive are applicable from 20 July 2015.

As to the transposition and implementation of these instruments, the Commission announced in September 2015²⁶⁶ that it adopted 40 infringement decisions against several Member States for their failure to implement *inter alia* the recast Qualification Directive and the recast Asylum Procedures Directive. Subsequently, in December 2015²⁶⁷ an additional number of infringement procedures were initiated due to late or incorrect transposition or the non-communication of transposition measures in national law of both instruments. More recently, in February 2016, the Commission reported that it started further infringement procedures against several Member States for not having communicated transposition or sent reasoned responses regarding the failure to transpose the recast Asylum Procedures Directive.²⁶⁸

²⁶¹ Eurostat (2016a): Asylum Statistics, Eurostat Statistics Explained, 20 April, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.

²⁶² For instance, for the period between January and September 2015, the recognition rates for asylum seekers from Afghanistan varied from almost 100% in Italy to 5.88% in Bulgaria.

²⁶³ Communication from the Commission to the European Parliament and the Council – Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, Brussels 6.4.2016, COM(2016) 197 final, p. 5.

²⁶⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 (recast) OJ L 337/9.

²⁶⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180/60.

²⁶⁶ European Commission (2015b): 'More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work', Press release, 23 September, available at: www.europa.eu/rapid/press-release_IP-15-5699_en.htm.

²⁶⁷ European Commission, Press Release, Implementing the Common European Asylum System: Commission escalates 8 infringement proceedings, Brussels, 10 December 2015 available at: http://europa.eu/rapid/press-release_IP-15-6276_en.htm.

²⁶⁸ European Commission, Press Release, Implementing the Common European Asylum System: Commission acts on 9 infringement proceedings Brussels, 10 February 2016: http://europa.eu/rapid/press-release_IP-16-270_en.htm

2.2.1. Recast Qualification Directive

KEY FINDINGS

- Depending on its interpretation and application by Member States, there are provisions in the recast Qualification Directive which still may give rise to protection gaps.
- Divergent practices remain in the recognition rates and the type of protection status granted (refugee or subsidiary protection) to applicants originating from the same country of origin.
- The recast Qualification Directive ensures individual examination of asylum applications. Hence, the Directive is not resistant to situations of large scale arrivals and preventing backlogs in asylum determination processing.

2.2.1.1. Main elements of the recast Qualification Directive

The main objective is to stipulate the standards for the qualification of third-country nationals as beneficiaries of international protection (refugee status or beneficiaries of subsidiary protection) and the content of international protection (Art. 1). This Directive is an important instrument in the harmonisation of common criteria on who qualifies for refugee status and subsidiary protection.

- The recast Qualification Directive ensures that Member States apply **common criteria** for the identification of persons genuinely in need of international protection.
- The recast Qualification Directive **ensures that a minimum level of benefits is available** for those persons in all Member States.
- The recast Qualification Directive **clarifies the grounds for obtaining international protection** (refugee status in the sense of the 1951 Geneva Convention and its 1967 Protocol and the grounds for receiving subsidiary protection).
- The recast Qualification Directive **stipulates that the assessment of an application** for international protection is to be carried out on an individual basis.
- The recast Qualification Directive seeks to **approximate the rights granted** to the two categories of beneficiaries of international protection.
- The recast Qualification Directive **stipulates the content of international protection** for refugees and beneficiaries of subsidiary protection.

2.2.1.2. Main challenges of the recast Qualification Directive

Overall, the content of the recast Qualification Directive has been assessed as relatively positive.²⁶⁹ The recast Qualification Directive enhanced the situation for beneficiaries of subsidiary protection status and limited the discretion left to Member States. Despite the several improvements contained in the recast Qualification Directive, there are provisions which still may give rise to interpretation and implementation issues at the national level. The transfer of the directive into a regulation proposed in the Commission's reform Communication of 6 April 2016 may indeed be an appropriate move towards bringing about

²⁶⁹ See Peers et al. (2015): *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, EU Asylum Law, Vol. 3, Brill/Nijhoff; Bauloz, C. & Ruiz, G. (2016): *Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?*, in P. de Bruycker, V. Chetail & F. Maiani (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, 240-268. Leiden: Brill/Nijhoff; ECRE Information Note on the on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 (recast), 2013.

increased convergence in the status decision and rights associated with the status²⁷⁰. However, the reform Communication also diverges from the direction of policy making so far, notably by proposing 'to better clarify the difference between the refugee and subsidiary protection status and differentiate further the respective rights attached to them'. In addition, a regular review of the protection status is proposed, thus temporalising protection. This raises a series of issues, including the administrative burden regular status reviews would entail and the impact the move is likely to have on integration of beneficiaries of international protection. On the other hand, the reform Communication also proposes to establish rules considering the mutual recognition of asylum decisions in the longer term.

Assessment of international protection

- One of the remaining challenges of divergent practices is the recognition rates and the type of protection status granted (refugee or subsidiary protection) to applicants originating from the same country of origin.²⁷¹

Alignment of protection statuses

- In regards to the content of the protection statuses, most rights and benefits granted to refugees and beneficiaries of subsidiary protection in the recast Qualification Directive have been effectively aligned, however, in two areas there are still striking differences in the treatment of beneficiaries of international protection, namely with respect to residence permits (Art. 24) and access to social welfare (Art. 29).²⁷² Beneficiaries of subsidiary protection shall receive a residence permit which must be valid for at least 1 year while refugee status holders shall receive a residence permit which shall be valid for at least 3 years.²⁷³ Secondly, Member States may limit the social assistance granted to beneficiaries of subsidiary protection status to 'core benefits'.²⁷⁴

Article 15(c) situation: the interpretation of serious harm

- The most divergent implementation and national practices identified between Member States is with Article 15(c)²⁷⁵ of the recast Qualification Directive. Most Member States have not established guidelines to interpret the terms 'real risk', 'serious harm' or 'armed conflict'. Incorrect interpretation by some Member States resulted in different transposition of the recast Qualification Directive. In addition, the question of individualisation of the serious threat revealed different practices between Member

²⁷⁰ Communication from the Commission to the European Parliament and the Council – Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, Brussels 6.4.2016, COM(2016) 197 final, pp. 10-11.

²⁷¹ Mouzourakis et al. (2015): 'AIDA, Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis, Annual Report 2014/2015', ECRE, September, pp. 18-23, available at: <http://ecre.org/component/downloads/downloads/1038.html>.

²⁷² See national practices on residence permits and social welfare in EMN (2013), 'Ad-Hoc Query on Article 29 of the Qualification Directive (2011/95/EU)', October, available at: http://ec.europa.eu/dqs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/489_emn_ahq_on_article_29_qualification_directive_2011_95_ec_wider_dissemination.pdf; EMN (2014a): 'Ad-Hoc Query on asylum decisions and residence permits for applicants from Syria and stateless persons', February, available at: [http://ec.europa.eu/dqs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/520_emn_ahq_syria_and_stateless_persons_6feb2014_\(wider_dissemination\).pdf](http://ec.europa.eu/dqs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/520_emn_ahq_syria_and_stateless_persons_6feb2014_(wider_dissemination).pdf).

²⁷³ Some EU Member States made use of this discretion to toughen their asylum system by changing from more favourable to stricter rules – see above Part II, section 3.2.

²⁷⁴ Recital 45 of the recast Qualification Directive stipulates that 'core benefits' must be interpreted as 'covering at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law.'

²⁷⁵ Article 15(c) reads: Serious harm consists of: (a) ...; or (b) ...; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

States.²⁷⁶ This divergent implementation practice among Member States is apparent with Syrian applicants. Since the violence intensified in Syria, the recognition rates for subsidiary protection status on the basis of Article 15 has increased. In 2013, a few Member States did not require the individual risk to be established for Syrian applicants on the basis of Article 15(c) of the recast Qualification Directive, while several other Member States required these individual elements to be established.²⁷⁷ A few other Member States granted subsidiary protection to Syrian applicants based on the protection of Article 15(b)²⁷⁸ or based on the Geneva Convention. By the end of 2014, at least eight Member States determined that the level of indiscriminate violence in all territories of Syria reached the threshold for an applicant to be subjected to a real risk just by their presence in the territory. Some other Member States granted protection based on Article 15(b); or Syrian applicants were considered to be eligible for refugee status based on the Geneva Convention.²⁷⁹

Child specific challenges

- Although EU law requires the best interests of children to be taken into account, including in status determination procedures, it does not prescribe a single process for doing so, and there are no widespread tools and means to achieve a formal best interest determination. Whereas the Qualifications Directive requires recognition of child specific forms of persecution, implementation of this provision can be problematic in the absence of relevant information on the general conditions for children in countries of origin or information on the individual circumstances of children, child friendly procedures and specialised lawyers and decision makers. Although there have been practical efforts to develop tools²⁸⁰, it is also clear that where inadequate processes are in place, children are sometimes simply provided with subsidiary protection or discretionary leave to stay until they are 18.²⁸¹
- Special measures may also be necessary to prevent children from becoming or continuing to be stateless.

2.2.1.3. *The recast Qualification Directive and large scale arrivals*

The recast Qualification Directive stipulates that the assessment for international protection should be carried out on an individual basis. However, as a result of large scale arrivals and due to the high numbers of asylum claims, several Member States have experienced a backlog in the processing of individual asylum applications.²⁸² The Temporary Protection

²⁷⁶ EASO (2015b): 'The Implementation of Article 15(c) QD in EU Member States', EASO Practical Guides Series, July, pp. 1-4, available at: https://easo.europa.eu/wp-content/uploads/EASO_The-Implementation-of-Art-15c-QD-in-EU-Member-States.pdf. See also EMN (2015d): 'Ad-Hoc Query on Asylum seekers from Iraq: Requested by FI EMN NCP on 17th September 2015', available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/ad-hoc-queries-2015.731_finland_ahq_asylum_seekers_from_iraq_wider_dissemination.pdf.

²⁷⁷ Interviews: HU/N/1, DE/G/1

²⁷⁸ Article 15(b) reads: Serious harm consists of: (a) ...; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c)

²⁷⁹ EASO (2015b): 'The Implementation of Article 15(c) QD in EU Member States', EASO Practical Guides Series, July, p. 22, available at: https://easo.europa.eu/wp-content/uploads/EASO_The-Implementation-of-Art-15c-QD-in-EU-Member-States.pdf.

²⁸⁰ An example is a recent EU funded project focussed on providing information on the situation and circumstances of children in countries of origin (see UNICEF: Child Notices accessed at <https://www.unicef.nl/wat-doet-unicef/kinderrechten-in-nl/child-notices/english/> on 13.04.2016).

²⁸¹ The EU Action Plan on Unaccompanied Minors emphasised the need to identify durable solutions for children as does the UN High Commissioner for Refugees (UNHCR) and UNICEF in - Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe, October 2014, available at: <http://www.refworld.org/docid/5423da264.html> (in particular pages 44-50).

²⁸² See for further details in EMN (2015b): 'Annual Report on Immigration and Asylum 2014: A Synthesis of Annual Policy Reports 2014', EMN Synthesis Report, June, p. 5, available at: <http://ec.europa.eu/dgs/home-affairs/what->

Directive (2001/55/EC) in principle would have represented an important tool that would allow states to grant a protection status to a pre-defined group of persons in need of international protection immediately. This would temporarily alleviate pressure on the asylum procedures of the Member States and make resources available for the processing of applications of other nationalities. So far, however, the Commission has never submitted a proposal for a Council decision triggering the application of the Temporary Protection Directive. In 2014, the European Parliament asked the Commission whether the numbers of Syrian refugees arriving to the EU constitutes a "mass influx" as stipulated in the Directive.²⁸³ However, the Commission responded that the scale of the influx of Syrians and the way Member States dealt with the asylum applications did not justify the activation of the temporary protection directive.²⁸⁴ A study on the possible ways to establish a workable system of temporary protection at the EU level has been prepared for the Commission but so far the results have not been published.

2.2.1.4. Relation to other instruments

According to Council Decisions 2015/1523 and 2015/1601 relocation will only cover the nationalities which meet the threshold of 75%. This will affect a relatively small number of applicants, thereby leaving out a large number of applicants arriving from countries of origin who might not fulfill the 75% threshold but still are in genuine need of international protection. For example, in 2015, persons from Afghanistan formed the second largest group of applicants of international protection in the EU.²⁸⁵ The recognition rate for Afghan asylum seekers increased from 55% in 2014 to 58% in 2015.²⁸⁶ However, according to the current threshold of 75%, Afghan applicants will not be considered for relocation.

In the face of rising numbers of applications for international protection, some Member States have reduced the duration of international protection status under the Qualification Directive.²⁸⁷ This may significantly hamper family reunification opportunities, leaving families separated for protracted periods.

2.2.1.5. Proposed reform of the recast Qualification Directive

The EC Communication towards a reform of the CEAS and enhancing legal avenues concludes that the current Qualification Directive left too much discretion for MSs. This, according to the EC, led to varying recognition rates and a lack of adequate convergence in individual decision-making.²⁸⁸

In order to achieve greater convergence the Communication proposes to replace the current Qualification Directive by a Regulation, setting uniform rules on the rights to be offered to beneficiaries of international protection; ensuring systematic and regular checks on continued protection needs of beneficiaries of international protection; more systematic use of cessation

we-do/networks/european_migration_network/reports/docs/annual-policy/2014/00.emn_annual_report_on_immigration_and_asylum_synthesis_report.pdf.

²⁸³ See Parliamentary question on the Application of Directive 2001/55/EC; E-008507-14 at <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2014-008507&language=EN>.

²⁸⁴ EN E-008507/2014 Answer given by Mr. Avramopoulos on behalf of the Commission (28.1.2015), period January-October 2014: http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/10_e_008507_2014_answer_/10_e_008507_2014_answer_en.pdf.

²⁸⁵ Eurostat (2016a): Asylum Statistics, Eurostat Statistics Explained, 20 April, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.

²⁸⁶ Eurostat data on first instance decisions: online code migr_asydcfstq. Data available at: <http://goo.gl/E7cneq>

²⁸⁷ See above under Part II section 3.2.

²⁸⁸ European Commission's Communication towards a reform of the CEAS and Enhancing Legal Avenues to Europe (COM(2016) 197 final), p 5; at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_avenues_to_europe_-_20160406_en.pdf

clauses; and to better clarify the differences between the refugee and subsidiary protection status. Mutual recognition of the protection granted is considered only in the long term.²⁸⁹

2.2.2. Recast Asylum Procedures Directive

KEY FINDINGS

- The complexity of the various parts of the instrument and the wide discretion left for the Member States in the interpretation and implementation of various concepts and provisions continues to be a weakness.
- The grounds available for the application of accelerated procedures and the broad interpretation left to Member States of these grounds may lead to generalised expedited processing of asylum applications with lowered procedural guarantees and undermining the effectiveness of remedies and protection from arbitrary refoulement.
- Large divergences between Member States regarding the use and content of national SCO lists may result in continued differences in recognition rates.
- The application of prioritised procedures has widely proliferated in the EU, however, its use does not seem to be sufficient to cope with large scale arrivals.

2.2.2.1. Main elements of the recast Asylum Procedures Directive

Similar to the recast Qualification Directive, the recast Asylum Procedures Directive needed improvements. The main objective of the recast Asylum Procedures Directive is to establish common procedures for the determination of asylum claims in accordance with the recast Qualification Directive (Art. 1). The intention of the Commission is to amend this Directive into a Regulation with the objective of establishing 'a single common asylum procedure in the EU'.²⁹⁰

The transposition of the recast Asylum Procedures Directive by Member States has not been without problems. This is exemplified by the 18 infringement decisions the Commission adopted on 23 September 2015 against Member States for the failure to communicate the transposition of the recast Asylum Procedures Directive.²⁹¹ On 10 February 2016 Reasoned Opinions were addressed to three Member States for the failure to notify the Commission of their transposition measures.²⁹² The Commission stated that this reflects one of the weaknesses of the CEAS: the failure of Member States to fully transpose EU legislation and implement in a consistent manner.²⁹³

- The recast Asylum Procedures Directive introduces **common procedural safeguards and guarantees for the processing of applications for international protection** (refugee and subsidiary protection).

²⁸⁹ Ibid, p 11.

²⁹⁰ Communication from the Commission to the European Parliament and the Council – Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, Brussels 6.4.2016, COM(2016) 197 final, p. 10.

²⁹¹ European Commission (2015b): 'More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work', Press release, 23 September, available at: www.europa.eu/rapid/press-release_IP-15-5699_en.html.

²⁹² European Commission - Press release (2016, 10. February): Implementing the Common European Asylum System: Commission acts on 9 infringement proceedings Brussels, 10 February 2016 http://europa.eu/rapid/press-release_IP-16-270_en.htm, accessed on 12.03.2016.

²⁹³ European Commission, 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, 10 February 2016, COM(2016) 85 Final, p. 22.

- The recast Asylum Procedures Directive includes provisions aimed at enhancing **access to the asylum procedure**. The Directive applies to all applications made in the territory of the Member States, including at the border, in the territorial waters or in transit zones.
- The recast Asylum Procedures Directive stipulates **rules for procedures at first instance and procedures in appeal**.
- The recast Asylum Procedures Directive **regulates the use of Safe Country concepts** (safe country of origin and safe third country).

2.2.2.2. *Main challenges of the recast Asylum Procedures Directive*

The reception of the recast Asylum Procedures Directive has been balanced. Scholars,²⁹⁴ as well as the UNHCR²⁹⁵ and NGOs,²⁹⁶ have criticised the failure of the recast directive to minimise derogations and reduce the complexity of the instrument. The divergence in implementation between Member States regarding procedural guarantees, notably the use of accelerated procedures, Safe Country of Origin practices and access to legal representation and information, is considered to be highly problematic from a harmonisation and fundamental rights perspective. In light of the “one chance only” principle underpinning the Dublin system this contributes to current “protection lottery” in the EU.²⁹⁷

‘Safe Country of Origin’

- When considering the implementation of the ‘safe countries of origin’ concept among Member States, the differences between the states are well documented. According to the Commission, twenty-two Member States have implemented it into their domestic legislation, fifteen Member States apply it in practice, ten Member States have designated safe countries of origin and five Member States apply the ‘safe country of origin’ concept on a case-by-case basis.²⁹⁸ Furthermore, different practices are identified when assessing the Member States that apply the concept in international protection. Firstly, there are differences in the criteria for designating a ‘safe country of origin’. Secondly, variation appears in the legal consequences related to the concept of ‘safe countries of origin’. Thirdly, differences exist in the competent body that designates countries as a safe country of origin. Fourthly, there are divergences in the judicial review of designations of safe countries of origin. Finally, differences are identified in the procedures for reviewing designations.²⁹⁹ In Greece, the concept is incorporated in Article 21 of Presidential Decree 113/2013, but it has not yet been applied in practice, thus a national list of safe countries

²⁹⁴ See Peers, S. (2013): ‘The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig?’, Statewatch, 8 April, available at: <http://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf>; Costello, C. & Honcox, E. (2015): ‘The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee’.

²⁹⁵ UNHCR (2009b): UNHCR comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009).

²⁹⁶ ECRE (2014): Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), December, available at: <http://www.ecre.org/component/downloads/downloads/971.html>; Tsourdi, E. L. (2014): ‘Laying the ground for LGBTI sensitive asylum decision-making in Europe: Transposition of the recast Asylum Procedures Directive and of the recast Reception Conditions Directive’, ILGA, May, available at: http://www.ilga-europe.org/sites/default/files/recast_asylum_directives_transposition_may_2014_1.pdf.

²⁹⁷ Mouzourakis et al. (2015): ‘AIDA, Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis’, Annual Report 2014/2015’, ECRE, September, p. 81, available at: <http://ecre.org/component/downloads/downloads/1038.html>.

²⁹⁸ Meijers Committee (2015): ‘Note on an EU list of safe countries of origin Recommendations and amendments’, p. 2, 5 October, available at: http://www.commissie-meijers.nl/sites/all/files/cm1515_an_eu_list_of_safe_countries_of_origin.pdf; Statewatch (2015): ‘Information note on the follow-up to the European Council Conclusions of 26 June 2015 on ‘safe countries of origin’’, available at: <http://www.statewatch.org/news/2015/jul/eu-com-safe-countries.pdf>.

²⁹⁹ Meijers Committee (2015): p. 2.

of origin has not been adopted.³⁰⁰ At the EU level, in order to harmonise the use of 'safe country of origin' procedures, the Commission proposed in September 2015 the adoption of a Regulation establishing an EU common list of 'safe countries of origin' for the purposes of the recast Asylum Procedures Directive.³⁰¹

Table 4: Overview of measures in selected countries³⁰²

| | SCO | Fast-track procedure | Hotspot |
|----------|-----|----------------------|---------|
| Austria | ● | ● | |
| Bulgaria | ○ | ● | |
| Germany | ● | ● | |
| Greece | ○ | ● | ● |
| Hungary | ● | ● | |
| Italy | | ● | ● |
| Spain | | ● | |
| Sweden | | ● | |

- = legislation in place and used in practice
- = legislation in place and not used in practice

Accelerated procedures

- The use of accelerated procedures had 15 potential grounds in the first phase of the CEAS. This plethora of optional provisions had been identified by the Commission as a key cause of divergence between Member States.³⁰³ These potential grounds were later reduced to 10. This is still a large number of optional provisions, the exhaustiveness of their enumeration is not completely clear. The provisions themselves are open to interpretation as well.³⁰⁴ Consequently, Member States retain non-enumerated grounds for accelerated procedures.³⁰⁵ Furthermore, the recast Asylum Procedures Directive allows Member States to process applicants coming from countries of origin identified as safe in an accelerated procedure. Divergences have also been identified among Member States in the application of the accelerated procedures.³⁰⁶
- For Greece, accelerated procedures are stipulated in the national legislation in accordance with Directive 2005/85/EC, Article 23, par. 4. In practice, accelerated procedures are

³⁰⁰ Interview EL/G/1

³⁰¹ Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU; COM(2015) 452 final

³⁰² This table is based on: Meijers Committee (2015): 'Note on an EU list of safe countries of origin Recommendations and amendments', p. 2, 5 October, available at: http://www.commissie-meijers.nl/sites/all/files/cm1515_an_eu_list_of_safe_countries_of_origin.pdf.

³⁰³ Commission report to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, p. 15.

³⁰⁴ Interview AT/G/1

³⁰⁵ Mouzourakis et al. (2015): 'AIDA, Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis, Annual Report 2014/2015', ECRE, September, p. 77, available at: <http://ecre.org/component/download/downloads/1038.html>.

³⁰⁶ Meijers Committee (2015): p. 2.

implied when the application is manifestly unfounded, which usually takes place during the first instance application.³⁰⁷

Border procedures

- There is a large divergence in the application of border procedures, including detention. The lengths of the detention can vary, in some procedures applicants are detained for the complete duration of their procedure and in others, detention is limited to a duration of less than 48 hours.³⁰⁸

Child specific challenges

- The Procedures Directive does not properly safeguard children during special procedures (e.g. accelerated procedures, Article 31), in that it allows for certain derogations from safeguards for children (e.g. Article 25.2) and it does not provide sufficient clarity on age assessment. It also should require child specific information about any safe country of origin, for both unaccompanied children and children within families.

The increased application of the safe country of origin and safe third country of origin concepts in the context of accelerated and border procedures increases risks of asylum seekers being subjected to expedited procedures that do not ensure a proper examination of their protection needs in practice, in particular where effective access to legal assistance and representation is not guaranteed. The increasing trend at EU level towards a purely nationality-driven approach whereby all resources are mainly invested in expedited procedures dealing with the manifestly well-founded and unfounded applications is worrying as it is based on simplified assumptions that ignore the complexity of asylum and mixed migration and may lead to increased risks of refoulement.

2.2.2.3. *The recast Asylum Procedures Directive and large scale arrivals*

During the mass influx of asylum seekers from 2014 to 2016 all aspects of the CEAS came under immense pressure. The application of the recast Asylum Procedures Directive and thus the access to asylum procedures is no exception. The national responses to this influx have been varied.

Member States are allowed to prioritise the examination for international protection of certain applications that are likely to be well-founded on the basis of Article 31(7) of the recast Asylum Procedures Directive. Hence, certain nationalities such as Syrians or Eritreans are more swiftly processed than other nationalities.³⁰⁹ However, even with these nationalities, divergences exist between EU Member States with regard to nationalities that are subject to such prioritisation and the time-limits applied in such procedures.³¹⁰

With children arriving in very high numbers and the difficult conditions currently found in border and transit countries in the EU, a process which places child protection at the centre of the response is required, regardless of the nationality and immigration status of the child. In the case of children who have been separated from their primary legal or customary

³⁰⁷ Interview EL/G/1

³⁰⁸ EMN (2014b): 'Ad-Hoc Query on detention of asylum applicants at the border: Requested by NL EMN NCP on 28 November 2014', available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/2014.636.emn_ahq_on_detention_of_asylum_applicants_at_the_border_\(wider_dissemination\).pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/2014.636.emn_ahq_on_detention_of_asylum_applicants_at_the_border_(wider_dissemination).pdf); See also AIDA, The Legality of Examining Asylum Claims in Detention from the Perspective of Procedural Rights and their Effectiveness, October 2015, p. 3.

³⁰⁹ Interview DE/G/1

³¹⁰ Mouzourakis et al. (2015): 'AIDA, Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis, Annual Report 2014/2015', ECRE, September, p. 81, available at: <http://ecre.org/component/downloads/downloads/1038.html>.

caregiver, there should be the immediate involvement of guardianship and child protection authorities on identification of an unaccompanied child in the jurisdiction, as well as an individual needs assessment for both procedural safeguards and special protection and assistance required. To reduce children embarking on further dangerous journeys or placing themselves in the hands of traffickers, it will be vital to enhance the ways in which they are informed and supported through the different procedures that may apply.

2.2.2.4. *Relation to other instruments*

Hotspots and the Asylum Procedures Directive

Scholars and NGOs have expressed their concerns over the implementation practices carried out in hotspots.³¹¹ According to the official explanation of the Commission, applicants wishing to apply for international protection in the hotspots will be immediately channelled into an asylum procedure. However, it is important that the processing of the assessments in these hotspots is in accordance with the basic procedural safeguards and guarantees as enshrined in the recast Asylum Procedures Directive.

The recast Asylum Procedures Directive applies to all applications for international protection made in the territory of an EU MS (Art. 3(1)) and thus also applies to the processes at the hotspots. As such, MS need to make sure that applicants have an effective opportunity to lodge an application for international protection. The registration needs to take place within three days, which may be prolonged to 10 days in the event of a large number of applicants arriving (Art. 6(1) and 6(5)).

Several guarantees derive from the recast Asylum Procedures Directive such as the duty to inform applicants about the procedure in a language understandable to them and that the applicant shall be heard personally before a decision is taken. The special needs of applicants are to be evaluated, including specific guarantees for unaccompanied minors. Additionally, UNHCR shall be allowed access to applicants (Art 29). The recast Asylum Procedures Directive additionally names different special procedures such as accelerated procedures or border procedures.

The hotspots approach in principle covers only the very initial stage of a procedure with respect to the registration, but, also foresees a crucial role, namely the identification of the protection needs of a person by determining possible future outcomes (either asylum process in the MS or relocation to another MS; or commencing the return process for irregular migrants). As such, the registration and identification carried out in the hotspots directly impact on the procedure for asylum applicants.

In fact, some reports from activists and civil society raise concerns about the lawfulness of the processes at the hotspots: civil society and media report on return decisions being issued without a proper examination of the individual cases, chaotic and imprecise approaches to the identification of people, unaccompanied children wrongly identified as adults and a general lack of protection safeguards and guarantees for migrants and refugees.³¹² In Italy, according to several news reports, both civil society organisations and UNHCR do not have access to refugees and migrants until after the initial police screening, which raises concerns about access to information on asylum procedures for new arrivals, a right guaranteed under

³¹¹ D'Angelo, A. (2016): 'Migrant crisis? The Italian hotspot approach is not a solution, but it has been politically effective', Middlesex Minds, 26 February, available at: <http://mdxminds.com/2016/02/26/migrant-crisis-the-italian-hotspot-approach-is-not-a-solution-but-its-politically-effective/>; 'EVI-MED – Constructing an Evidence Base of Mediterranean Migrations', Middlesex University London, 26 February: <http://mdxminds.com/2016/02/26/migrant-crisis-the-italian-hotspot-approach-is-not-a-solution-but-its-politically-effective/>; ECRE (2015e): *Italy: a worrying trend is developing in the 'hotspots'*, 20 November, available at: <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1285-italy-a-worrying-trend-is-developing-in-the-hotspots.html>.

³¹² ECRE (2015e): *Italy: a worrying trend is developing in the 'hotspots'*, 20 November.

the recast Asylum Procedures Directive.³¹³ Additionally, the potential use of force in registration procedures in an effort to fingerprint all migrants who arrive has been expressed as a concern by Italian civil society organisations.³¹⁴

Authorities operating in the hotspots are under high pressure to achieve tangible results, with the intention of pushing for deterrent actions. A swift registration and channelling of migrants without a valid claim into the return process in connection with the extensive use of the evolving list of safe countries of origin might well mean automatic rejection of claims.³¹⁵ Its presumption that the country is safe for nationals to return to is a strong one, and forms the basis of an accelerated procedure which easily becomes a self-fulfilling process of rejection.³¹⁶ Such practice has been reported with a group of 16 Gambians who were immediately transported from the Lampedusa "hotspot" to a detention centre in Caltanissetta, with a deportation procedure already under way. Questions over the existence of an effective possibility to apply for asylum and a 'group based automatic expulsion' for those coming from countries other than Syria or Eritrea have already been raised in Italy.³¹⁷

The use of special procedures at hotspots and their relation to due processing and access to legal counsel for applicants requires further observation to better understand the state of play. In addition to this, the question whether applicants receive fair and equal treatment when they are rushed through their preliminary interviews, or held in specific "hotspot zones" certainly needs further observation to provide a better picture of the situation.

There is a lack of transparency of the procedures carried out in the hotspots and the legal framework governing these hotspots remains unclear.³¹⁸ In practice, access to legal assistance in the hotspots is largely lacking, while migrants and asylum seekers arriving in Italy and Greece are deprived of their liberty during the procedures that are carried out, without the necessity and proportionality of detention being assessed in their individual cases.³¹⁹ A communication of the Commission of March 2016 relating to the EU-Turkey cooperation emphasised the need for the objective of the hotspots in Greece to change from registration and swift referral to the mainland to the implementation of returns to Turkey. In addition to increased reception capacity on the islands, the Commission also explicitly points to the need for sufficient detention capacity in order to prevent persons from absconding.³²⁰ Should this result in the systematic detention of all new entrants on the Greek islands, this would be in clear contradiction of the exceptional nature of detention as guaranteed under EU law and the presumption against detention that is laid down in international refugee and human rights law.

2.2.2.5. *Proposed Reform of the recast Asylum Procedures Directive*

The EC Communication towards a reform of the CEAS and enhancing legal avenues to Europe identified the different durations of the asylum procedures in EU MS and the different transposition of the country of origin and the safe third country concept as some of the short comings due to the wide discretion given to EU MS by the Asylum Procedures Directive. This, according to the EC, is one of the reasons for secondary movements, without, however,

³¹³ Ibid.

³¹⁴ ECRE (2015d): "Hotspots": the Italian example – conversation with Christopher Hein from CIR, 2 October, available at: <http://ecre.org/component/content/article/70-weekly-bulletin-articles/1210-hotspots-the-italian-example-conversation-with-christopher-hein-from-cir-.html>.

³¹⁵ Interview DE/N/1

³¹⁶ As reported for the UK fast track procedures, see: Webber Francis (2015): 'Hotspots' for asylum applications: some things we urgently need to know accessed at <http://eulawanalysis.blogspot.co.at/2015/09/hotspots-for-asylum-applications-some.html> on 07.03.2016.

³¹⁷ ECRE (2015d): "Hotspots": the Italian example – conversation with Christopher Hein from CIR, 2 October.

³¹⁸ Interview EL/G/2

³¹⁹ Interview IT/A/1

³²⁰ See COM(2016) 166 final, *Next operational steps in EU-Turkey cooperation in the field of migration*, Brussels, 16 March 2016, p. 4

substantiating such statement with evidence in absence of any impact assessment of the recast Asylum Procedures Directive.³²¹

With the aim to achieve greater convergence the Communication proposes to replace the current Asylum Procedures Directive by a Regulation establishing a single common asylum procedure in the EU. According to the outline in the Communication the new regulation should include rules on specific procedures (admissibility, border and accelerated procedures), set a maximum duration of the procedure; harmonise the use and procedural consequences of applying the safe country of origin mechanism; and to harmonise the safe third country mechanism.

³²¹ Communication from the Commission to the European Parliament and the Council – Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, Brussels 6.4.2016, COM(2016) 197 final, p. 10.

3. THE RECEPTION OF ASYLUM SEEKERS

3.1. Introduction

Reception systems rarely operate in a stable context. The number of applicants changes from month to month and is difficult to forecast. Moreover, during periods of lower numbers of applications, reception capacities come under the scrutiny of austerity measures. This dynamic context makes the efficient management of reception infrastructure a particularly challenging task.

Perceptions in the general public of the reception of asylum seekers and the resulting pressure of public opinion on policy makers are yet another complicating factor. While the material conditions provided to asylum seekers are modest in most countries and even substandard in some EU Member States, the public is often of the opinion that asylum seekers receive too much support, are a drain on the local resources or that such support comes at the expense of social security benefits for the local population. Furthermore, the physical reception of asylum seekers is not only a heavily disputed topic at EU level, but it also creates tensions at the national level: the "fair" or more equal distribution of asylum seekers within a country must often be enforced against municipalities and the local population, who sometimes protest against the accommodation of asylum seekers in their neighbourhood.

Different EU Member States have different practices for the reception of asylum seekers. Some countries subcontract or outsource the management of housing to specialised state agencies (e.g. COA in the Netherlands or Fedasil in Belgium), while others maintain the responsibility for the management of reception facilities within the respective Ministry. While some countries accommodate asylum seekers in different centres (for example, in the Netherlands according to the different procedural steps) others prefer private housing solutions (for example, in Sweden). Obviously any housing system has its advantages and disadvantages but also limits with respect to available capacities. Reception therefore is highly dependent on proper planning and monitoring of expected reception needs.

3.2. Instruments for the reception of asylum seekers

3.2.1. Recast Reception Conditions Directive

KEY FINDINGS

- The correct implementation of the recast Reception Conditions Directive is highly relevant for the implementation of the Dublin III Regulation as the lack of dignified reception conditions has been the main reason for national and European Courts to suspend transfers of asylum seekers to the responsible Member State.
- The Reception Conditions Directive is an important yardstick for measuring the conditions applied at the hotspots.
- The level of material reception conditions during the asylum procedure may have only limited impact on secondary movements of asylum seekers because other pull factors such as social ties (including family reunification³²²), reputation of other countries or job opportunities may be regarded as more important by asylum seekers.
- The recast Reception Conditions Directive included a number of improvements but still allows for a broad variation of standards.

³²² For Afghans, joining family/relatives was the 3rd most important reasons for selecting a destination country in Europe. For Syrians, family reunification was the main reason to choose a destination country. See: page 4 of the Profiling of Afghans and Syrians on the UNHCR emergency web portal at <http://data.unhcr.org/mediterranean/documents.php?page=1&view=grid&Search=%23profile%23>.

3.2.1.1. Main elements

The Reception Conditions Directive 2003/9/EC aimed at developing dignified standards of living for asylum seekers across all Member States to limit secondary movements of asylum seekers influenced by the variety of conditions for their reception (see recital 7 and 8). The intention was to develop minimum standards, leading to a harmonisation of reception conditions. However, an evaluation of this instrument showed that the wide discretion allowed by the Directive in a number of areas, notably access to employment, health care, level and form of material reception conditions, free movement rights and needs of vulnerable persons undermines the objective of creating a level playing field in the area of reception conditions.³²³

The main objective of the EC's proposal for the recast of the Reception Conditions Directive³²⁴ consequently was to increase the level of harmonisation of the reception conditions in Member States to limit secondary movement of applicants within the EU (recital 12 of Council Directive 2013/33/EU). The recast Reception Conditions Directive, adopted in June 2013 includes the following key amendments to the 2003 Directive:

- It widens the scope of applicability of the Directive to all applicants for international protection, including those in territorial waters or in transit zones of a Member State, and subsidiary protection.
- It shortens the waiting periods for access to labour market;
- It extends the list of vulnerable persons and introduced the requirement to conduct an individual vulnerability assessment;
- It introduces an exhaustive list of six grounds for detention; and
- It introduces a needs assessment for the reception of vulnerable persons.

It should be noted that while Denmark, Ireland and the United Kingdom have opted out of the recast Directive, its detention provisions apply to all Member States and associated states that apply the Dublin Regulation.³²⁵

The recast Reception Condition Directive clarifies in Art. 3 that, in order to ensure equal treatment of applicants throughout the Union, it shall apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants, including at the border, in the territorial waters or in the transit zones of Member States and for as long as they are allowed to remain in the territory of the Member States as applicants.³²⁶ This implies that the recast Reception Condition Directive is also applicable in hotspots.

Member States bound by the recast Reception Conditions Directive were obliged to transpose its provisions into national law by 20 July 2015. Since the transposition deadline has expired the standards laid down in the revised Reception Conditions Directive became legally binding, while those provisions that are sufficiently clear and precise in line with the jurisprudence of the CJEU can have a direct effect and can be invoked by applicants vis-à-vis national

³²³ Report from the Commission to the Council and the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; COM(2007) 745 final, p 10; accessed at <https://www.ulb.ac.be/assoc/odysseus/CEAS/COM%282007%29745.pdf> on 20.03.2016.

³²⁴ Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers; 03.12.2008 COM (2008) 815, accessed at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0815:FIN:EN:PDF> on 22.03.2016.

³²⁵ See Art 28/4 Regulation (EU) 604/2013. Thus the provisions regarding detention are also applicable for the UK and Ireland when implementing the Dublin Regulation (see also Chetail, V., Brueycker, P. & Maiani, F. (eds.) (2016): *Reforming the Common European Asylum System: The New European Refugee Law*. Leiden: Brill/Nijhoff, p. 281).

³²⁶ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Art. 3.

authorities. However, some Member States lag behind in the legal transposition. As of 10 February 2016 infringement proceedings against 19 Member States for the non-transposition of the Directive were pending.³²⁷ However, the majority of the infringements include cases of non-communication to the EC. Out of the 19 infringement cases, 16 were in the first step of the procedure³²⁸ and in the case of Germany, Malta and Greece the EC has initiated the second phase of the infringement procedure.³²⁹

Beyond the legal transposition the current increase of asylum seekers makes non-compliance of the practical implementation more obvious than before. The following section highlights the main challenges in the current situation characterised by high numbers of applicants in the context of the revised Reception Condition Directive.

3.2.1.2. Main challenges in the current situation

Accommodation

Member States have the obligation to provide appropriate accommodation which meets asylum seekers' needs and guarantees an adequate standard of living and subsistence that protects their physical and mental health throughout the examination of the asylum application (Art 17 recast Reception Conditions Directive). Under regular conditions (i.e. non-large scale arrivals of asylum applicants) many Member States organise the reception in two phases. Initial or preliminary reception is mainly provided in collective centres (for example, AT, BE, BG, DE, ES, GR, IT, MT, PL, UK, CH³³⁰) often with the purpose of an initial registration and the distribution of asylum seekers across the country. The accommodation in a second phase is often provided through a mix of private housing solutions, collective centres and accommodation places managed by NGOs or privately run hostels.³³¹

In the current situation of a considerable increase in the number of applications, Member States have severe difficulties meeting their obligations for reception conditions, in particular with providing accommodation³³² which guarantees an adequate standard of living.³³³ In the context of the Reception Conditions Directive, Sweden describes its housing shortage as the main challenge in dealing with a higher number of applications. While in November 2015, the Swedish Migration Agency announced a shortage of reception facilities and the need to cater for temporary solutions (e.g. accommodation in sport halls), the Agency declared in February 2016 that it is now able to offer all asylum seekers a place to stay, yet the need for housing

³²⁷ European Commission: ANNEX 8 to the 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 Implementation of EU law; COM(2016) 85 final - State of Play accessed at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_annex_08_en.pdf (09.03.2016).

³²⁸ The first step of the infringement procedure includes letters of formal notice send from the EC to the respective Member State.

³²⁹ The second step of the infringement procedure includes a *reasoned opinion* which is sent to the Member State. If the Member State fails to notify the EC on the measures taken for a full transposition within 2 months, the EC can decide to refer the case to the Court of Justice of the EU (CJEU). (European Commission - Press release: Implementing the Common European Asylum System: Commission acts on 9 infringement proceedings" accessed at http://europa.eu/rapid/press-release_IP-16-270_en.htm?locale=en (09.03.2016)

³³⁰ See the table at AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 16 accessed at http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_wrong_counts_and_closing_doors.pdf on 31.03.2016

³³¹ Ibid.

³³² Interviews: DE/G/1, SE/G/1, SE/A/1.

³³³ Mouzourakis et al. (2015): 'AIDA, Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis, Annual Report 2014/2015', ECRE, September, p. 89, available at: <http://ecre.org/component/downloads/downloads/1038.html>.

remains high.³³⁴ Some Member States struggling with housing shortages turn to the private housing market for renting appropriate accommodation³³⁵ at higher costs.³³⁶

In Hungary, the largest reception centre was closed in December 2015 after the closure of the borders with Serbia and Croatia. However, the reception situation in Hungary is so precarious that ECRE voiced its concern for asylum seekers who are at risk of being exposed to situations of severe overcrowding if no additional reception centres are created.³³⁷ National courts in Germany, Austria and Luxembourg have decided to not return asylum seekers to Hungary according to the Dublin regulation due to the lack of reception capacities and their poor quality (see chapter on Dublin and reception conditions).³³⁸ Shortages in reception capacities were also reported in the United Kingdom and in Cyprus.³³⁹

Reception capacities exceeded their limits in Member States that were affected most by newly arriving asylum seekers (who either wanted to submit their application or who were in transit) in September 2015,³⁴⁰ such as in Germany, Sweden, Austria and Hungary. Thus, the responsible authorities set up provisional emergency shelters. In Germany, asylum seekers were hosted in gyms, a former airport in Berlin, containers, warehouses and heated tents,³⁴¹ sometimes under inadequate sanitary conditions.³⁴² The emergency shelters were initially planned as temporary accommodation; however, some of these centres became permanent.³⁴³ These emergency shelters might still be in line with the recast Reception Conditions Directive since it allows for derogation from standards laid down in the Directive in exceptional cases where housing capacities are temporarily exhausted stipulating that basic needs should still be covered. However, this exception can be applied only “for a reasonable period which shall be as short as possible” (Art. 18 (9) and Art 17 recast Reception Conditions Directive).³⁴⁴

In some Member States, such as Germany, Austria and Sweden, municipalities are responsible for providing accommodation which is either based on the availability of housing or on the basis of quota systems. In Austria, some municipalities refused to fulfil their quotas for accommodation. This resulted in the federal state setting up large camps and accommodating asylum seekers in heated tents. This was strongly criticised by civil society and media, which in turn placed pressure on local governments. As a consequence, special constitutional law was adopted which allows the federal state to create accommodation facilities without the agreement of the local authorities (“*Durchgriffsrecht*”). According to the quota in place, each municipality needs to accommodate a quota of asylum seekers equivalent to 1.5% of the population in its territory.³⁴⁵

³³⁴ Migrationsverket (2016): Great need for housing, despite fewer applicants (from 05.02.2016) at <http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Nyheter/2016-02-05-Great-need-for-housing-despite-fewer-applicants.html> (14.03.2016).

³³⁵ Interviews: SE/N/1, SE/A/1.

³³⁶ The Guardian: Swedish private housing sector accused of profiting from refugees (18.10.2015) at <http://www.theguardian.com/world/2015/oct/18/swedish-private-housing-sector-refugees> (14.03.2016)

³³⁷ AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 31.

³³⁸ ECRE (2016): Case law fact sheet: Prevention of Dublin Transfers to Hungary, p. 11. Accessed at: http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Fact%20sheet%20-%20Case%20law%20on%20Hungary_FIN.pdf 14.04.2016

³³⁹ AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 31.

³⁴⁰ Interview SE/A/1.

³⁴¹ Mouzourakis et al. (2015): ‘AIDA, Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis, Annual Report 2014/2015’, ECRE, September, p. 53, available at: <http://ecre.org/component/downloads/downloads/1038.html>.

³⁴² AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 32.

³⁴³ Deutsche Welle (28.01.2016): Berlin to extend Tempelhof airport refugee camp at: <http://www.dw.com/en/berlin-to-extend-tempelhof-airport-refugee-camp/a-19010260> (17.03.2016)

³⁴⁴ AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 32.

³⁴⁵ Federal Constitutional Law on accommodation and distribution of foreigners in need of protection (Bundesverfassungsgesetz über die Unterbringung und Aufteilung von hilfs- und schutzbedürftigen Fremden (BGBl. I Nr. 120/2015). See also EMN, 2015b: 3.

While accommodation places and capacities can be limited, the policies that followed in some countries, like Austria or Sweden, were introduced because some local governments refused to cooperate in the attempt to achieve a more equal distribution of asylum seekers at a national level.

A number of countries have increased their reception capacities, such as France, Belgium and Italy, the latter has mainly created accommodation in emergency reception centres.³⁴⁶ In December 2015, the EC communicated an increase in numbers of accommodation places in Greece. However, around 5,700 new reception places are located in pre-removal detention facilities.³⁴⁷ Whether detention centres can be qualified as appropriate accommodation that guarantees dignified standard of living is a continually contested issue.

After receiving a positive decision on their asylum claim, it has been reported that refugees face difficulties in finding adequate housing in the private housing market³⁴⁸ and thus, remain longer in the accommodation than is originally foreseen.³⁴⁹

In addition to the overall shortage in reception capacity, the accommodation of vulnerable persons in need of special reception arrangements poses particular problems in the current situation.³⁵⁰ It has been reported that vulnerable persons are placed in highly unsuitable conditions in several Member States, for example Italy, Greece, Austria, the Netherlands and the United Kingdom.³⁵¹ In an initial reception centre in Traiskirchen, Austria, in the summer of 2015, women and children had to sleep on the floor³⁵² and 1,250 unaccompanied children had insufficient access to education and health care in November 2015.³⁵³ In the United Kingdom, it was reported that newly arrived women, children and vulnerable persons coming from France were placed in detention centres together with unrelated adult males.³⁵⁴ The failure to provide accommodation suitable for addressing special needs is caused by the increased numbers of asylum seekers and the shortage in adequate accommodation and by the absence of mechanisms to identify vulnerable persons.

Assessment of special reception needs of vulnerable persons

According to the recast Reception Conditions Directive, Member States need to assess whether an applicant has special reception needs. However, the revised Directive remains silent on how the identification of such vulnerable persons shall be conducted, in spite of a proposal made by the EC (and supported by the EP) on the inclusion of an identification procedure in the recast Reception Conditions Directive.³⁵⁵ The Directive leaves the responsibility on the Member States to determine how the identification process is carried

³⁴⁶ Mouzourakis et al. (2015): 'AIDA, Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis, Annual Report 2014/2015', ECRE, September, p. 89, available at: <http://ecre.org/component/downloads/downloads/1038.html>.

³⁴⁷ ECRE (2016): 'Comments on the European Commission Recommendation relating to the reinstatement of Dublin transfers to Greece – C (2016) 871', February, p. 6, available at: <http://ecre.org/component/downloads/downloads/1076>; AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 22.

³⁴⁸ The Local (2015): Refugees being 'ripped off by private landlords' at <http://www.thelocal.at/20151111/refugees-being-ripped-off-by-private-landlords> (16.03.2016)

³⁴⁹ Interview SE/G/1. See also IFHP (2015): Housing Refugees Report - Part of the IFHP Refugee Housing Programme at <http://www.ifhp.org/sites/default/files/staff/IFHP%20Housing%20Refugees%20Report%20-%20final.pdf> (16.03.2016).

³⁵⁰ Interviews: DE/G/1, SE/G/1, SE/A/1.

³⁵¹ AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 36.

³⁵² Ibid.

³⁵³ AIDA (2015): Navigating the maze: Structural barriers to accessing protection in Austria, p. 23, accessed at: <http://ecre.org/component/downloads/downloads/1071> on 18.04.2016.

³⁵⁴ AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 36.

³⁵⁵ Peers, S. (2012): 'The EU Directive on Reception Conditions: A weak compromise', Statewatch, July, p. 6, available at: <http://www.statewatch.org/analyses/no-184-reception-compromise.pdf>.

out. ECRE views this issue as one of the key challenges in the implementation of the recast Reception Conditions Directive into national law.³⁵⁶

Despite the missing provisions, few Member States have inducted norms for vulnerability assessment procedures into their national legislation. For example, in France the vulnerability assessment is conducted during the first interview, in Malta at Initial Reception Centres, in Poland the border guards have to check whether or not the applicant is a victim of trafficking or torture and in Croatia the relevant authorities are obliged to continuously carry out vulnerability assessments. Nonetheless most of these assessments are limited to obvious or visible elements of vulnerability and thus risk failing to identify other categories of vulnerable persons included in the wider definition of vulnerability in the recast Reception Conditions Directive.³⁵⁷

The lack of regulatory framework in national legislation in many Member States,³⁵⁸ in combination with the high numbers of asylum seekers and limited reception capacities, makes the identification of vulnerability arbitrary and the application of the provisions in the recast Reception Conditions Directive relating to asylum seekers with special reception needs in those countries very unlikely.³⁵⁹ The reception system in Germany is exhausted to such an extent that an identification of vulnerable persons and their placement in specific accommodation is almost impossible.³⁶⁰ According to the report by a German expert commission for access to health care, the care of vulnerable persons in initial reception centres in Germany cannot be fulfilled due to the lack of qualified personnel.³⁶¹ The situation in Greece is similar, where the unprecedented numbers of asylum seekers makes the identification of vulnerable persons practically impossible.³⁶² In the context of reception centres in 'hotspots' in Greece, the Red Cross EU Office raises concerns on the ability to carry out vulnerability assessments and addressing special needs of vulnerable persons.³⁶³

Art. 24 (2) of the recast Reception Conditions Directive states that unaccompanied children should be placed either with adult relatives, foster families, in accommodation centres or other accommodation suitable for children. In light of this special provision it is questionable whether the detention of unaccompanied children can be considered suitable accommodation for minors and whether this constitutes a breach of the special provisions laid down in the recast Reception Conditions Directive.³⁶⁴

Access to labour market

The recast Reception Conditions Directive reduced the waiting time for asylum seekers' access to the labour market from 12 months to 9 months, starting from the time when the application is lodged (Art. 15 (1) recast Reception Conditions Directive). The EP and the Commission supported a 6 months period but the Council wanted to retain the 12-month

³⁵⁶ ECRE (2015b): 'Information Note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)', July, p. 34, available at: <http://ecre.org/component/downloads/downloads/1033.html>.

³⁵⁷ AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 35.

³⁵⁸ Interviews: DE/N/1, DE/G/1.

³⁵⁹ AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 35.

³⁶⁰ Ibid.

³⁶¹ Robert Bosch Expertenkommission (2016): Zugang zu Gesundheitsleistungen und Gesundheitsversorgung für Flüchtlinge und Asylwerber: Von der Erstversorgung bis zur psychosozialen Behandlung. Themendossier. Robert Bosch Stiftung, p 8. Online accessed at: http://www.bosch-stiftung.de/content/language1/downloads/RBS_Kommissionsbericht_Fluechtlingspolitik_Gesundheit_ES.pdf

³⁶² AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 35.

³⁶³ Moreno-Lax, V. (2015): 'Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward', Red Cross EU Office, available at: http://www.redcross.eu/en/upload/documents/2016/Europe%20in%20Crisis_Dr%20Moreno-Lax_final.pdf.

³⁶⁴ ECRE (2015b): 'Information Note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)', July, p. 36, available at: <http://ecre.org/component/downloads/downloads/1033.html>.

restriction.³⁶⁵ However, there is no obligation to ensure access to the labour market if a first-instance decision is taken within the waiting period of 9 months, or if the delay for taking such decision beyond 9 months can be attributed to the applicant. The majority of Member States have transposed this provision in national legislation. However, the implementation strongly differs among countries. As of July 2015, only Sweden and Greece allow for immediate labour market access and Ireland and Lithuania provide no access to the labour market.³⁶⁶

ECRE voices concern over the restrictions in access to the labour market that some Member States have imposed, such as labour market testing or limiting the access to certain sectors.³⁶⁷ The labour market tests make it very difficult for asylum seekers to find employment and is thus restricting effective access to the labour market.³⁶⁸ In some cases the labour market tests may seriously undermine the advantage of the shortened waiting periods. In Germany, for instance, following a November 2014 amendment to the law, authorities are allowed to carry out a labour market test ("priority review") for a period of 12 months from the date the asylum seeker was granted access to the labour market, which is now three months after the application was lodged. As a result, access to the labour market for asylum seekers can be seriously constrained for up to 15 months in Germany or, depending on when they receive their first instance decision, in reality be non-existent.³⁶⁹

Table 5: Information on asylum seekers access to labour market in selected 8 EU MS³⁷⁰

| Country | Waiting period | Other restrictions |
|----------|--|--|
| Austria | 3 months | <ul style="list-style-type: none"> • Work permit has to be requested by employer and are limited by yearly quotas for each province • Labour market test • Access is limited to seasonal work in tourism and agriculture |
| Bulgaria | 12 months (amendment to reduce to 9 months has been submitted to the national parliament in August 2015) | No further restrictions |
| Germany | 3 months | <ul style="list-style-type: none"> • Labour market test • As of Oct 2015, asylum seekers who are obliged to stay in reception centres have no access (max. period of 6 months; persons from safe countries of origin have no access until their procedure has ended)³⁷¹ |

³⁶⁵ Peers, S. (2012): 'The EU Directive on Reception Conditions: A weak compromise', Statewatch, July, available at: <http://www.statewatch.org/analyses/no-184-reception-compromise.pdf>.

³⁶⁶ ECRE (2015b): 'Information Note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)', July, p. 28.

³⁶⁷ Ibid, p 29.

³⁶⁸ UNHCR (2015): UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>.

³⁶⁹ Mouzourakis et al. (2015): 'AIDA, Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis, Annual Report 2014/2015', ECRE, September, p. 93, available at: <http://ecre.org/component/downloads/downloads/1038.html>.

³⁷⁰ Mainly based on information provided in the EMN (2015a): 'Ad-hoc Query on access to the labour market for asylum seekers', 3 June, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/654_emn_ahq_access_to_the_labour_market_for_asylum_seekers_wider_dissemination.pdf.

³⁷¹ AIDA: Access to the labour market; Germany; at <http://www.asylumineurope.org/reports/country/germany/reception-conditions/employment-education/access-labour-market> (11.03.2016).

| | | |
|---------|--|--|
| Greece | immediate access | <ul style="list-style-type: none"> • Labour market test |
| Hungary | 9 months | <ul style="list-style-type: none"> • During the first 9 months asylum seekers are allowed to work within reception centres • Work permit has to be requested by employer |
| Italy | 6 months (if the procedure has been delayed due to reasons attributed to the asylum seeker, then access can be denied ³⁷²) | No further restrictions |
| Spain | 6 months | No further restrictions (information provided in 2013) ³⁷³ |
| Sweden | immediate access (if the applicant refuses to cooperate in the identification process, access can be denied) | No further restrictions |

Detention

Detention affects the right to liberty of the individual, which is guaranteed by Article 6 of the Charter³⁷⁴ and Article 9 ICCPR. Therefore, detention measures have to comply with requirements of necessity and proportionality in order to avoid the risk of arbitrary detention. While the 2003 Reception Conditions Directive (2003/9/EC) only refers to the possibility of restricting the freedom of movement of asylum seekers and the confinement to a particular place for reasons of public order, the Return Directive³⁷⁵ regulates the detention of irregular migrants. Because of the lack of specific grounds for detention of asylum seekers in EU law and the wide and varied use of asylum detention in EU MS, the Commission considered it necessary to adopt specific grounds when detention can be exceptionally ordered for asylum seekers.³⁷⁶ As a general rule, both the Asylum Procedures Directive and the Reception Conditions Directive determine that Member States shall not hold a person in detention for the sole reason that he or she is an applicant (Art 26 (1) and Art 8 (1) respectively). The specific six grounds³⁷⁷ when detention may exceptionally be ordered are laid down in the recast Reception Conditions Directive (Art 8/ 3 a-f). Art 8/ 3f refers to a specific ground for detention regulated in Art 28 Dublin III Regulation, which allows detention of asylum seekers in order to secure Dublin transfer procedures, in the case of a significant risk of absconding.

The CJEU recently reiterated the importance of the proportionality of the interference with the right to liberty.³⁷⁸ According to Peers, the judgment sends a clear signal that the CJEU is going to assert its legal authority to ensure that measures taken to deal with the refugee and

³⁷² Reasons attributed to the asylum seekers: if the delay is caused by false documents submitted by the applicant, if necessary information is not provided for identification, failure to appear for the interview which is beyond the applicant's control.

³⁷³ EMN (2013): Ad-Hoc Query on access to the labour market for asylum seekers at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/450_emn_ad-hoc_query_on_access_to_the_labour_market_for_asylum_seekers09january2013_wider_dissemination_en.pdf (15.03.2016).

³⁷⁴ Charter of the Fundamental Rights of the European Union (2000/C 364/01)

³⁷⁵ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning irregular third-country nationals

³⁷⁶ COM(2008) 815: Proposal for a Directive of the European Parliament and the Council laying down minimum standards for the reception of asylum seekers (Recast), p 6 at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008PC0815>.

³⁷⁷ The six grounds mentioned under Art 8/ 3 are: (a) 'in order to determine or verify the identity or nationality [of an asylum seeker]'; (b) to 'determine the elements on which' the application is based 'which could not be obtained in the absence of detention, in particular where there is a risk of absconding'; (c) in order to decide on the applicant's right to enter the territory; (d) when the asylum-seeker is detained in the context of a return procedure and there are objective grounds to believe that the asylum application was only submitted to 'delay or frustrate' expulsion, despite having had an opportunity to access the asylum procedure; (e) 'when protection of national security or public order so requires'; (f) in accordance with Art 28 Dublin III Regulation allowing detention to secure transfer procedures in case of a 'significant risk of absconding'.

³⁷⁸ J.N. v Staatssecretaris van Veiligheidszaken; Judgment in Case C-601/15 PPU

migration crisis are compatible with human rights, and, overall, while not mentioning the current 'refugee crisis', the JN judgment is considered "an implied rebuff to those who would like to resort to extensive detention of asylum-seekers as a means to address that crisis".³⁷⁹

Whether the restriction of movement of asylum seekers can be qualified as detention has been contested in the past particularly in the context of transit zones at airports³⁸⁰, in addition to the practice of some EU MS to restrict the movement of asylum seekers at a specific part in their territory or district.³⁸¹ The restriction of movement in the context of initial reception gains importance in the context of the established hotspots (see above) in Greece and Italy. In both countries the hotspots lacked a legal basis, despite being partially operational since October 2015.³⁸² The respective legal amendments and the introduction of Standard Operating Procedures were still in the process of adoption by the end of March 2016.³⁸³ As indicated above, the hotspots are implemented at the sites of former reception facilities. However, NGOs in Italy denounced "hotspot" facilities such as Pozzallo for confining people to a state of detention and preventing them from exiting the centre while the hotspots in Greece are being modelled based on the First Reception Centre of Evros, which – contrary to its title – hosts migrants and asylum seekers in a state of detention.³⁸⁴

With the agreement between the EU and Turkey³⁸⁵ to stem the large-scale arrival of refugees in Greece entering into force on 20th of March, migrants and asylum seekers arriving after that date became subject of the new return policy. According to UNHCR the hotspots in Lesbos became mandatory detention facilities under the new provisions, which is why UNHCR suspended some of its activities at the closed centres in Lesbos.³⁸⁶ The hotspot Moria in Lesbos, in fact resembles a detention facility: extensive barbed wire fences covers the outside walls, and it is heavily guarded. Freedom of movement is restricted at the hotspots, access to a fair and efficient asylum procedure, including legal assistance and information is not guaranteed.³⁸⁷

Child specific challenges

Although the Reception Conditions Directive contained a range of improvements for the reception of asylum seeking children, there are more safeguards focussed on the situation of unaccompanied children rather than children within families (e.g. information and support for children and restrictions on detention of children). Frequently, EU reception provisions concerning children are expressed in general terms, and have proved challenging to implement without further guidance (e.g. provisions concerning tracing of families). There has often been inadequate provisions made by Member States for the services needed to properly implement these provisions (for example, interpretation services during physical

³⁷⁹ Peers, S. (2016b): 'Detention of asylum-seekers: the first CJEU judgment', EU Law Analysis, available at: <http://eulawanalysis.blogspot.co.at/2016/03/detention-of-asylum-seekers-first-cjeu.html>.

³⁸⁰ AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 12 accessed at http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_wrong_counts_and_closing_doors.pdf on 31.03.2016

³⁸¹ <http://www.zeit.de/politik/deutschland/2016-02/fluechtlinge-asylbewerber-residenzpflicht-bamf>

³⁸² European Council (Press Release of 18 March 2016): EU-Turkey statement, 18 March 2016, accessed at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> on 31.03.2016.

³⁸³ See ANNEX 3 and 4 to the Communication from the Commission to the European Parliament, the European Council and the Council - First report on relocation and resettlement - Annex III: Greece – State of Play Report and Annex IV: Italy – State of Play Report COM(2016) 165 final

³⁸⁴ AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, p 12 and 13; accessed at http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_wrong_counts_and_closing_doors.pdf on 31.03.2016

³⁸⁵ EU-Turkey statement, 18 March 2016 at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> accessed on 29.03.2016

³⁸⁶ UNHCR (2016) redefines role in Greece as EU-Turkey deal comes into effect - Briefing Notes, 22 March 2016 accessed at <http://www.unhcr.org/56f10d049.html> on 31.03.2016

³⁸⁷ EL/N/3, Athens, March 2016.

and mental health assessments, specialised services for addressing the needs of traumatised youngsters). Although guidance on certain priority issues is emerging from the EU agencies,³⁸⁸ further support for implementation at the national level could be significantly enhanced, through further exchange of national practices on best interests' assessments, including for children within families and enhanced capacity building of all actors (including guardians) who come into contact with children.

Prevention and responses to disappearances of unaccompanied children from state care are not specifically addressed in the EU provisions; yet there is a clear role for the EU to ensure that multi-disciplinary and inter-agency procedures are in place both at national and cross-border levels. There is a need to enhance possibilities for family based care for unaccompanied children, through tailored foster family programmes.

There is no harmonised procedure for addressing the situation of children who are "ageing-out" of the system, or turning 18, a moment when a sudden shift in the provision of support and assistance contributes to the young person being placed in vulnerable situations and potentially disappearing.³⁸⁹

In the face of recent large scale arrivals, there is evidence in some countries, including along the route through Greece and Macedonia, of a lack of suitable reception conditions for families with children, and children separated from their families.³⁹⁰ Disappearances of unaccompanied children from state care have been widely reported.³⁹¹ Systems of direct provision for families and stakeholders may significantly jeopardise family life and child development – something that has been vigorously argued by some stakeholders.³⁹²

3.2.1.3. Proposed Reform of the recast Reception Conditions Directive

The EC Communication towards a reform of the CEAS and enhancing legal avenues identified among others the different treatment of asylum applicants as allowed by the Reception Conditions Directive as a weakness of the system, causing secondary movements.³⁹³

Differently than then with the Qualification and Asylum Procedures Directive, the EC does not propose a replacement by a regulation but changes to the directive itself. The EC is less specific on its intentions regarding the Reception Conditions Directive, but has asked EASO to develop standards and guidance for the reception system of the MS, which shall in the future serve as benchmarks to facilitate monitoring.

³⁸⁸ For example, FRA's handbook on guardianship and EASO's materials on assessment of the special needs of vulnerable groups.

³⁸⁹ UNHCR, Unaccompanied and Separated Asylum-seeking and Refugee Children Turning Eighteen: What to Celebrate? March 2014, <http://www.refworld.org/docid/53281a864.html>

³⁹⁰ AIDA (2016): Wrong counts and closing doors - The reception of refugees and asylum seekers in Europe, pp. 35-37; UNHCR (2016b): Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis - Greece and the former Yugoslav Republic of Macedonia, 20 January, available at: <http://www.refworld.org/docid/56a078cf4.html>.

³⁹¹ The Guardian (2016): "10,000 refugee children are missing, says Europol" from 30 January 2016 at <http://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees>.

³⁹² For example, see O'Reilly, E (2013): Dealing with Asylum Seekers: Why Have We Gone Wrong? Lead article in the Summer 2013 edition of Studies Magazine, vol.102, no.406 - 31 July 2013 <https://www.ombudsman.gov.ie/en/News/Speeches-Articles/2013/Asylum-Seekers-Wrong.html>

³⁹³ Communication from the Commission to the European Parliament and the Council – Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, Brussels 6.4.2016, COM(2016) 197 final, p. 11.

PART IV: CONCLUSIONS & RECOMMENDATIONS

1. IS THE CEAS WORKING?

CEAS in the framework of overall EU migration management

An assessment of the functioning of the Common European Asylum System cannot be done independently from an overall view of EU migration policy. Flaws in the asylum system are deeply rooted in a restrictive migration system that is designed to strictly control and limit migratory flows. The only remaining path left open for non-EU citizens to access the EU is often the asylum channel, which, due to international obligations, must allow persons who face persecution to submit an asylum claim. Eminent flaws and gaps in broader migration policy are at the expense of the asylum system, and ultimately, the persons who are forced to leave their country of origin in search for protection and a dignified way of living abroad.

With the asylum channel being almost the only way to gain access to Europe, migration control and management to the EU has *de facto* been transferred to the EU's protection system. The CEAS has come under increasing criticism due to its complexity, slow pace and malfunctioning, but one of the reasons for its underperformance and absence of efficient and fast procedures is the fact that the CEAS needs to cater for overall migration management in the absence of a system for legal migration.

While the CEAS in many parts requires renovation, the overall EU migration management is even more in need of fundamental reform to address current migration challenges in a more comprehensive way, for example, by streamlining the currently scattered EU legal framework.³⁹⁴

Access to protection

One of the most fundamental flaws in the global international protection regime is the way in which refugees are supposed to access it. The Geneva Refugee Convention is silent about how to access protection. The CEAS is slightly more precise, albeit only with respect to the application of the Asylum Procedures Directive, which, according to its Art 3, shall apply to all applications for international protection made in the territory, including at the border, territorial waters or transit zones, while it shall not apply to requests at diplomatic representations abroad. However, it does not prevent Member States providing the possibility to apply for asylum from overseas. A number of EU Member States, such as Austria, Denmark, the Netherlands and Spain, offered in the past the possibility to apply for international protection at their embassies. Switzerland was the last country abolishing this opportunity in 2010. Other Member States provide entry visas for international protection reasons on an *ad hoc* basis, as it has been the case recently for Belgium and France. However, the reality is that, for the vast majority of refugees, the only realistic option to access the EU in a safe and legal manner is resettlement, which is a protection tool for mainly vulnerable groups facilitated mostly by UNHCR. Other programmes such as the Humanitarian Admission Programmes or humanitarian evacuation programmes have similar features as the resettlement scheme. However, EU MS were all but generous in the past when offering resettlement places. Resettlement is also based on a rather detailed, thus time-consuming, selection process.

³⁹⁴ I.e.: Blue Card Directive (2009/50/EC), Family Reunification Directive (2003/86/EC), Long Term Residence Directive (2003/109/EC), Single Permit Directive (2011/98/EU), Researchers Directive (2005/71/EC), Students Directive (2004/114/EC), Seasonal Workers Directive (Directive 2014/36/EU), Visa Code (Regulation (EC) No 810/2009), Schengen Acquis, Return Directive (2008/115/EC), etc..

Resettlement is based on voluntary participation by Member States. So far only few EU MS developed a resettlement tradition and the overall numbers pledged remained low. The recently agreed upon EU Resettlement Scheme of 22,504 places is almost symbolic in light of the global resettlement needs, but is certainly a step in the right direction as it aims to involve all EU MS and associated countries and offers a safe passage to protection for those in need. However, implementation of the scheme in practice remains very disappointing. As of 13 May 2016 only 6,321 persons were resettled to 16 countries, of which 4 were Schengen Associated States.³⁹⁵ Moreover, some EU Member States pledged their entire pre-existing national resettlement quota under the 20 July 2015 Council Conclusions, while others pledged part of their pre-existing quota under the scheme.

The EC Communication towards a reform of the CEAS and enhancing legal avenues to Europe promises to build on the existing initiatives and to set out a proposal framing the EU's policy on resettlement, with the over-arching objective of ensuring that the Union takes on its fair share of the global responsibility to provide safe haven for the world's refugees.³⁹⁶ It remains to be seen whether this policy really will live up to "enable the EU to lead by example and to provide visible and concrete expression of European solidarity towards the international community"³⁹⁷ and how it will address the essentially voluntary nature of resettlement commitments of Member States in an EU context so far.

Determination of the responsibility for asylum claims

In the absence of legal channels to reach the EU for the purpose of submitting an asylum claim and in the absence of durable solutions for asylum seekers in the region, many asylum seekers are forced to undertake perilous journeys to reach the EU. While most commentators are of the opinion that for refugees, a free choice of which host country to select for protection cannot be based on the Refugee Convention, many argue, at the same time, that no blanket obligation for refugees to seek protection in a specific country or the first country where they arrive, can be derived from the Refugee Convention either.

The uneven distribution of asylum applicants across EU Member States has only increased, despite 15 years of harmonisation of asylum policies at EU level. In the absence of an EU-wide asylum system, the Dublin system makes (as a default criteria if other criteria do not apply in a specific case) the first country of entry responsible for processing a claim and providing reception to asylum seekers. To make the system work, coercion has been used to prevent secondary movements to other EU Member States, however with limited success. Ultimately, coercive measures to prevent free choice and to address secondary movements lead to the biggest criticism, as it turns out to be ineffective, expensive, time consuming and results in human rights violations – thus a burden for all.

There are a number of factors which make some Member States more attractive for asylum seekers than others. The asylum policy of a country may constitute a pull factor or a deterrence factor, but ultimately stronger pull factors such as family and social ties, language skills, pre-existing past relations with a country and job opportunities are decisive for asylum seekers. Therefore, an asylum policy that aims to address secondary movements in a sustainable way needs to take such priorities of asylum seekers into account.

³⁹⁵ European Commission: ANNEX 3 to the Communication from the Commission to the European Parliament, the European Council and the Council - third report on relocation and resettlement; COM(2016) 360 final; at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160518/communication_third_report_on_relocation_and_resettlement_annex_3_en.pdf on 25.04.2016.

³⁹⁶ Communication from the Commission to the European Parliament and the Council – Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, Brussels 6.4.2016, COM(2016) 197 final, p. 16.

³⁹⁷ Ibid.

Asylum Procedure

Without any doubt, the most complex task is the harmonisation of procedural standards, bringing together the great variety of legal traditions of individual Member States. It is not surprising that the recast Asylum Procedures Directive leaves wide discretion and captures basically all possible variations of procedural particularities of the different countries. As a result, the Asylum Procedures Directive developed into a complex legal instrument, difficult to understand and even more difficult to implement. Ultimately the utilised instrument of the Directive to establish minimum and later common standards provided a first path of harmonisation but it did not achieve the goal of developing a "common asylum procedure" which would be applied in all 28 EU MS in the same manner. The ways to solve this issue are, however, rather limited: 1) the Commission could further invest, with the support of EASO, into permanent monitoring of the implementation of the Directive, thereby lobbying for adaptations that would result in further harmonisation; 2) the Asylum Procedures Directive could be transformed into an "asylum procedures regulation" describing a single asylum procedure applicable in all EU MS; or 3) an EU Asylum agency could be given the authority to make individual decisions on asylum applications, thereby conferring responsibility for the asylum determination from the national level to an EU wide specialised agency.

Determination of asylum claims

The legal basis for the determination of asylum claims bears much room for interpretation. Different recognition rates and the unequal use of refugee protection versus subsidiary protection are challenges that require further harmonisation but are broadly being tackled by joint EASO trainings, exchange of COI among EU MS and other forms of practical cooperation. However, it is very unlikely that complete harmonisation and convergence of decision-making on asylum applications in 28 EU Member States will ever be possible. The question is rather what level of harmonisation of individual decision-making is required within the Common European Asylum System.

The discretion vested in the Qualification Directive, however, has recently been used by EU MS to reduce their attractiveness for asylum seekers, by introducing restrictions in the duration of residence permits for beneficiaries of international protection (with different durations for refugee status and subsidiary protection status). A similar trend is now emerging with restrictions on the waiting periods for family reunification. The given discretion evidently leads to a race to the bottom.

Another shortcoming of the CEAS is the absence of mutual recognition of positive asylum decisions and transfer of protection from one MS to another, whereas this would be a way to achieve the establishment of a uniform status valid throughout the Union as required in Article 78(2) TFEU. In the past, several scholars advocated for limiting the "waiting" period to obtain long term residence status in the country that granted international protection, which allows the individual concerned to take up residence in another EU Member State under certain conditions, or for a general mutual recognition of asylum decisions and transfer of protection.

Reception

A very difficult field of harmonisation is the provision of reception conditions for asylum seekers. Standards set in EU law are unable to alleviate the economic differences between EU MS, which eventually means that perspectives in some EU Member States remain better than in others. However, as evidenced in the study, the reception conditions and their application vary significantly in EU MS. The deficiencies are also to be found in poor contingency planning by EU MS, by not quickly adapting to increasing reception needs.

The shortcomings in the EU reception conditions consequently and, as put by Carrera and Guild, ultimately undermine any proposed variation of the Dublin asylum system just as it undermined the Dublin system itself and will also constitute a serious practical impediment for the temporary relocation model to work.³⁹⁸

The discretion allowed by the Reception Conditions Directive is widely used by EU MS to make the country less attractive compared to others. Cuts in or restrictions of financial support and/or provision of material reception conditions are but one of many options for making a state appear unattractive for claiming asylum.

Integration

A field which almost completely remains outside the scope of the CEAS is the integration of beneficiaries of international protection. Once a person is recognised as being in need of international protection there is often very little support available, with particular difficulties in finding accommodation. As indicated by many of the interviewees, integration may exist and work in countries with a migration history, but it is basically non-existent in other countries. The EU legal framework does not address integration aside from financial support for integration programmes under the AMIF funding.

Child specific conclusions

With respect to children, despite improved safeguards in the CEAS and EU migration instruments and in particular the need to take their best interests as a primary consideration, implementation at Member State level needs considerable additional efforts to ensure that the individual circumstances, needs and rights of all children, as children first and foremost, are addressed. In particular, implementation should involve protection authorities in assessing the circumstances of children, both within Member States and across borders. Capacity building and training, as well as the availability of specialised reception, health and educational services for children, need to be boosted. Enhanced EU measures to reinforce cross border cooperation on key issues (such as family tracing, family reunification, responses to disappearances and best interests' assessments) are vital.

2. Is the CEAS fit for large scale arrivals?

In a letter addressed to Vice President Frans Timmermans and Commissioner Dimitris Avramopoulos, Angelino Alfano, the Minister of Interior of Italy and Thomas de Maizière, the Federal Minister of Interior of Germany, requested a re-think of the Dublin System and the CEAS as a whole; arguing in particular that the CEAS is not designed for large scale migration.³⁹⁹ In fact the CEAS particularly showed deficiencies once the numbers of asylum seekers and migrants arriving in the EU increased. The deficiencies became apparent in the application of the Dublin system and were exacerbated in the context of increasing numbers entering the EU almost entirely through two countries at the EU external border (being Greece and Italy, with significant pressure also witnessed on Hungary, Croatia and Slovenia).

In addition, European political leaders did not trigger the only available instrument that had been specifically designed to respond to such cases of mass influx. The Temporary Protection Directive would have allowed the provision of *prima facie* temporary protection to – for example – Syrian refugees, thereby avoiding a full individual examination in the context of normal asylum procedures and could have contributed to avoiding the increasing backlog of

³⁹⁸ Carrera, S. & Guild, E. (2015): 'Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU', *CEPS Policy Brief*, No. 334, p. 2, October, available at: <https://www.ceps.eu/system/files/PB334%20RefugeeRelocationProgramme.pdf>.

³⁹⁹ Joint letter by Ministers Alfano and de Maizière and a German-Italian non-paper on "Save Schengen/Beyond Dublin" accessed at: <http://data.consilium.europa.eu/doc/document/ST-6797-2016-INIT/en/pdf> on 15.03.2016.

pending asylum cases towards the end of 2015. Coupled with a relocation system it could have potentially made a difference on the necessary resources and, additionally, would have provided a more fair distribution among EU MS. Admittedly the Temporary Protection Directive may have required some adaptations as well, but the legal basis would have been present. Evidently, there is a lack of trust in this instrument which *per se* makes it unfit.

Most countries observed the developments of the migratory flows. Some interviews confirmed that while the scale of the flows had been expected, the routes and the means of arrivals had been underestimated. This statement seems to be true for EU MS as well as EU stakeholders. The European Agenda on Migration, which first fully concentrated on the Mediterranean within 3 months, needed to completely shift the attention towards the Western Balkan Route, one that had been long neglected. Early warning systems as introduced into the Dublin III Regulation did not work sufficiently and were never applied in practice.

Contingency planning and adaptation of resources in EU MS consequently lagged behind. Thorough planning of resources is a crucial element for the comprehensive implementation of the Common European Asylum System and more so for an effective response to large scale arrivals. Again, a system that is based on solidarity, attributing quotas to EU MS, would provide a concrete indication of the number of asylum seekers every Member State is expected to host and would allow for better planning of human resources and reception capacity by each Member State.

From 2015 up until now, the uncontrolled entry of large numbers of asylum seekers and migrants illustrated that the CEAS, as currently designed and implemented, is not fit to address large scale arrivals. The structural deficiencies of the system and lack of preparedness resulted in a number of *ad hoc* established response mechanisms such as the emergency relocation scheme, the hotspots approach, EU resettlement schemes and ultimately resulted in a controversial agreement between EU leaders and Turkey that is raising numerous legal concerns and has been labelled as morally questionable by certain stakeholders. While it is too early to evaluate all the measures introduced, a first snapshot showed that the high pressure on re-gaining control of the asylum and migration flows results in highly questionable practices denying people in search/need of protection effective access to fundamental rights, including the right to asylum (e.g. dividing arriving migrants at hotspots solely based upon the country of origin).⁴⁰⁰

The European Agenda on Migration has been tabled to effectively respond to the tragic loss of lives at sea of approximately 800 migrants in the Mediterranean on 19 April 2015. One year later, following the closure of the Western Balkan Route and the agreement between the EU and Turkey to effectively close the route via the Aegean, new, more dangerous and expensive routes which will ultimately lead to further losses of lives⁴⁰¹ are already being explored by migrants and smugglers.

3. Recommendations

Policy making

- 1) In the **external dimension**, the European Parliament should closely monitor the EU's global obligation to base measures and agreements with third countries in the field of international protection on credible **responsibility sharing mechanisms**. This should

⁴⁰⁰ D'Angelo, A. (2016): 'Migrant crisis? The Italian hotspot approach is not a solution, but it has been politically effective', Middlesex Minds, 26 February, available at: <http://mdxminds.com/2016/02/26/migrant-crisis-the-italian-hotspot-approach-is-not-a-solution-but-its-politically-effective/>.

⁴⁰¹ See Reuters: Up to 500 migrants may have drowned in Mediterranean tragedy at: <http://reut.rs/1U6EYwZ>. See also UNHCR: Massive loss of life reported in latest Mediterranean tragedy News Stories, 20 April 2016 at <http://www.unhcr.org/57178bcf6.html>.

be conditional on **compliance with international refugee and human rights law and promote compliance with higher protection standards in the EU asylum acquis as benchmarks.**

- 2) **Regarding the internal dimension of the EU's asylum policy**, the European Parliament should urge the Commission to ensure that all proposals on the reform of the Common European Asylum System are in full compliance with a full and inclusive interpretation of the 1951 Refugee Convention, the 1967 Protocol and other relevant human rights treaties, and the EU Charter of Fundamental Rights, in particular the right to asylum.
- 3) The European Parliament should support the European Commission's Communication towards a reform of the CEAS and enhancing legal avenues to Europe (COM(2016) 197 final) regarding the development of "a smarter and well-managed legal migration policy." Care should be taken to address the reforms in this area independently from repairing the deficiencies of the Common European Asylum System.
- 4) The European Commission responded to the increase of arrivals of asylum seekers, refugees and migrants in 2015 and 2016 by an avalanche of legislative proposals and ad hoc measures. This was often done without waiting for their full implementation and on the basis of often partial assessments of the impact of the recently adopted recast asylum legislation as deadlines for transposition had only expired less than one year ago. Consequently, the policy framework developed under the European Agenda on Migration consists of a mosaic of emergency-driven ad hoc legislation without a coherent vision on the long term. The European Parliament should closely **monitor the ongoing policy developments and undertake a thorough assessment of its shortcomings and achievements since the increase of flows in 2015.** In particular, the European Parliament should carefully assess the necessity and added value of upcoming Commission proposals to the objective of setting high standards of protection throughout the EU and foresee sufficient time for expert consultation.
- 5) Irrespective of the future scope and the detailed framework in which the CEAS will develop, the European Parliament should promote **a system that is flexible and well equipped to address large-scale influx** as well as regular and moderate influx.
- 6) **Child protection measures should be a cornerstone** of the EU migration agenda and an integral part of all EU policies and procedures in both emergencies and in regular situations.

Access to protection

- 7) The European Parliament, the European Commission and the Council should urgently explore ways to establish and enhance legal avenues to protection.

A number of proposals have already been tabled by various stakeholders and there are enough good practices to examine the lessons learned. In this respect, the European Parliament should continue to push for:

- significant **increase in resettlement capacities**, which will, as indicated in the EC Communication on the reform of the CEAS, enable the EU "to lead by example as well as provide visible and concrete expression of European solidarity towards the international community";
- exchange on good practices in resettlement (e.g. by assessing the **Canadian resettlement scheme**, which recently allowed the swift resettlement of 25,000 persons within a period of less than three months; and **private sponsorship**

programmes to identify effective *modus operandi* of transforming such examples into a good fit with the EU model);

- following alternative proposals for access to protection as indicated in earlier studies that suggest to **facilitate the wider use of family reunification, a more generous approach towards visa rules, further humanitarian evacuation programmes** or dedicating resources to assess legal and practical preconditions for **processing asylum claims in third countries**; and
 - a **joint umbrella** under which **global solidarity tools**, as summarised above, are combined for the sake of transparency and to better evaluate their impact on facilitating access to protection.
- 8) In the long term, the European Parliament should encourage the European Commission to develop legal admission schemes at hubs deployed close to crisis regions, acting as EU representations with the capacity to grant vulnerable persons safe access to the EU.
- 9) Safe and legal avenues should always be discussed and developed on the basis that they are without prejudice to the right to seek asylum in the territory of EU Member States and should never be seen as a substitute to Member States' international protection obligations vis-à-vis those arriving spontaneously in their territory.

Determination of the responsibility for asylum claims

On the EC's Proposal for the recast Dublin Regulation from 4 May 2016

- 10) The current proposal for the recast Dublin Regulation from 4 May 2016 only foresees that relocation is triggered once a country is disproportionately affected by an influx of asylum seekers defined by an influx of 150% compared to the reference key. As such the proposal institutionalizes a reactive emergency driven approach as opposed to a solidarity based and pro-active allocation that is applied from the beginning. The European Parliament should promote **the replacement of the Dublin System with a responsibility-allocation mechanism** that is governed by the principle of solidarity and fair sharing of responsibility.

On the mechanism to determine the responsibility for asylum applications

- 11) The European Parliament should argue for a mechanism for the distribution of asylum applications which should be based on:
- fair benchmarks in order to determine maximum processing and reception capacities of EU MS;
 - **fine-tune** the design of the **distribution key** by rethinking the weight given to unemployment rates and the number of asylum applications received in the past. The current proposal for a recast of the Dublin Regulation from 4 May 2016 is based on two criteria, the population size and the GDP, both weighted at 50%, which seems sufficient;
 - a **mix of solidarity measures** (including physical relocation, financial compensation, sharing of procedural steps such as registration, reception, return, etc.) that allows EU MS to better act in solidarity. The financial solidarity mechanism currently proposed in the recast Dublin Regulation from 4 May 2016 (250.000 EUR per applicant) seems unrealistic and will rather lead to refusing the whole distribution mechanism as such;
 - **positive incentives for EU MS** to act in solidarity (e.g. through better linking structural funds with relocation efforts).

On secondary movements

12) Regarding measures to prevent secondary movement, the European Parliament should encourage the European Commission to develop policies that allow **positive incentives for asylum applicants to refrain from secondary movements** such as:

- taking the **asylum seekers preference** into account (e.g. family and social ties, language skills, pre-existing relations with a country, matching of skills versus job opportunities, etc.) while at the same time striving to keep relocation processes as swift as possible;
- **better inform** the applicants of international protection on the relocation procedure;
- providing asylum seekers a **limited choice of relocation countries** (e.g. a choice of three possible countries for relocation);
- providing **positive incentives** for asylum seekers to remain in the allocated country (e.g. integration measures that allow the asylum seeker to realistically adapt to the country's culture);
- providing beneficiaries of international protection with **perspectives for inter-EU mobility** (e.g. mutual recognition of positive decisions or lowering the threshold for obtaining long term residence status).
- On the other hand, the European Commission's (see: European Commission's Communication towards a reform of the CEAS and enhancing legal avenues to Europe (COM(2016) 197 final)) proposed link between a belated lodging of an asylum claim (i.e. if the application is not lodged "as soon as possible once the asylum seeker has an effective opportunity") and the credibility assessment or between secondary movement and the application of accelerated procedures or non-suspensive appeals should be clearly rejected as these factors are as such unrelated to a person's need for international protection and should never justify reduced safeguards to protect asylum seekers from refoulement.

On the EC's Proposal for the recast EURODAC Regulation from 4 May 2016

13) The European Parliament should critically review the Commission's proposal for a recast EURODAC Regulation from 4 May 2016 and particularly **question the proportionality and necessity of another extension of the personal and material scope of the Regulation** and their compatibility with the **key data protection principle of purpose limitation**; the need for lowering the age for taking fingerprints from 14 to 6 years and the ever increasing authorities being granted access to the data base.

On emergency relocation

14) The European Parliament should encourage the European Commission to closely **monitor** the implementation of the **emergency relocation mechanism** introduced under the two Council Decisions from September 2015, by specifically taking into account the **replacement of the recognition threshold** (75%) by an initial assessment of the claim. All founded applications should be open for relocation, while unfounded applications (e.g. safe country of origin) should be denied relocation.

On hotspots

15) Following the first months of practical experiences of running the **hotspots** in Greece and Italy and in light of the serious human rights concerns raised by inter alia UNHCR regarding the conditions and procedures carried out in the hotspots, the European Parliament should conduct an analysis and evaluation of the hotspots in order to:

- create more **clarity of the functioning of the hotspots**, its legal qualifications and its relation to other instruments of the CEAS such as the Asylum Procedures Directive and the Reception Conditions Directive;
- closely **monitor the screening processes at hotspots** to swiftly take measures to prevent refoulement and guarantee the right to asylum;
- closely **monitor** the treatment of vulnerable applicants with **special needs**, including unaccompanied children, and insist on the exemption of such persons from procedures in the hotspots in accordance with international and EU standards. As they can be converted into a detention regime, as in the case of Greece, the conditions and design of the hotspots are not suitable to process applications of vulnerable applicants with special needs. Adequate support to ensure that they can meet the applicant's rights and comply with their obligations under the recast EU asylum acquis cannot be guaranteed;
- closely monitor that the **best interests of the child** are thoroughly addressed during the screening and relocation of children.

16) Following the review of the hotspots and the lessons learned, the European Parliament should adapt the hotspot approach to bring it in line with the asylum acquis and international humanitarian standards, particularly paying attention to safeguards to prevent refoulement and arbitrary decisions based on a misperception of the 75% recognition threshold vis a vis the safe country of origin concept.

17) The concept of the hotspots, i.e. supporting frontline states in initial screening processes, could gradually be extended to countries that face specific pressure of influx, provided that full compliance with fundamental rights obligations can be respected in practice and that it is not framed as a detention regime. An understanding of hotspot as a concept rather than a location where the screening processes are conducted is, however, a precondition for such a flexible tool.

Asylum Determination

18) The European Parliament should carefully assess the pros and cons and the legal feasibility under the current EU Treaties of the European Commission plans to reinforce the role of EASO into a European Asylum Agency with a responsibility of individual decision-making. In particular the possibility of the gradual extension of EASO's mandate should be considered:

- In the **short term**, the EASO mandate should focus on its role of policy implementation and its strengthened operational role as anticipated by the Commission's reform proposal and implemented in the Commission proposal of 4 May 2016 for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010. The Agency however must be equipped with sufficient staff and a reserve pool of asylum experts following the model of the proposed European border and coast guard.
- In the **medium term**, EASO's mandate should be extended to conduct screening functions of asylum applicants, designed to assess and decide on the eligibility of asylum applicants for relocation (based on a permanent EU relocation system).
- In the **long term**, the European Asylum Agency should gradually take responsibility for processing asylum claims in one single asylum procedure, ensuring a full application of the Refugee Convention and European human rights standards. The European Asylum Agency should have the competence to grant international protection status to applicants, mutually recognised throughout all EU MS.

- 19) *In the short term, the European Parliament should encourage the European Commission, with the support of EASO, to strengthen the quality and capacity of **monitoring the correct and timely implementation** of the asylum acquis.*
- 20) *The envisaged strengthening of the harmonisation of CEAS instruments as proposed in the Commission reform communication of 6 April 2016 to transfer **the Asylum Procedures Directive and the Qualification Directive into Regulations** (COM (2016) 197 final) is a promising way forward to achieve a high degree of harmonisation of an EU asylum system. Caution shall be given that the establishment of the Asylum Procedure Regulation and the Qualification Regulation are in full compliance with high protection standards, including specific safeguards for vulnerable asylum seekers.*
- 21) *The European Parliament should promote the development of **procedures to assess and determine the best interests of children**, based on multi-disciplinary and inter-agency processes (involving both national and EU actors). The best interests should be at the heart of individual assessments to ensure appropriate reception and services to children. A formal best interests' procedure should inform key decisions concerning both children within families and children separated from their families, including decisions on the transfer of children under Dublin, relocation within the EU or establishing a durable solution in their best interests within the EU or in a third country.*
- 22) *The European Parliament **should promote a unified status for both refugee status and beneficiaries of subsidiary protection**. The current plans of the European Commission outlined in the European Commission's reform Communication (COM(2016) 197 final) propose to "better clarify the difference between refugee status and subsidiary protection status and differentiate the respective rights attached to them". This differentiation will ultimately only lead to extended procedures (appeals against the less generous status) and to further discretion given to EU MS, creating a race to the bottom between Member States in order to deter asylum seekers from choosing one country over the other.*
- 23) *The European Parliament should support the European Commission's suggestion outlined in the European Commission's reform Communication (COM(2016) 197 final) to develop **mutual recognition of the protection granted in different Member States** and clearly define its legal implications with the ambition of harmonisation of rights and obligations of beneficiaries of international protection.*
- 24) *The European Parliament should further **analyse why the Temporary Protection Directive was not perceived as appropriate to respond to the crisis** and whether such an instrument should be adapted or further maintained at all, considering it proved irrelevant and was completely ignored in a situation for which it was primarily adopted.*
- 25) *The European Parliament should encourage the Commission to take all measures to monitor the **compliance of the emergency measures** (relocation processes and hotspots) **with the Asylum Procedures Directive**.*

Reception & Integration

- 26) *The European Parliament should promote the investment of considerable financial resources in the establishment of resilient reception systems in all EU Member States in the area of reception conditions and procedural guarantees including legal assistance.*
- 27) *The European Parliament should promote the development and impose contingency planning on all EU Member States in order to enable asylum systems to more efficiently anticipate fluctuations in the number of asylum seekers arriving.*

- 28) *The European Parliament should promote more structural exchange among EU MS in setting standards and the development of tools for the reception of asylum applicants (e.g. to exchange experiences regarding sharing of reception places between EU MS that face a lack of accommodation places and EU MS with capacity).*
- 29) *The European Parliament should encourage the European Commission to take all measures to ensure that emergency measures do not – in the long run – lower reception standards in EU MS.*
- 30) *Alternatives to detention which respect international human rights standards should be put in place accompanied by robust case management through appointment of representatives/guardians to avoid the detention of unaccompanied children and children in families.*
- 31) *The European Parliament should urge the European Commission to prioritise, in its projects under AMIF, projects that are focused on the long term and address the circumstances of applicants with specific needs. The key focus should be on unaccompanied children, providing support to facilitate guardianship systems.*
- 32) *The European Parliament should encourage the European Commission and the Council to take legislative measures for the integration of beneficiaries of international protection, thereby taking into account that;*
- *Integration measures are already available during the asylum procedure;*
 - *EU MS develop common standards for the integration of beneficiaries of international protection; and*
 - *EU MS are provided with guidance on how to establish integration measures.*

Child related recommendations

A comprehensive approach to assessing and determining the best interests of children in hotspots would need to be developed and implemented by all actors concerned (both national and EU actors). Additionally, necessary support from child protection experts should be provided to ensure that decisions to transfer children under Dublin, to relocate them within the EU or to implement a durable solution in their best interests elsewhere (e.g. in a first country of asylum or through voluntary return where they could reunite with their family) would be in their best interests.

- 33) *In light of the high numbers of children arriving in Europe, the European Parliament should promote:*
- *a comprehensive approach at EU level for ensuring that the needs and rights of all migrant children are specifically identified and addressed. This should be guided by the UN Convention on the Rights of the Child, the Fundamental Rights Charter, the safeguards in EU instruments and the principles contained in the Commission Reflection Paper on integrated child protection systems;*
 - *significantly enhanced EU mechanisms for transnational cooperation between Member States, and between Member States and third countries. These mechanisms should include the involvement of child protection professionals in matters such as Dublin transfers, family tracing, family reunification, obtaining child specific information on countries of origin, responding to disappearances and preventing and responding to trafficking and exploitation and return and reintegration where this is the child's best interest after assessment of their individual circumstances. Furthermore, it is worth exploring the establishment of an EU child protection agency to deal with cross border situations;*

- *Robust EU measures to prevent and respond to trafficking and exploitation of children, that prevent and respond to disappearances of unaccompanied children in care, and to avoid detention of children.*

CEAS in the framework of overall EU migration management

34) *The European Parliament should encourage the European Commission to come up with a **credible and courageous "new model of legal migration"** indicated in the Communication towards a Reform of the Common European Asylum System and enhancing the legal avenues to Europe (COM(2016) 197 final).*

- a) The proposal shall be credible for third countries under the Mobility Partnership, offering legal avenues for mobility; for potential labour migrants, offering legal avenues to seek employment; and for third country nationals seeking education.*
- b) The proposal shall be courageous enough to offer a real prospect of legal migration to Europe by offering legal avenues, for example, through lottery migration avenues similar to the US model.*

Asylum data

As data on asylum applications are used in the public discussion in EU MS as well as for EU policy decision making (e.g. when deciding on the relocation or when establishing distribution quotas) it is indispensable to have reliable and recent data available.

35) *The European Parliament should urge the European Commission to:*

- ***improve timeliness and accuracy** of asylum data submitted to Eurostat in order to allow a solid and evidence-based policy development in migration and asylum;*
- *ensure a **careful interpretation of the data** on asylum applications provided by Eurostat as to how these statistics depict the actual reception needs of the MS. This critical interpretation of the available statistics is of particular importance when they serve as instruments for determining or triggering policies (e.g. emergency relocation, corrective allocation mechanism, distribution quota);*
- *request detailed and up-to-date information from Member States on the number of applicants for international protection detained, the reasons for detention and its duration, and detailed information on the detention of vulnerable applicants;*
- *explore developing **new indicators** more suitable to assess de-facto reception needs in MS. Data on asylum applications do not necessarily depict reception needs, as they do not always correspond to the number of persons being accommodated or awaiting a decision;*
- *transparently **separate statistics** on the fulfilment of EU-guided resettlement or relocation quotas from statistics on the progress of other previous resettlement schemes. Previous efforts of several MS in the area of resettlement can be considered for quota determination; however the inclusion of past programmes in the counting of places provided through the EU resettlement scheme will de facto lower the targeted number of 20,000 places that was initially envisaged additional to any other programmes in place;*
- *promote the compilation of both quantitative and qualitative data on the **situation of children** to ensure their visibility at all moments in the migration chain, impact assessments of any new EU measures on children, regular review and monitoring of national and EU actions to evaluate the impact and efficacy of child rights safeguards, the commitment of adequate resources within the EU institutions and agencies to resource this work.*

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Note: all links provided were last accessed on 27 April 2016.

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BG/N/1: Interview with a representative of Bulgarian Helsinki Committee on 18.03.2016.

Germany

DE/A/1: Interview with representative of University of Osnabrück on 18.03.2016.

DE/G/1: Written answer to the questionnaire from governmental representative from the Federal Office for Migration and refugees received on 04.04.2016.

DE/N/1: Interview with a representative from a non-governmental organisation offering legal counselling for asylum seekers on 23.03.2016.

Greece (The interviews took place between 2nd and 28th March 2016.)

EL/G/1: Interview with representative of the Asylum Service, Athens Greece

EL/G/2: Interview with representative of the First Reception Service, Athens Greece

EL/N/1: Interview with representative of Medicine Sans Frontier, Athens Greece

EL/O/1: Interview with representative of UNHCR Athens, Greece

Hungary

HU/A/1: Interview with a representative of academia, Department of Constitutional Law, University of Szeged on 04.03.2016.

HU/N/1: Interview with a representative of Hungarian Helsinki Committee on 16.03.2016.

Italy

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IT/N/1: Interview with a representative of Italian Council for Refugees, on 15.03.2016.

Spain

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ISBN 978-92-823-9279-9 (paper)
ISBN 978-92-823-9280-5 (pdf)

doi: 10.2861/645528 (paper)
doi: 10.2861/87224 (pdf)