

## Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis



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## GLOSSARY

<b>Accelerated procedure</b>	Asylum procedure conducted in shorter time-frames and involving reduced procedural safeguards, including reduced time-limits for lodging appeals
<b>Acquis</b>	Accumulated legislation and jurisprudence constituting the body of European Union law
<b>Asylum seeker(s) or protection seeker(s) or applicant(s)</b>	Person(s) seeking international protection, whether recognition as a refugee, subsidiary protection beneficiary or other protection status
<b>Conseil d'Etat</b>	Council of State, the highest appellate administrative court in France
<b>Distribution key</b>	Arrangement for the distribution of applicants between countries according to respective reception capacity
<b>Dublin</b>	Dublin system establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application
<b>EU NAFVOR MED</b>	Common Security and Defence Policy operation for the identification and destruction of vessels used by smugglers in the Mediterranean Sea
<b>Mare Nostrum</b>	Maritime surveillance and search and rescue operation run by the Ministry of Interior of Italy
<b>MY Phoenix</b>	Joint MOAS-MSF search and rescue operation in the Mediterranean Sea
<b>Poseidon</b>	Maritime surveillance operation coordinated by Frontex and hosted by Greece
<b>Presidency trio</b>	Group of 3 successive Presidencies of the Council of the European Union
<b>Recognition rate</b>	Rate of positive asylum decisions, including refugee status, subsidiary protection status or other protection status
<b>Relocation</b>	Transfer of a person from one European Union Member State to another
<b>Resettlement</b>	Transfer of a person from a third country to a European Union Member State
<b>Quota</b>	Number of persons allocated to a country
<b>Safe country of origin</b>	Country of origin of an applicant whose nationals are not considered to be at risk of persecution or serious harm
<b>Safe third country</b>	Country of transit of an applicant which is considered as capable of offering him or her adequate protection against persecution or serious harm
<b>Triton</b>	Maritime surveillance operation coordinated by Frontex and hosted by Italy

## LIST OF ABBREVIATIONS

<b>AIDA</b>	Asylum Information Database
<b>AMIF</b>	Asylum, Migration and Integration Fund
<b>ASGI</b>	Association on Legal Studies on Immigration (Italy)
<b>BAMF</b>	Bundesamt für Migration und Flüchtlinge   Federal Office for Migration and Refugees (Germany)
<b>BCHR</b>	Belgrade Centre for Human Rights (Serbia)
<b>BFA</b>	Bundesamt für Fremdenwesen und Asyl   Federal Agency for Immigration and Asylum (Austria)
<b>CADA</b>	Centre d'accueil pour demandeurs d'asile   Reception centre for asylum seekers (France)
<b>CARA</b>	Centro di accoglienza per i richiedenti asilo   Reception centre for asylum seekers (Italy)
<b>CAS</b>	Centro di accoglienza straordinaria   Emergency reception centre (Italy)
<b>CBAR-BCHV</b>	Comité belge d'aide aux réfugiés   Belgisch Comité voor Hulp aan Vluchtelingen   Belgian Refugee Council
<b>CEAS</b>	Common European Asylum System
<b>Ceseda</b>	Code de l'entrée et du séjour des étrangers et du droit d'asile   Code on entry and residence of foreigners and asylum (France)
<b>CGRS</b>	Commissaire général aux réfugiés et aux apatrides   Commissariaat-generaal voor de vluchtelingen en de staatlozen   Commissioner-General for Refugees and Stateless Persons (Belgium)
<b>CIE</b>	Centro di identificazione ed espulsione   Centre of Identification and Expulsion (Italy)
<b>CJEU</b>	Court of Justice of the European Union
<b>CRMD</b>	Civil Registry and Migration Department (Cyprus)
<b>CSDP</b>	Common Security and Defence Policy
<b>DFT</b>	Detained fast-track procedure (United Kingdom)
<b>DGMM</b>	Directorate-General for Migration Management (Turkey)
<b>DG HOME</b>	European Commission Directorate-General for Home Affairs
<b>EASO</b>	European Asylum Support Office
<b>EAST</b>	Erstaufnahmestelle   Initial reception centre (Austria)
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ECRE</b>	European Council on Refugees and Exiles
<b>EDAL</b>	European Database of Asylum Law
<b>EMN</b>	European Migration Network
<b>EPIM</b>	European Programme for Integration and Migration
<b>EU</b>	European Union
<b>EU+</b>	European Union Member States plus Switzerland and Norway
<b>Eurodac</b>	European fingerprint database
<b>Eurojust</b>	European Union Judicial Coordination Unit
<b>Europol</b>	European Police Office
<b>Eurostat</b>	European Commission Directorate-General for Statistics
<b>EXCOM</b>	Executive Committee of the United Nations High Commissioner for Refugees
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>FRC</b>	First Reception Centre (Greece)
<b>Frontex</b>	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
<b>FYROM</b>	Former Yugoslav Republic of Macedonia
<b>GCR</b>	Greek Council for Refugees
<b>GDP</b>	Gross domestic product

<b>GISTI</b>	Groupe d'information et de soutien des immigrés (France)
<b>ICJ</b>	International Court of Justice
<b>ICMPD</b>	International Centre for Migration Policy Development
<b>ILC</b>	International Law Commission
<b>IND</b>	Immigration and Naturalisation Service (Netherlands)
<b>IRC</b>	International Rescue Committee
<b>ISF</b>	Internal Security Fund
<b>JRCC</b>	Joint Rescue Coordination Centre
<b>KISA</b>	Action for Equality, Support and Antiracism (Cyprus)
<b>LFIP</b>	Law on Foreigners and International Protection (Turkey)
<b>MedIn</b>	Medical Intervention (Greece)
<b>MENA</b>	Middle-East and North Africa
<b>MOAS</b>	Migrant Offshore Aid Station
<b>MRCC</b>	Maritime Rescue Coordination Centre
<b>MSF</b>	Médecins Sans Frontières
<b>MYLA</b>	Macedonian Young Lawyers' Association
<b>NGO(s)</b>	Non-governmental organisation(s)
<b>OFPPA</b>	Office français pour la protection des réfugiés et des apatrides   French Office for the Protection of Refugees and Stateless Persons
<b>OIN</b>	Office for Immigration and Nationality (Hungary)
<b>ORAC</b>	Office of the Refugee Applications Commissioner (Ireland)
<b>PD</b>	Presidential Decree (Greece)
<b>RAO</b>	Regional Asylum Office (Greece)
<b>RDPP</b>	Regional Development and Protection Programme
<b>RSD</b>	Refugee status determination
<b>SAR</b>	Search and rescue
<b>SEM</b>	State Secretariat for Migration (Switzerland)
<b>SPRAR</b>	Sistema di protezione per richiedenti asilo e rifugiati   System for the protection of asylum seekers and refugees (Italy)
<b>SSHD</b>	Secretary of State for the Home Department (United Kingdom)
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TPR</b>	Temporary Protection Regulation (Turkey)
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNHCR</b>	United Nations High Commissioner for Refugees

## THE AIDA PROJECT

Three years following its inception in 2012, the Asylum Information Database (AIDA) project has become a living, interactive source of knowledge on the situation of asylum in Europe. The project, coordinated by the European Council on Refugees and Exiles (ECRE) in partnership with Forum Réfugiés-Cosi, the Irish Refugee Council and the Hungarian Helsinki Committee, provides up-to-date information on asylum procedures, reception conditions and detention of asylum seekers in 16 European Union (EU) Member States (Austria, Belgium, Bulgaria, Cyprus, Germany, France, Greece, Croatia, Hungary, Ireland, Italy, Malta, the Netherlands, Poland, Sweden, the United Kingdom) and 2 non-EU countries (Switzerland, Turkey).

Throughout its development, AIDA has increasingly been used as a source of up-to-date and reliable evidence by academics, researchers, policymakers and legal practitioners and is increasingly being cited and invoked in national court proceedings relating to Dublin transfers of asylum seekers, as well as before the European Court of Human Rights (ECtHR).

As the AIDA project entered its third year, the need for a broader, holistic understanding of migration and refugee phenomena in Europe beyond the strict contours of the EU became increasingly apparent. At the same time, AIDA's activities have been expanded to further complement information gathering and contribute to the debate on asylum in Europe through the legal analysis of key aspects of EU asylum law and practice.

### *Mapping the boundaries of the EU's common policy on asylum: the geographical expansion*

On one hand, the peculiar nature of EU asylum and migration policies attracts a special and closer relationship between the Union and its Associated States – that is Switzerland, Norway, Liechtenstein and Iceland – which contrasts with other policy areas. These 'outsider' countries partake in the Schengen border-free area and are active operators of the Dublin system, thereby almost acquiring a status of quasi-membership in the Common European Asylum System.

**Switzerland** is arguably the starkest illustration of this relationship. The country has been at the heart of political and legal debates around the application of the Dublin Regulation,<sup>1</sup> that dominated the EU agenda during 2014-2015, not least in the light of the ECtHR's seminal ruling in *Tarakhel v Switzerland*,<sup>2</sup> which shed light on the necessary guarantees to be provided by receiving countries prior to an asylum seeker's Dublin transfer. At the same time, Switzerland actively takes part in EU-led protection initiatives developed in 2015: it has pledged to resettle 519 refugees as part of the EU resettlement scheme, and is expected to pledge in the relocation scheme designed under the draft Council Decision on provisional measures for Italy and Greece, discussed in detail in this report. The inclusion of Switzerland in AIDA therefore seems timely and ever-relevant to better understanding the development and impact of EU asylum policies beyond the 28 Member States.

On the other hand, the EU maintains different relations with other third countries in its immediate neighbourhood. The so-called external dimension of the Common European Asylum System mandates closer cooperation with such countries, in the effort of regulating migratory phenomena beyond the Union's borders, before persons manage to enter the territory of Member States.<sup>3</sup> The strategic relevance of the developments in **Turkey** for the EU's asylum and migration policy is clear from the EU's engagement with Turkey in the field of asylum, readmission and border control management.

The expansion of AIDA to Turkey aims to closely analyse the newly established international protection framework, which crystallises the itinerant character of EU asylum standards beyond Member States. Collecting evidence from the ground on the way this framework is applied in practice will be paramount to assessing the evolution of the protection regime in Turkey as a country of strategic importance in the asylum and migration debate in Europe. .

### *Complementing research and advocacy: the expansion of AIDA activities*

Alongside the inclusion of new countries in its scope of operation, AIDA has strived to engage in additional activities beyond the compilation of country reports, with a view to complementing its asylum research and providing

1. 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 stateless person (recast), OJ 2013 L180/31.
2. ECtHR, *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014.
3. European Commission, *European Agenda on Migration*, COM(2015) 240, 13 May 2015, 5.

more tools towards advocacy and policy. The diversity of activities carried out under the rubric of AIDA has aided ECRE and its members in developing hands-on involvement in research and quality advocacy. To date, this expansion has taken two forms in particular:

**AIDA fact-finding** visits were envisioned as a focused approach to addressing particular challenges relating to asylum in specific countries. Through the direct presence of ECRE and relevant partners in the countries concerned, these visits support the broader country information process by providing targeted research. The first fact-finding visit was conducted in December 2014 in **Greece** and focussed on the reception conditions in the First Reception Centre of Fylakio. A special report,<sup>4</sup> documenting the findings of the visit, has expressed concerns over the deprivation of liberty of persons transferred to the centre, which results de facto in a state of detention, as well as the lack of available places for vulnerable asylum seekers such as unaccompanied children. A second AIDA fact-finding visit in **Hungary** is planned in September–October 2015, driven by the recent unprecedented increase in arrivals of persons in need of international protection and the legislative and policy responses it has provoked.

**AIDA legal briefings** were conceived as a way of bridging AIDA research with evidence-based legal reasoning and advocacy. With the invaluable assistance of information gathered from AIDA country reports, these short papers identify and analyse key issues in EU asylum law and policy, in the aim of better informing policymakers, advocacy groups, as well as practitioners of potential protection gaps in the asylum acquis. The first legal briefing, published in June 2015, examined the legality of detention of asylum seekers under the Dublin Regulation,<sup>5</sup> arguing that an appropriate reading of Article 5 of the European Convention on Human Rights (ECHR) and the EU asylum acquis precludes the detention of applicants for international protection for the purpose of deportation to another Member State. The second legal briefing, published in August 2015, discusses key problems in the collection and provision of asylum statistics in the EU.<sup>6</sup>

4. ECRE, *What's in a name? The reality of First "Reception" at Evros: AIDA fact-finding visit in Greece*, February 2015, available at: <http://bit.ly/1GfXlzk>.
5. ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, AIDA Legal Briefing No 1, June 2015, available at: <http://bit.ly/1Jk1Ly1>.
6. ECRE, *Asylum Statistics in the European Union: A Need for Numbers*, AIDA Legal Briefing No 2, August 2015, available at: <http://bit.ly/1KPJIho>.



EUROPEAN PROGRAMME FOR INTEGRATION AND MIGRATION

The AIDA project is funded by the European Programme for Integration and Migration (EPIM), an initiative of the Network of European Foundations, by the Adessium Foundation and UNHCR. The content of the database is the sole responsibility of ECRE and the national experts drafting the country reports and do not necessarily reflect the views of EPIM, Adessium Foundation or UNHCR.

## INTRODUCTION

The end of 2014 and first half of 2015 has been a particularly tumultuous period for the migration and asylum policy of the EU. With ongoing refugee crises in Syria, Eritrea and other parts of the world, over 59.5 million people had been forcibly displaced by the end of 2014. While 86% of the world's refugees remain hosted in developing countries,<sup>7</sup> a number undoubtedly putting any European debate on asylum into perspective, the number of people entering Europe in search of protection has risen substantially in comparison to previous years. Coupled with countless tragic deaths of refugees and migrants attempting to cross the Mediterranean over 2014 and 2015, these developments have kept asylum and migration high on the Union's political agenda throughout this period. Hardly surprisingly, according to a recent Eurobarometer survey, EU citizens view immigration as the major challenge facing the Union.<sup>8</sup>

The aura of "high politics" around asylum and migration has translated into a series of laborious policy initiatives on the part of the EU, within only a year after the European Council's Strategic Guidelines had called Member States to focus on implementation of the long and painfully negotiated recast asylum *acquis*.<sup>9</sup> In May 2015, the European Commission issued its European Agenda on Migration, with the aim of reconceptualising migration policy for the coming years. Since then, a controversial military operation was launched in order to disrupt smuggling networks in the Mediterranean; political agreement was reached in the Council on a resettlement scheme for 20,000 refugees outside Europe and a relocation scheme for 40,000 persons in Italy and Greece; questionable common approaches to "safe country of origin" determinations and fingerprinting of migrants were endorsed by the Council; and an evaluation of the Dublin system was initiated by the Commission.

At the same time, as July 2015 marked the end of the transposition period for the remaining recast asylum Directives adopted in 2013, Member States' policy and legislative cycles have worked internally with equal pace. A number of legislative reforms were adopted with a view to bringing national laws in line with the second-phase asylum standards, ranging from extensive overhauls of asylum systems in some countries to minor and swift amendments in others, while a number of Member States have not complied with their obligations under EU law to date. Conversely, the unprecedented focus on asylum and migration issues, coupled with the increase in arrivals in several countries, has triggered a wide array of reactive national measures, aimed at restricting protection space and deterring migrants from entering or staying on their territory. On the other hand, against this backdrop have also emerged protective approaches in certain countries, as well as an unparalleled engagement by civil society to assist refugees arriving in Europe.

This Annual Report documents the main developments witnessed both at national and European level through an overview of practice in the 18 AIDA countries; for that purpose, this report also includes reference to relevant practice in Switzerland and Turkey. This is done bearing in mind a highly distinctive social and political context of increased attention on migrants and refugees, and even a sense of urgency regarding their predicament. This peculiar context can either bring Europe together, to design common solutions for what is undoubtedly a common protection challenge, or break apart even those European standards and achievements the Union deemed up until now unquestionable.

The Annual Report 2014/2015 focusses on the abovementioned developments in 3 chapters.

- A statistical overview of asylum applicants, recognition rates and analysis of the main variations between EU Member States and Schengen Associated States, as well as limited data with regard to the application of the Dublin III Regulation and the routes for asylum seekers and refugees into Europe for 2014 and the first half of 2015.
- An analysis of key developments in the EU's common asylum and immigration policy during the end of 2014 and first half of 2015, with a particular focus on the meaning and impact of the solidarity measures taken with regard to the situation in the Mediterranean, the response to refugee crisis unfolding in Greece and examples of unilateral national responses to the current challenges with possible repercussions beyond the EU's asylum and migration policies *stricto sensu*.
- The implementation of the recast legal instruments of the Common European Asylum System, as documented through transposition reforms and practice on the ground. This section is structured around seven themes:

7. UNHCR, *Global Trends 2014: World at War*, June 2015.

8. European Commission, 'Spring 2015 Standard Eurobarometer: Citizens see immigration as top challenge to tackle', IP/15/5451, 31 July 2015.

9. European Council, *Conclusions 26-27 June 2014*, EUCO 79/14, 27 June 2014. For a discussion, see AIDA, *Mind the Gap: an NGO perspective on challenges to accessing protection in the Common European Asylum System: Annual Report 2013/2014*, September 2014, available at: <http://bit.ly/1GxadWk>, 32 et seq.

access to the territory and to the procedure; the use of accelerated and prioritised procedures with regard to manifestly unfounded and manifestly well-founded applications; the application of the Dublin III Regulation with regard to its family provisions and discretionary clauses; developments related to detention, including in the context of Dublin procedures; reception conditions and special accommodation for families and children; access to the labour market with a special focus on temporal, material, sectoral and working time restrictions to accessing employment; and asylum seekers' access to legal assistance and information.

A final part of the report draws conclusions and sketches out a number of policy recommendations for the future development of EU asylum and immigration policies.

**CHAPTER I**  
MAIN STATISTICAL DATA AND ROUTES

## I. MAIN STATISTICAL DATA AND ROUTES

In 2014, there was a substantial rise in the number of persons seeking asylum in Europe in the face of continuing wars, conflict and persecution, with a total of 626,710 applicants in the EU 28,<sup>10</sup> and nearly 662,000 in the EU and Switzerland and Norway (hereafter referred to as “EU+”).<sup>11</sup> In the EU 28, this was an increase of almost 195,000 in relation to the year before, and this rise continued in the first quarter of 2015, with 184,800 people making applications, 86% higher than the same period in the previous year.<sup>12</sup> Approximately 90% of the applicants for both the EU 28 and EU+ in 2014 were first time applicants.<sup>13</sup>

This increase in the number of asylum applicants has to be framed within what has been described by UNHCR as “an unchecked slide into an era in which the scale of global forced displacement as well as the response required is now dwarfing anything seen before”.<sup>14</sup> By the end of 2014, over 59.5 million people had been forcibly displaced as a result of persecution, conflict, generalised violence, or human rights violations.<sup>15</sup> This included some 13.9 million people newly displaced in 2014 alone. The conflict in Syria continued to be one of the main drivers of this displacement, which in turn led to more and more people fleeing this war to neighbouring countries, with Turkey becoming the largest refugee hosting country in the world, granting protection to 1.59 million people in 2014, while Lebanon hosted the largest number of refugees in relation to its population, with 232 refugees per 1,000 inhabitants.<sup>16</sup> 2015 saw these numbers rise even higher, as the globe witnessed the largest displacement crisis since World War II.

With legal avenues to Europe not available to the majority of people seeking international protection, 2014 saw record numbers of people attempting dangerous journeys in order to reach the continent. As will be discussed in Section 5.1 below, ever greater numbers of people attempted journeys across the Mediterranean in unseaworthy and overcrowded boats throughout 2014 and continuing at even higher levels in the first six months of 2015 at a huge human cost.<sup>17</sup> While this has occupied the central focus of both policymakers and advocates, the marked increase in irregular border crossings in the Western Balkans region has brought questions regarding the safety of land migration and the possibilities for effective international protection into sharper relief, with receiving countries taking more restrictive approaches in response to the increase of migrants’ flows.<sup>18</sup>

By way of preliminary observation, it is crucial to highlight the impact accurate and up-to-date statistics bear on evidence-led debates on asylum policies in Europe.<sup>19</sup> The collection of asylum statistics in the EU is regulated by the Migration Statistics Regulation,<sup>20</sup> under which Member States are required to submit data to Eurostat. However, Eurostat is not provided with information on all aspects of asylum with equal periodicity. Statistics on applications are submitted every month, while first instance decisions are communicated on a quarterly basis, and data on unaccompanied children, final decisions and Dublin on a yearly basis.<sup>21</sup> This means that it is impossible to draw a comprehensive picture of the situation of asylum in Europe at any given time by relying on Eurostat statistics, which are also the statistics used by EASO.

At the same time, divergences in statistical practice and definitions often lead to inaccuracies in the provision of data. A notable example is the counting of Dublin decisions as rejection decisions, which has an important impact on the calculation of recognition rates. Though this has been clarified as of December 2013 by Eurostat in its revised Technical Guidelines,<sup>22</sup> the distinction remains unclear in the national statistics published by a number of countries, especially those that deem the applicability of the Dublin Regulation a ground for declaring an applica-

10. Eurostat, *Asylum and first time applicants by citizenship, age and sex: Annual aggregated data*, migr\_asyappctza.

11. EASO, *Annual Report on the Situation of Asylum in the European Union 2014*, July 2015, 11.

12. Eurostat, *Asylum quarterly report*, June 2015

13. Eurostat, *Asylum and first time applicants by citizenship, age and sex: Annual aggregated data*, migr\_asyappctza.

14. UNHCR, *Global Trends 2014: World at War*, June 2015, 3.

15. *Ibid*, 2.

16. *Ibid*

17. UNHCR, *The sea route to Europe: The Mediterranean passage in the age of refugees*, 1 July 2015, 2.

18. Amnesty International, *Europe’s Borderlands Violations against refugees and migrants in Macedonia, Serbia and Hungary*, EUR 70/1579/2015, July 2015, available at: <http://bit.ly/1I545Wg>.

19. E Guild et al., *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection*, European Parliament, PE509.989, October 2014, 24 et seq.

20. 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, OJ 2007 L199/23.

21. Articles 4(1)-(4) Migration Statistics Regulation.

22. Eurostat, *Technical Guidelines for the Data Collection under Art. 4 of Regulation 862/2007- Statistics on Asylum*, Version Amended in December 2013, available at: <http://bit.ly/1MzeNvj>, 12.

tion inadmissible.<sup>23</sup>

Accordingly, gaps in the timely and reliable provision of asylum statistics pose a substantial constraint to research and informed policy development, which is no less visible in the AIDA context.<sup>24</sup> For example, no official figures on asylum applications and decisions were available for 2014 in **France** and **Malta** during the third update of country reports, finalised in January and February 2015 respectively.

## 1. Main receiving EU Member States

The distribution of asylum applicants across the EU has not substantially changed in 2014 compared to 2013, with almost 70% of all applications submitted in five Member States (Germany, Sweden, Italy, France and Hungary). **Germany** and **Sweden** remained the principal countries of destination, recording 202,815 and 81,325 applications respectively.<sup>25</sup> However, the large increase in numbers crossing the EU borders across the Western Balkan and Mediterranean routes was reflected by the highest relative increases in applications compared to 2013 seen in **Hungary** and **Italy**. Recording 42,775 and 64,265 claims respectively, both countries saw the number of applicants more than double from the year before.<sup>26</sup>

**Chart 1.1: Distribution of asylum applicants in EU+: 2014**

Member State	Share in 2014 (%)	Number of applicants
Germany	30.6%	202,815
Sweden	12.3%	81,325
Italy	9.7%	64,625
France	9.7%	64,310
Hungary	6.4%	42,775
UK	4.8%	31,945
Austria	4.2%	28,065
Netherlands	3.7%	24,535
Switzerland	3.6%	23,770
Belgium	3.4%	22,850
Denmark	2.2%	14,715
Norway	1.7%	11,480
Bulgaria	1.6%	11,080
Greece	1.4%	9,435
Poland	1.2%	8,025
Spain	0.8%	5,615
Finland	0.5%	3,625
Cyprus	0.2%	1,745
Romania	0.2%	1,545
Ireland	0.2%	1,450
Malta	0.2%	1,350
Czech Republic	0.17%	1,155
Luxembourg	0.17%	1,150
Croatia	0.06%	450
Portugal	0.06%	445
Lithuania	0.06%	440
Slovenia	0.05%	385
Latvia	0.05%	375
Slovakia	0.04%	330
Estonia	0.02%	155
<b>Total</b>		<b>661,965</b>

Source: Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex Annual data (rounded)*, migr\_asyappctza.

23. This includes Austria, Germany, Croatia, Malta and the United Kingdom.

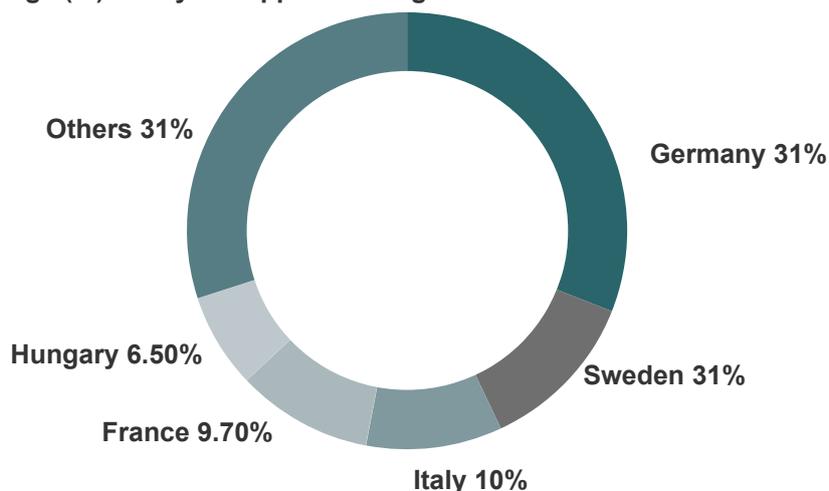
24. For a more detailed analysis, see ECRE, *Asylum Statistics in the European Union: A Need for Numbers*, AIDA Legal Briefing No 2, August 2015, available at: <http://bit.ly/1KPJlho>.

25. Eurostat, *Asylum and first time applicants by citizenship, age and sex: Annual aggregated data*, migr\_asyappctza.

26. *Ibid.*

**Chart 1.2: 70% of all applicants registered in just 5 EU+ Member States**

Percentage (%) of asylum applicants registered in EU+ Member States in 2014



Source: Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex Annual data (rounded)*, migr\_asyappctza.

These trends have continued into 2015, with **Germany, Hungary, Italy, France** and **Sweden** accounting for 80% of the total number of applications for international protection in the EU+.<sup>27</sup> Significantly, **Hungary** registered 32,800 applications in the first quarter of 2015, which made the number of first time applicants in Hungary thirteen-times higher than the same quarter in 2014, and this figure rose to 66,785 by the end of June. In the 17 EU+ countries covered by AIDA, applicants were distributed as follows during the first half of 2015:

**Chart 1.3: Distribution of asylum applicants in AIDA countries: first half of 2015**

Member State	Number of applicants
Germany	179,037
Hungary	66,785
Sweden	28,697
Austria	28,311
France	32,155
Italy	30,535
United Kingdom	12,158
Switzerland	11,873
Netherlands	9,745
Belgium	9,158
Bulgaria	7,348
Greece	6,236
Poland	4,130
Ireland	1,481
Cyprus	966
Malta	722
Croatia	181

Source: National asylum and immigration authorities and Eurostat.<sup>28</sup> Note that data for June 2015 in Italy and France is not available at the time of writing.

27. Eurostat, *Asylum quarterly report*, June 2015.

28. Austria: <http://bit.ly/1eUM2uv>; Belgium: <http://bit.ly/1IGSNYw>; Bulgaria: <http://bit.ly/1JzTvYn>; Cyprus: Information provided by Future Worlds Center; Germany: <http://bit.ly/1OHp6vA>; France: Eurostat; Greece: <http://bit.ly/1JJC3U3>; Croatia: <http://bit.ly/1eULYLm>; Hungary: Eurostat; Ireland: <http://bit.ly/1hkW3D8>; Italy: Eurostat; Malta: <http://bit.ly/1SSp1eg>; Netherlands: <http://bit.ly/1HsRPOE>; Poland: Eurostat; Sweden: <http://bit.ly/1BPrCZc>; UK: <http://bit.ly/1JI0wNd>; Switzerland: <http://bit.ly/1eURFsF>.

Some 23,075 of all applications made across the EU in 2014 were by unaccompanied children, which was almost twice as many as the previous year.<sup>29</sup> While efforts have been made to collect more reliable data on this issue through the implementation of the European Union's Action Plan on Unaccompanied Minors between 2010 and 2014,<sup>30</sup> it is expected that this figure could be higher in reality as many unaccompanied children do not register with authorities,<sup>31</sup> while others are often wrongly identified as adults due to disputes in age assessment procedures.

Available statistics from January until the end of June 2015 from some Member States have shown large rises in the number of unaccompanied children applying for asylum, such as **Sweden** registering a 93% increase when compared to the same period in 2014, with 4,542 unaccompanied children applying.<sup>32</sup> According to this year's statistics, one out of three asylum seekers in Sweden was a child.<sup>33</sup> The majority of these children came from Afghanistan, Eritrea, and Somalia.<sup>34</sup> **Belgium** also registered significantly higher numbers in the first 6 months of 2015 as 170% more unaccompanied children applied for asylum than in the same period in 2014,<sup>35</sup> with Afghanistan the country of origin for more than half of the applicants.<sup>36</sup>

## 2. Main countries of origin of asylum applicants in the EU

The continuing violence in **Syria** saw ever-higher numbers of people seek international protection in the EU in 2014, with a total of 122,115 applications made, representing close to 20% of all asylum applications made in the EU that year.<sup>37</sup> The other main countries of origin were **Afghanistan** (41,370 applications), **Kosovo** (37,895), **Eritrea** (36,925), and **Serbia** (30,840).<sup>38</sup> At the same time, a significant increase in applications was also recorded from nationals of **Iraq**, **Nigeria**, and **Ukraine** due to the respective ongoing conflicts in those countries.<sup>39</sup>

Nearly 60% of all applications for international protection from Syrians were received by **Germany** and **Sweden**, with Germany becoming the main recipient of Syrian applications in 2014 with 41,400 claims registered, and Syrians were the main citizenship of asylum seekers in a further 10 Member States. 2015 continues to see the numbers of Syrians seeking protection in Europe rise, with 29,100 applications lodged in the first 4 months of the year, 12,500 more than the same period in 2014;<sup>40</sup> while in May 2015 alone UNHCR reported 7,600 Syrians claiming asylum in EU+ countries.<sup>41</sup>

29. Eurostat, *Asylum applicants considered to be unaccompanied minors by citizenship, age and sex Annual data*, available at: <http://bit.ly/1myQQGh>.

30. European Commission, *Action Plan on unaccompanied minors*, COM(2010) 213, 6 May 2010.

31. UNHCR, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, 7, available at: <http://bit.ly/1pvFKk4>.

32. Swedish Migration Agency, *Applications for asylum received, 2015*, available at: <http://bit.ly/1P5VdVW>, 1.

33. AIDA, 'Sweden: One in three asylum seekers is a child', 21 August 2015, available at: <http://bit.ly/1KztMzU>.

34. Swedish Migration Agency, *Applications for asylum received, 2015*, 2.

35. 174 applications from unaccompanied children in January-June 2014, 469 January-June 2015. Commissioner General for Refugees and Stateless Persons (CGRS), *Asylum Statistics June 2015*, 14 July 2015, available at: <http://bit.ly/1IGSNYw>.

36. *Ibid.*, 12.

37. Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex Annual data (rounded)*, migr\_asyappctza.

38. *Ibid.* yes

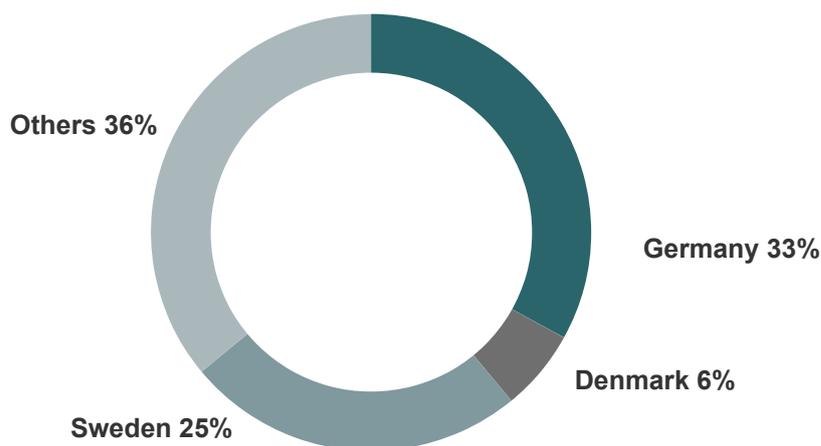
39. *Ibid.*

40. Eurostat, *Asylum quarterly report*, June 2015.

41. UNHCR, *Syria Regional Refugee Response. Europe: Syrian Asylum Applications, from April 2011 to May 2015*; available at: <http://bit.ly/1wOL45L>.

**Chart 2.1: Distribution of Syrian applicants in EU 28 in 2014**

**Percentage (%) of Syrian asylum applicants in EU 28 Member States in 2014**



Source: Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex Annual data (rounded)*, migr\_asyappctza.

The second main country of origin was **Afghanistan** with 41,370 applications in 2014, compared to 26,215 in 2013,<sup>42</sup> including the highest share of unaccompanied children in the EU+ at 6,125.<sup>43</sup>

The number of **Kosovars** registering asylum applications in 2014 grew by 87%, and this figure has grown considerably in the first 4 months of 2015, with 48,900 applications – representing the main citizenship of first time asylum applicants in the EU over this quarter.<sup>44</sup> 90% of the applicants were registered in **Hungary** and **Germany**.<sup>45</sup> However, it should be noted that the number of asylum applicants originating from Kosovo registered in March 2015 dropped to 30 times less than the levels recorded in January and February due to concerted countermeasures implemented at the regional level.<sup>46</sup>

The spike in claims lodged in 2014 for international protection from **Eritrea** is also notable. The number of applications more than doubled in comparison to 2013, with the increase attributed to systemic and widespread human rights violations and indefinite military conscription.<sup>47</sup>

## 3. Recognition Rates

### 3.1. Overall recognition rates for the EU

There was a considerable increase in recognition rates in the EU in 2014. Against a first instance recognition rate of 34% in 2013,<sup>48</sup> the EU reported a 45% overall recognition rate,<sup>49</sup> and a rate of 47% in the EU+.<sup>50</sup> This rate continued in the first quarter of 2015 (46%).<sup>51</sup> This upward trend has in part been caused by an increase in applicants from refugee-producing countries, such as those from Syria. It has also been affected by changes to the Eurostat Technical Guidelines, where it is now prescribed that Dublin cases are not reported as negative decisions.<sup>52</sup> As

42. Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex Annual data (rounded)*, migr\_asyappctza.

43. Eurostat, *Asylum applicants considered to be unaccompanied minors by citizenship, age and sex Annual data (rounded)*, migr\_asyunaa.

44. Eurostat, *Asylum Quarterly Report*, June 2015, available at: <http://bit.ly/1A4Ljx8>

45. *Ibid*

46. Frontex, *Western Balkans Quarterly, Quarter 1, January-March 2015*, 18, available at: <http://bit.ly/1K15m1O>.

47. UN Commission of Inquiry, *Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea*, 8 June 2015.

48. Eurostat, *Asylum Applicants and First Instance Decisions on Applications: 2013*, March 2014, KS-QA-14-003-EN-N (“Asylum Statistics 2013”), 12.

49. Eurostat, *Asylum Applicants and First Instance Decisions on Applications: 2014*, March 2015, 12.

50. EASO, *Annual Report on the Situation of Asylum in the European Union 2014*, July 2015, 23.

51. Eurostat, *Asylum quarterly report*, June 2015.

52. Eurostat, *Technical Guidelines for the Data Collection under Art. 4 of Regulation 862/2007- Statistics on Asylum*, Version Amended in December 2013, available at: <http://bit.ly/1MzeNvj>, 12.

such, the 2014 recognition rate figures are not directly comparable to those from previous years.<sup>53</sup>

The nationalities receiving the highest recognition rates in the EU 28 in 2014 were: Syrians (95%), Eritreans (89%), stateless persons (88%), Iraqis (71%), Somalis (68%), and Afghans (63%).<sup>54</sup>

Across different Member States, however, the overall rate of positive decisions varied dramatically in 2014: from 94% in **Bulgaria** and 74% in **Sweden**, to 11% in **Croatia** and 9% in **Hungary**.<sup>55</sup> While the above contrast in recognition rates reflects differences in the citizenship of applicants in each Member State, and the key characteristics of the caseloads from specific countries of origin, a comparison in respect of applicants originating from the same country of origin suggest that the granting of international protection has not been coherent in the CEAS.

### 3.2. Divergences in recognition rates for the same nationalities

It continues to be the case across EU+ countries that there are divergences in the recognition rate for people of the same nationality. The maps below illustrate these differences with regard to first instance decisions on asylum applications lodged by **Syrian, Eritrean, Iraqi** and **Afghan** nationals.

Even where the overall recognition rate for international protection is high across Europe for a particular nationality, such as for Syrians and Eritreans, there are considerable variations in the protection statuses applicants receive in different countries, i.e. refugee status or subsidiary protection. While the recast Qualification Directive<sup>56</sup> has reduced the gap between the protection offered by refugee status and subsidiary protection,<sup>57</sup> numerous Member States still treat each status differently. Further, the granting of humanitarian status under national law does not confer the rights and benefits that would be available to those seeking international protection under the auspices of EU law. In the EU+, **Switzerland** – which is not bound by the Qualification Directive – grants the highest level of humanitarian protection status, with 68% of Syrian applicants, 61% of Somali applicants, and 48% of Iraqi applicants granted this form of protection in 2014. This status limits the right of these beneficiaries of international protection to move freely in the national territory, limits access to the employment market, while beneficiaries do not have the right to family reunification.<sup>58</sup> Similar caseloads are also handled differently between Member States, for example, **Germany** granted refugee status to 80% of Syrian applicants, whereas **Sweden** granted subsidiary protection to 89%. Asylum statistics thus confirm yet again the widely different ways in which Member States understand and implement their international protection obligations under the CEAS.

It should be noted that the common standards laid down by recast Qualification Directive already informed – at least in theory – refugee status determination in EU 28 in 2014, as the transposition deadline for the Directive was 21 December 2013.<sup>59</sup>

Yet the risks of a “protection lottery” in a heterogeneous CEAS of 28 national asylum systems do not seem to have been eradicated even in the light of second-phase standards on protection, as practice and data reveal that similar cases are not equally treated in every country.

53. EASO, *Annual Report on the Situation of Asylum in the European Union 2014*, July 2015, 23.

54. Eurostat, *Asylum Applicants and First Instance Decisions on Applications: 2014*, March 2015, 13. Recognition rates among the 30 main citizenships of asylum applicants granted decisions in EU 28, 2014.

55. Eurostat, *Asylum Applicants and First Instance Decisions on Applications: 2014*, March 2015, 12.

56. 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 2011 L337/9.

57. European Migration Network (EMN), *Ad-Hoc Query on uniform international protection status*, 24 November 2014, available at: <http://bit.ly/1P2L7oI>.

58. Caritas, *Plus de droits, plus de protection: La prise de position de Caritas sur le statut précaire des étrangers admis provisoirement en Suisse*, May 2015, available at: <http://bit.ly/1P2NXdw>, 2.

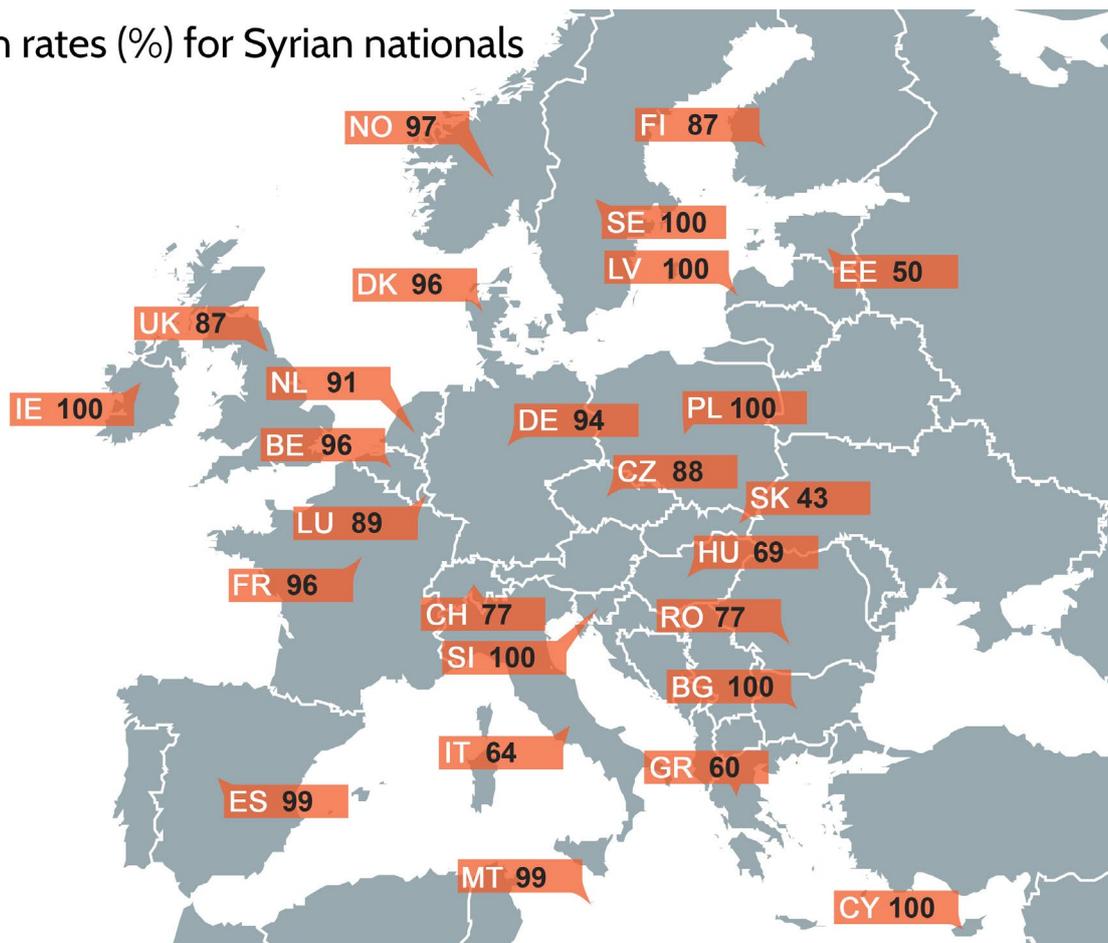
59. Article 41 recast Qualification Directive.

**Map 3.1: First instance recognition rates (%) for Syrian nationals: 2014**

All rates are for all types of protection status granted (refugee status, subsidiary protection, or humanitarian status).

## Recognition rates (%) for Syrian nationals

2014



Source: Eurostat, *First instance decisions on applications by citizenships, age and sex. Annual aggregated data (rounded)*, migr\_asydcfsta.

Syrian applicants received some level of protection in 95% of first instance decisions in 2014, but it remains the case that there are some continuing disparities in how different Member States assess claims. For example, **Bulgaria** granted refugee and subsidiary protection status to 99% of Syrian applicants, while **Hungary** only offered international protection to 69% the same year, and **Croatia** offered protection to 0%.<sup>60</sup> Equally, as mentioned above, the type of protection varied across EU+ countries, with the **United Kingdom, Poland, Germany, Denmark** and **Bulgaria** granting refugee status in most cases, whereas **Sweden, Malta, Spain, the Netherlands** and **Cyprus** granted subsidiary protection more commonly.<sup>61</sup>

### The protest and hunger strike of Syrian Kurds in Cyprus

ECRE member KISA has documented the predicament of 56 stateless Kurds from Syria who have struggled to this day to obtain the appropriate level of protection they are entitled to in Cyprus.<sup>62</sup>

In October 2014, they started a protest outside the Ministry of Interior to denounce the extremely lengthy asylum procedure which they had been subjected to, waiting for a decision on their claim for over 7 years. They mainly protested against the Minister's intention to grant them subsidiary protection status rather than refugee status, on the basis that subsidiary protection would not grant them family reunification rights or travel documents, while it would also be contrary to other EU Member States' policy of granting refugee status to Kurds from Syria.

The protesters were in fact granted subsidiary protection, and thus continued their protest. In March 2015, the

60. Eurostat, *Asylum Decisions 2014*, migr\_asydcfsta.

61. EASO, *Annual Report on the Situation of Asylum in the European Union 2014*, July 2015, 44.

62. See KISA, *Hunger strike of stateless Kurds from Syria*, available at: <http://bit.ly/1K1BoKY>. For a full chronology of events, see: <http://bit.ly/1JJDB1T>.

Ministry of Interior issued a press statement holding that “the subsidiary protection granted to them is not inferior to the recognized refugee status”, in a move sharply criticised by NGOs.<sup>63</sup> On 27 April 2015, a number of protesters went on hunger strike, while NGOs such as KISA and Future Worlds Center made joint calls to the Ministry to revise its decision and grant them the appropriate international protection status.<sup>64</sup>

While a solidarity event held in May 2015 with the assistance of NGOs attracted media attention to the Syrian refugees’ predicament, their claims were not met. As a result, the protesters started a thirst strike on 18 May in addition to their continued hunger strike, despite showing clear signs of physical exhaustion and risk of harm. To overcome the impasse, instead of granting refugee status, the Ministry of Interior urged them to apply for Cypriot citizenship, even though only one of them met the legal criteria for citizenship at that time.<sup>65</sup> The strikers nevertheless agreed to apply for citizenship.

However, one month later, they found out that the Civil Registry and Migration Department (CRMD) had never forwarded their applications for citizenship to the Ministry of Interior.<sup>66</sup> It was not until August 2015 that their applications were considered and they were granted Cypriot citizenship.<sup>67</sup>

Beyond the EU+, there have been various responses to the large number of people seeking protection status from Syria. As will be described here, **Turkey** has developed a specific procedural framework for Syrian applicants that runs in parallel to the country’s international protection procedure.

### The temporary protection regime for Syrians in Turkey

Turkey currently hosts both a mass-influx asylum seeking population from neighbouring Syria and a surging number of individually arriving asylum seekers of other nationalities, most principally originating from Iraq, Afghanistan, Iran and Somalia, among others. These two populations are subject to two different sets of asylum rules and procedures. Whereas individually arriving asylum seekers are subject to the international protection procedure laid down by the 2013 Law on Foreigners and International Protection (LFIP), which has established a procedural framework largely reminiscent of EU asylum standards,<sup>68</sup> refugees fleeing Syria have no access to that procedure.<sup>69</sup>

Turkey has introduced a temporary protection regime for persons fleeing Syria, which was formalised by a dedicated Temporary Protection Regulation (TPR), which came into force on 22 October 2014.<sup>70</sup> The Turkish “temporary protection” concept amounts to the granting, on *prima facie* basis, of a temporary residence status to all protection seekers originating from Syria, except for persons falling within the exclusion grounds set out in the TPR. As such, asylum seekers from Syria should be able to formalise their status as “temporary protection” beneficiaries through the mere act of registering with the Government agency in charge of migration and asylum, the recently created Directorate General of Migration Management (DGMM).

As of July 2015, Turkey has registered and offered temporary protection to over 1,805,000 refugees fleeing Syria on its territory,<sup>71</sup> a number far higher than the total number of Syrian refugees hosted by the entire EU. Nevertheless, Turkey’s policy of offering temporary protection to refugees fleeing Syria under a separate scheme to its international protection procedure, practicable as it may be for promptly processing a large caseload, does create risks of denying Syrians the full set of rights they should be enjoying as refugees. For instance, while the TPR provides for protection against *refoulement*, it only affords limited access to employment, education and social assistance, which is only provided at the discretion of the government.<sup>72</sup>

It is also worth noting that UNHCR, which otherwise remains involved in the international protection procedure

63. KISA, ‘The Ministry attempts to justify its non-compliance with the refugee law’, 3 March 2015, available at: <http://bit.ly/1K1BK12>.
64. KISA & Future Worlds Center, ‘Joint call for demonstration for solidarity with the struggling refugees from Syria’, 13 May 2015, available at: <http://bit.ly/1N6HHA2>.
65. KISA, ‘The lives of the strikers must be protected’, 19 May 2015, available at: <http://bit.ly/1Ukfudu>.
66. See KISA, ‘Last-minute appeal to the Interior Minister to honour its commitments to the hunger strikers’, 26 June 2015, available at: <http://bit.ly/1E5S9CM>.
67. See KISA, ‘Vindication of the struggle of the stateless Kurds from Syria’, 4 August 2015, available at: <http://bit.ly/1Tr75Tb>.
68. See A İçduygu, *Syrian Refugees in Turkey: The Road Long Ahead*, April 2015, Transatlantic Council on Migration, 5.
69. Article 16 Temporary Protection Regulation.
70. AIDA Country Report Turkey, May 2015, available at: <http://bit.ly/1eqjSIC>, 65 et seq.
71. UNHCR, *Syria Regional Refugee Response: Turkey*, July 2015, available at: <http://bit.ly/1z0szMq>.
72. Under the Refugee Convention, refugees are entitled to access to education and social security under the same conditions as nationals, and to employment under the most favourable conditions provided to foreign nationals.

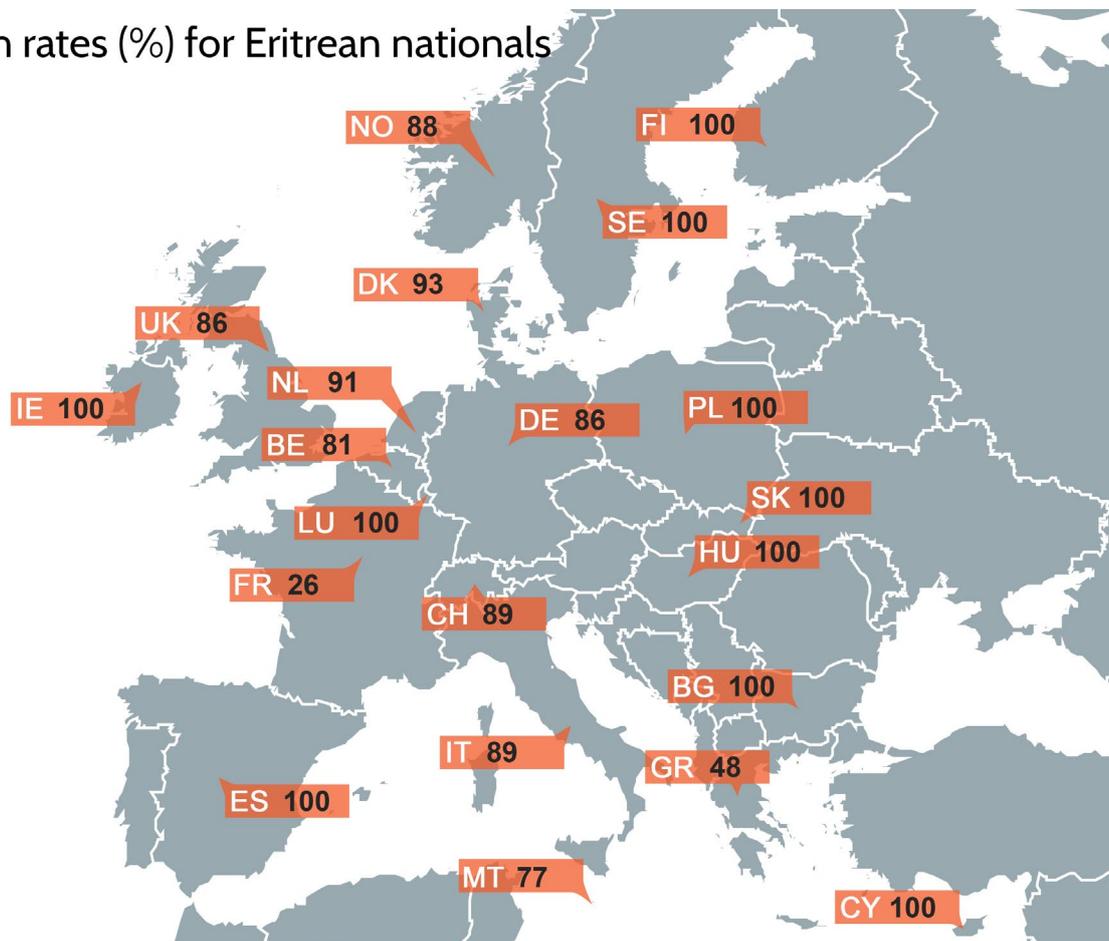
through its mandate refugee status determination (RSD), does not partake in any way in the registration and processing of temporary protection applicants and beneficiaries.<sup>73</sup>

### Map 3.2: First instance recognition rates (%) for Eritrean nationals: 2014

All rates are for all types of protection status granted (refugee status, subsidiary protection, or humanitarian status).

#### Recognition rates (%) for Eritrean nationals

2014



Source: Eurostat, *First instance decisions on applications by citizenships, age and sex. Annual aggregated data (rounded)*, migr\_asydcfsta.

89% of decisions granted at first instance to Eritrean nationals granted some form of protection status. Although this suggests some level of homogeneity across the EU+ countries, there was still a wide divergence in the recognition rate in a few examples, with **Greece** granting protection in less than 50% of decisions, and **France** to only 26% of Eritrean applicants.<sup>74</sup>

Discrepancies have continued through 2015 with worrying trends in countries such as the **UK**, which granted international protection only to 34% of Eritreans during the second quarter of 2015, compared to 73% in the first quarter.<sup>75</sup> The significant drop in the recognition rate for Eritreans has been mainly attributed to new country guidelines on Eritrea relied upon by the Home Office.<sup>76</sup>

73. AIDA Country Report Turkey, 11.

74. Eurostat, *First instance decisions on applications by citizenship, age and sex Annual aggregated data (rounded)*, migr\_asydcfsta.

75. UK Home Office, *Asylum Statistics: April-June 2015*, available at: <http://bit.ly/1WwoAzk>. See British Refugee Council, 'UK paves way to return asylum seekers to Eritrea', 27 August 2015, available at: <http://bit.ly/1JARafq>.

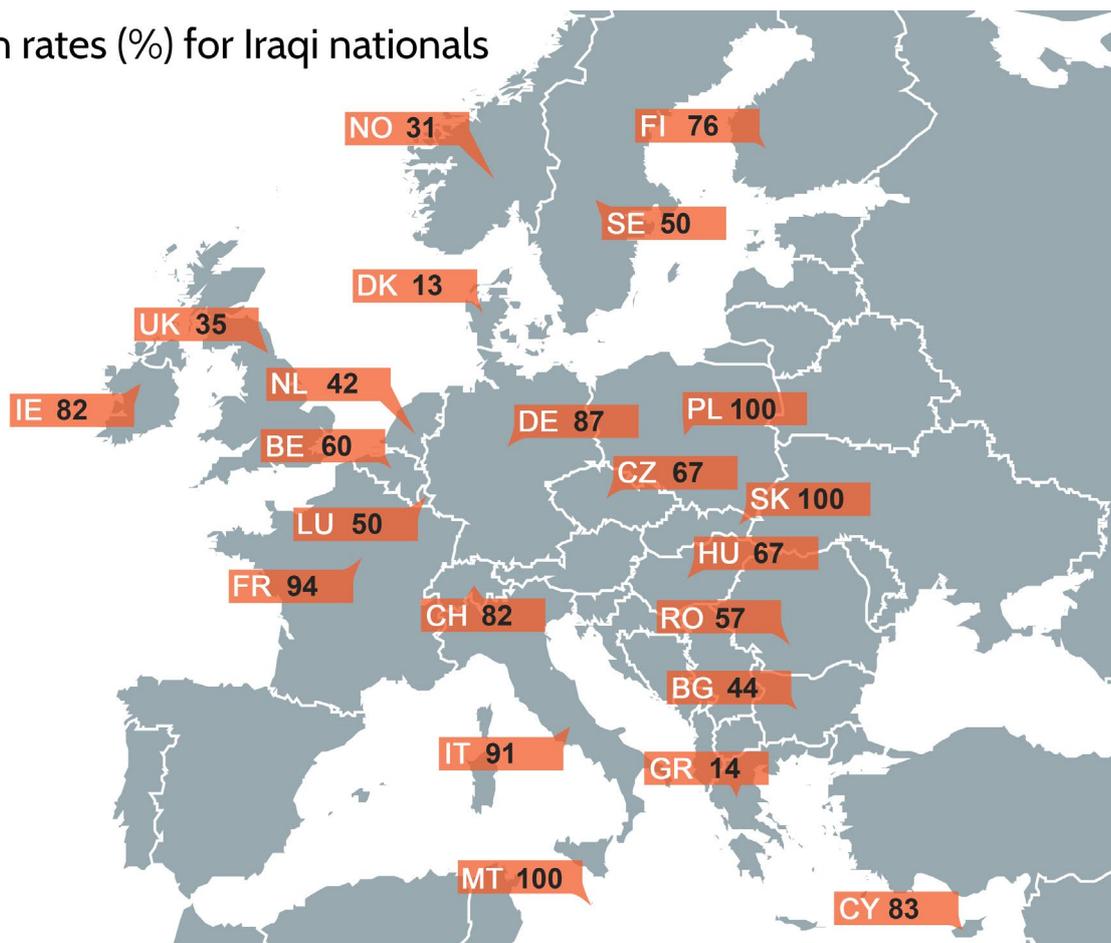
76. UK Home Office, *Country Information and Guidance: Eritrea: Illegal Exit*, March 2015, available at: <http://bit.ly/1G0e9BB>.

**Map 3.3: First instance recognition rates (%) for Iraqi nationals: 2014**

All rates are for all types of protection status granted (refugee status, subsidiary protection, or humanitarian status).

## Recognition rates (%) for Iraqi nationals

**2014**



Source: Eurostat, *First instance decisions on applications by citizenships, age and sex. Annual aggregated data (rounded)*, migr\_asydcfsta.

Over half of decisions issued at first instance for Iraqi nationals were carried out in **Germany, Belgium and Italy**, countries where the recognition rate was over 70%. However, in other EU+ countries there was little uniformity in the rate of positive decisions issued. **Greece** granted protection status in 80 out of 575 decisions (14%), in contrast to **Switzerland** giving protection status in 335 out of 410 decisions (82%).<sup>77</sup> The first quarter of 2015 has seen the recognition rate for Iraqi nationals increase substantially, with some form of protection status granted in 88% of decisions.<sup>78</sup>

77. Eurostat, *First instance decisions on applications by citizenships, age and sex. Annual aggregated data (rounded)*, migr\_asydcfsta.

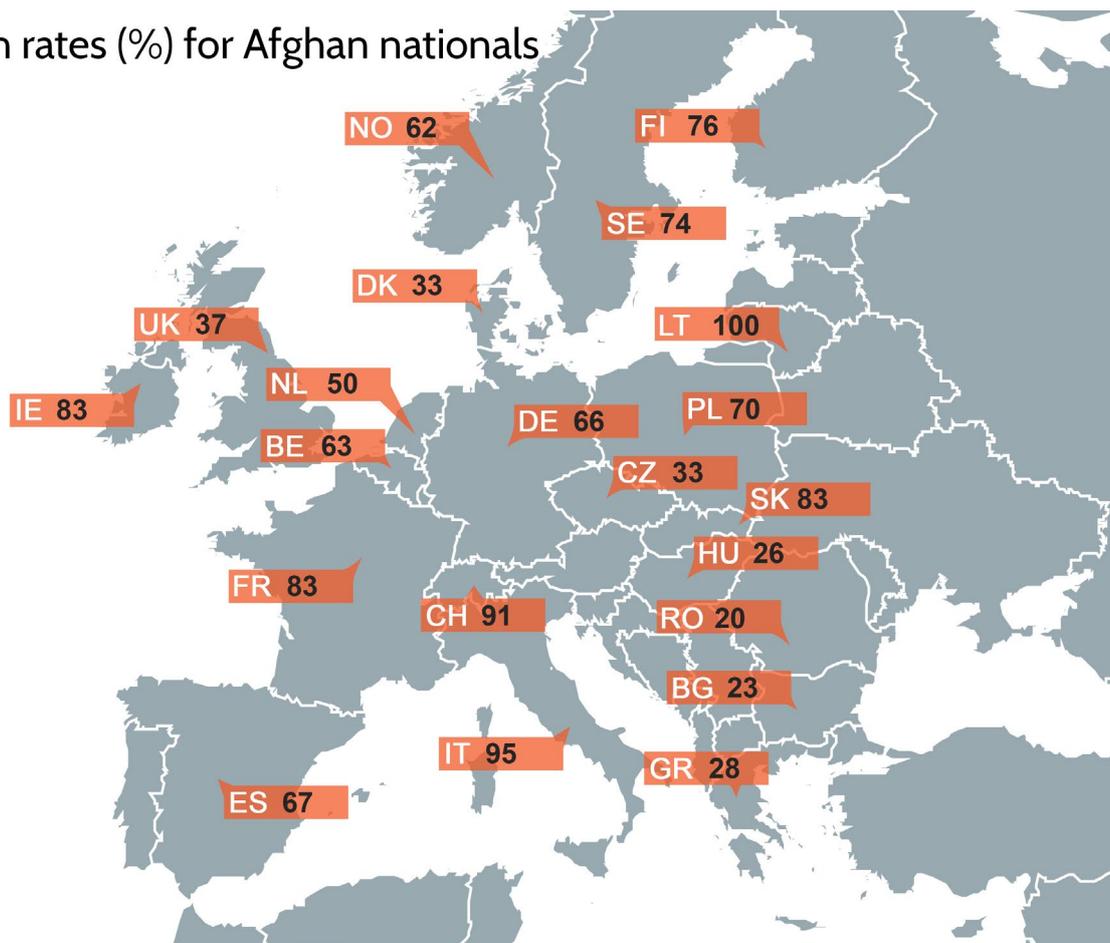
78. Eurostat, *First instance decisions by outcome and recognition rates, 30 main citizenships of asylum applicants granted decisions in the EU-28, 1st quarter 2015*, available at: <http://bit.ly/1EbeRJP>.

**Map 3.4: First instance recognition rates (%) for Afghan nationals: 2014**

All rates are for all types of protection status granted (refugee status, subsidiary protection, or humanitarian status).

## Recognition rates (%) for Afghan nationals

2014



Source: Eurostat, *First instance decisions on applications by citizenships, age and sex. Annual aggregated data (rounded)*, migr\_asydcfsta.

There were large differences in both the number of positive decisions issued to Afghan applicants for asylum and in the type of protection granted in 2014. While it may be the case that this reflects the existence of various profiles of applicants from Afghanistan, it also suggests that the interpretation of the grounds for granting protection status have been interpreted in different ways in EU+ countries, resulting in a recognition rate of 20% in **Romania**, compared to 95% in **Italy**.<sup>79</sup> EASO has reported that the interpretation of provisions in the EU *acquis* vary significantly when granting subsidiary protection to Afghan applicants, with some countries providing subsidiary protection due to a general situation of armed conflict and indiscriminate violence in Afghanistan, whereas other countries require individual elements to be established first.<sup>80</sup>

## 4. Statistics on the application of the Dublin Regulation

Accurate and reliable statistics on the operation of the Dublin system remain scarce in the EU. While EU sources such as Eurostat and EASO now publish specific data on Dublin requests and transfers, these sources encounter difficulties in gathering and releasing up-to-date information. By way of example, EASO's 2014 annual report, published in July 2015, provides information on Dublin for only 21 out of the 30 EU+ Member States.<sup>81</sup> In its 2013 report, published in July 2014, EASO included "only incomplete data" from 16 Member States.<sup>82</sup>

Moreover, the methodology employed by EU institutions for collecting and compiling Dublin statistics seems to

79. Eurostat, *First instance decisions on applications by citizenships, age and sex. Annual aggregated data (rounded)*, migr\_asydcfsta.

80. EASO, *Annual Report on the Situation of Asylum in the European Union 2014*, July 2015, 47.

81. EASO, *Annual Report on the situation of asylum in the European Union 2014*, July 2015, 32. This was attributed to a change in the methodology for collecting Dublin statistics, which led to an extension of the deadline for reporting to Eurostat.

82. EASO, *Annual report on the situation of asylum in the European Union 2013*, July 2014, 30.

leave knowledge gaps. Both EASO and Eurostat categorise data based on the type of Dublin request, thereby distinguishing “take charge” from “take back” requests.<sup>83</sup> It will be recalled that the Dublin III Regulation distinguishes between “take charge” and “take back” procedures based on whether the person concerned has a pending, withdrawn or rejected application in another Member State.<sup>84</sup> The distinction between those two types of procedures does not relate to the applicable criteria for responsibility under the Regulation.

Nevertheless, EASO and Eurostat draw an uneasy distinction in the way Dublin data is portrayed, by categorising “take charge” requests based on the applicable criterion (family reasons; documentation and legal entry; irregular entry or stay; humanitarian reasons; dependent persons) on one hand, and “take back” requests based on the type of “take back” request (under examination; rejection; withdrawal) on the other.<sup>85</sup> Accordingly, these Dublin statistics do not reveal the criteria on the basis of which Member States issue “take back” requests. This information gap is all the more concerning given that the majority of Dublin requests are “take back” requests, as illustrated in the table below.

Challenges to obtaining precise figures on Dublin are equally marked in statistical information provided by national asylum authorities. Out of the 17 AIDA countries operating the Dublin system, detailed and up-to-date Dublin statistics are published only by **Switzerland**.<sup>86</sup> Even there, the State Secretariat for Migration (SEM) does not spell out the basis for different requests or transfers; it only mentions the receiving or sending country of a request. While countries such as **Belgium**, **Ireland** and **Greece** include some reference to Dublin statistics, they only mention the number of requests or decisions taken, without disaggregating the grounds for such requests or the Member States concerned. **Germany** has published more detailed information, but not in its official asylum statistics and only upon request.<sup>87</sup>

Limited data from 2014 reveals the following numbers of outgoing requests:

**Chart 4.1: Outgoing “take charge” and “take back” requests per top 5 requesting states: 2014**

Member State	Total outgoing requests	“Take back”	“Take charge”
Germany	35,058	27,047	8,011
Switzerland	14,900	4,220	10,680
Sweden	8,272	4,024	4,248
Austria	6,066	4,061	2,005
France	4,948	3,788	1,160

Note: Due to discrepancies in how participating states report outgoing and incoming requests, the numbers here are based on outgoing request data only. The following countries had not reported request numbers for 2014: Czech Republic, Spain, Italy, Cyprus, Lithuania, the Netherlands, Poland, Portugal and Finland.

Source: Eurostat: *Outgoing ‘Dublin’ requests by receiving country, type of request and legal provision*, migr\_dubro.

These trends seem to be confirmed by scarce data on the application of the Dublin Regulation in the course of 2015. During the first half of the year, **Germany** issued 14,028 Dublin requests,<sup>88</sup> while **Switzerland** issued 8,034.<sup>89</sup> In contrast, **Greece** issued 707 requests.<sup>90</sup>

EASO notes that over a longer-term period dating back to 2009, while an average of 55,000 outgoing Dublin requests were made annually, only 26% of these led to a physical transfer of a person from one EU+ country to another.<sup>91</sup> The available data from 2014 calls the efficacy of the system into question again, with **Germany** – the

83. Eurostat, ‘Dublin statistics’, migr\_dub, available at: <http://bit.ly/1CaDQfc>.

84. Article 18(1)(a)-(d) Dublin III Regulation.

85. See e.g. EASO, *Annual report on the situation of asylum in the EU 2014*, July 2015, 32.

86. SEM, *Statistique en matière d’asile juin 2015*, available at: <http://bit.ly/1KIVTYy>, Table T10M-C et seq.

87. The German government has provided detailed Dublin-specific information in response to various parliamentary queries; Cf. for example: “Additional information on asylum statistics for the year 2014”, response to parliamentary query by the parliamentary group of “The Left” party (“Ergänzende Informationen zur Asylstatistik für das Jahr 2014”, Antwort auf die Kleine Anfrage der Fraktion Die Linke), no. 18/3713, 7 January 2015, available at: <http://bit.ly/1PWTouZ>.

88. German Federal Office for Migration and Refugees (BAMF), *Asylum Statistics for June 2015*, available in German at: <http://bit.ly/1OHp6vA>.

89. SEM, *Statistique en matière d’asile juin 2015*, Table T10M-C et seq.

90. Greek Asylum Service, *Statistics of the Asylum Service (1.1.2015 – 30.06.2015)*, available in Greek at: <http://bit.ly/1M24LRP>, 5.

91. EASO, *Annual report on the situation of asylum in the EU 2014*, July 2015, 34

main country issuing outgoing requests – only seeing 13% of the accepted outgoing requests for transfers being effected. The country recording the highest percentage of transfers following the acceptance of an outgoing request was **Norway**, with 85% of these accepted outgoing requests resulting in a transfer, while **Croatia** had the lowest share of accepted requests resulting in a transfer, at only 2%.<sup>92</sup> Further, of the EU+ countries that provided data for 2014, there were only 6 countries that transferred (incoming and outgoing) more than 1,000 applicants in 2014.<sup>93</sup> Data from previous years has suggested that a number of Member States exchange similar numbers of asylum seekers, which casts doubt on whether such transfers are necessary.<sup>94</sup> The available data has not allowed for a similar comparison of this trend in 2014.

**Chart 4.2: Number of transfers per top 5 requesting states: 2014**

Member State	Outgoing requests accepted	Outgoing Dublin transfers	Share of accepted requests resulting in transfer
Germany	22,911	2,887	13%
Switzerland	5,642	2,638	47%
Sweden	5,166	2,059	40%
Austria	4,107	1,076	26%
France	3,281	470	14%

Note: Due to discrepancies in how participating states report outgoing and incoming requests, the numbers here are based on Dublin request data only. The following countries had not reported or had incomplete outgoing request numbers for 2014: Bulgaria, the Czech Republic, Spain, Italy, Cyprus, Lithuania, Netherlands, Poland, Portugal.

Source: Eurostat, *Outgoing ‘Dublin’ transfers by receiving country, legal provision and duration of transfer*, migr\_dubto; Eurostat, *Decisions on outgoing ‘Dublin’ requests by receiving country, type of request and legal provision*, migr\_dubdo.<sup>95</sup>

The current lack of comprehensive data on various aspects of the Dublin system including the duration of the procedures, the reasons preventing transfers, the impact on reception conditions and integration, and the costs of the system to states, means that an analytic evaluation of the Dublin system is only indicative at this time. This raises concerns over the overall transparency of the operation of the Dublin procedure and should form a central concern for the Commission in advance of and during its evaluation of the Dublin system throughout the second half of 2015 and 2016.

## 5. Routes into Europe

Migrants and refugees arrive in Europe by a variety of routes. The number of people taking precarious journeys to reach Europe has risen exponentially across continually evolving routes. This section focuses on three of these, and the impact of European and national policies on them, to provide an overview of the overall picture as well as highlighting the main issues at stake.

Concepts such as country of departure and transit are extremely fluid because routes are constantly changing, especially in response to reinforced border control policies, including expulsions and push-backs that cannot stem but merely divert migratory flows elsewhere; as it also results from the deterioration and perpetration of conflicts such as in Libya and Syria.<sup>96</sup> Moreover, even when a particular country of arrival is established at the time of departure, migrants and refugees can change destinations over time, especially if living conditions there do not allow them to stay.

92. Eurostat, *Outgoing ‘Dublin’ transfers by receiving country, legal provision and duration of transfer*, migr\_dubto; Eurostat, *Decisions on outgoing ‘Dublin’ requests by receiving country, type of request and legal provision*, migr\_dubdo.

93. Germany, Switzerland, Norway, Austria, France, and Denmark. EASO, *Annual report on the situation of asylum in the EU 2014*, July 2015, 33

94. S Fratzke, *Not Adding Up, The Fading Promise of Europe’s Dublin System*, Migration Policy Institute, March 2015, 13.

95. Note that, according to the Austrian Ministry of Interior, Austria performed 1,327 outgoing transfers in 2014: Austrian Ministry of Interior, *Response to parliamentary request 4084/AB*, 19 May 2015.

96. Altai Consulting, *Migration Trends Across the Mediterranean: Connecting the Dots*, IOM MENA Regional Office, June 2015, available at: <http://bit.ly/1GDj2RM>, 104-105.

Map 5.1: Number of persons arriving in Italy, Greece, and Hungary: January-August 2015



Source: UNHCR, *Sea arrivals to Southern Europe*, accessed 31 August 2015; UNHCR, 'Bodies found dead in a truck near border, while asylum seekers flow into Hungary', 28 August 2015.

## 5.1. The Mediterranean sea route

Due to the lack of legal and safe alternatives, in 2014 219,000 refugees and other migrants arrived in Europe by sea,<sup>97</sup> mainly through the Central Mediterranean route to **Italy** and the Eastern Mediterranean route, from **Turkey** to **Greece**. These numbers have been constantly increasing since the beginning of 2015, as 137,000 refugees and migrants arrived by sea in the first six months of 2015, more than double the number of the same period in 2014 (75,000).<sup>98</sup> By the end of August 2015, over 291,000 persons had entered Europe by sea.<sup>99</sup>

During the migratory journey, refugees and asylum seekers are continuously at risk of serious human rights abuses and dangers, including death at sea. In 2014, victims of trafficking among migrants arriving in **Italy** increased by 300% compared to 2013. Equally worrisome is the growing number of unaccompanied children and women trafficked for sexual exploitation, as documented by research for the International Organisation for Migration (IOM).<sup>100</sup>

### 5.1.1. Central Mediterranean route

In 2014, the Mediterranean Sea was the deadliest sea route worldwide, with 3,279 migrants losing their lives at sea.<sup>101</sup> 2015 is expected to be a deadlier year than 2014, as between January and August 2015, 2,643 migrants

97. UNHCR, *The sea route to Europe: Mediterranean passage in the age of refugees*, 1 July 2015, available at: <http://bit.ly/1G01E5P>, 5.

98. *Ibid*, 6.

99. UNHCR, *Arrivals to Southern Europe*, available at: <http://bit.ly/1JgTX1Z>.

100. Altai Consulting, *Migration Trends Across the Mediterranean: Connecting the Dots*, IOM MENA Regional Office, June 2015, available at: <http://bit.ly/1GDj2RM>, 92.

101. IOM, *The missing migrants project: Migrant border-related deaths around the world, 2014*, available at <http://bit.ly/1SwB-gaX>, accessed 31 August 2015.

died in the Mediterranean attempting to seek protection in Europe, compared with 1,479 deaths in 2014.<sup>102</sup> Although the number of migrant deaths is still high, recent decreasing trends should be recognised.

In particular, since the end of the Italian operation Mare Nostrum at the end of 2014, the number of migrants who lost their lives crossing the Mediterranean Sea rose from 1 in 50 to 1 in 23.<sup>103</sup> In April 2015, 1,308 refugees and migrants drowned or went missing in the Mediterranean Sea, representing the most deadly month on record.<sup>104</sup>

These figures clearly showed that the capacity and the scope of Joint Operation “Triton”, launched on 1 November 2014 under Frontex mandate and discussed thoroughly in Chapter II, Section 1.1<sup>105</sup> were far from sufficient. Following two tragedies off the Libyan coast in April 2015, the EU increased its presence in the Mediterranean, and, engagement in search and rescue operations. Meanwhile, private organisations, such as Migrant Offshore Aid Station (MOAS) and Médecins Sans Frontières (MSF) had already engaged in search and rescue activities in light of the initial failure of EU Member States to step up search and rescue capacity in the Mediterranean,<sup>106</sup>

Since May 2015, the joint MOAS-MSF search and rescue operation “MY Phoenix” has so far saved more than 5,500 lives in the Mediterranean Sea.<sup>107</sup> At the same time, the boats Bourbon Argos and Dignity I, solely operated by MSF, have rescued 6,000 migrants and refugees, as of 8 July 2015.<sup>108</sup> This has also been possible because these boats are equipped with a fully-stocked clinic on board, as well as a crew, which includes medical staff, to provide emergency care and medical assessment on board.<sup>109</sup>

In addition, commercial vessels and merchant ships have been increasingly involved in search and rescue operation. According to the International Chamber of Shipping, since the beginning of 2014, over 1,000 merchant ships rescued more than 50,000 people.<sup>110</sup> Furthermore, IOM recently reported that between January and June 2015, commercial vessels rescued 14,500 migrants and other vessels rescued over 9,000 migrants.<sup>111</sup> However, these vessels do not have the expertise or the instruments to carry out these operations, which may limit the capacity to save the lives of all migrants and refugees in danger at sea.<sup>112</sup>

Following the increased scale of search and rescue operations, the number of migrant deaths at sea has decreased,<sup>113</sup> despite the summer season, which normally sees more people attempt sea crossings.<sup>114</sup> This demonstrates that joint search and rescue operations can contribute to effectively reducing the number of refugees and migrants’ deaths.

In 2014, more than 3/4 of migrants and refugees reaching Europe by sea arrived through **Italy**, though only 1/5 came through **Greece**.<sup>115</sup> However, figures reported in 2015 demonstrate that routes constantly change. Between January and August 2015, 204,954 people had crossed the Mediterranean Sea to **Greece**, while 115,500 migrants had disembarked in **Italy**.<sup>116</sup> This important shift particularly concerns **Syrian** refugees who are now primarily fleeing from Turkey to Greece.<sup>117</sup>

102. IOM, *Mediterranean update: Missing migrants project*, available at: <http://bit.ly/1DRNHYG>.

103. Amnesty International, *Europe’s sinking shame: The failure to save refugees and migrants at sea*, April 2015, available at: <http://bit.ly/1ErynqE>.

104. UNHCR, ‘Mediterranean Crisis 2015 at six months: refugee and migrant numbers highest on record’, Press Release, 1 July 2015, available at: <http://bit.ly/1dwhVJ3>.

105. European Commission, ‘Frontex Joint Operation ‘Triton’ – Concerted Efforts for managing migrator flows in the Central Mediterranean’, MEMO 14/609, 31 October 2014.

106. MSF, ‘MSF & MOAS to launch Mediterranean search, rescue and medical aid operation’, 10 April 2015; available at: <http://bit.ly/1FtJeed>.

107. MOAS, ‘€1.5 million in four weeks: MOAS can keep saving lives beyond October if donations continue’, Press release, 29 July 2015; available at <http://bit.ly/1U6uGKU>.

108. MSF, ‘Mediterranean migration: Frequently Asked Questions’, 7 July 2015; available at: <http://bit.ly/1HivXXz>.

109. MOAS, ‘MOAS enhances its rescue capabilities with donations of innovative rescue equipment’, Press release, 30 June 2015; available at <http://bit.ly/1IJMKmj>; MSF, ‘Mediterranean Migration’; available at <http://bit.ly/1H2gIR2>.

110. International Chamber of Shipping, *Large Scale Rescue Operations at Sea Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons*, second Edition 2015, available at: <http://bit.ly/1MHEjys>.

111. IOM, *Mediterranean rescue operations, 2015 data on flotilla*; available at: <http://bit.ly/1MGFEFH>.

112. L Østerbø, ‘Commercial Rescues Down, But Serious Legal Problems Emerge’, Migrant Report, 23 July 2015; available at: <http://bit.ly/1MGDOUt>.

113. IOM, *Mediterranean update: Missing migrants project*, 29 July 2015

114. UNHCR, *The sea route to Europe: Mediterranean passage in the age of refugees*, 1 July 2015, 6.

115. *Ibid*, 11.

116. UNHCR, *Sea arrivals to Southern Europe*, <http://bit.ly/1JgTX1Z>, accessed 31 August 2015.

117. IOM, ‘Migrant Boat Arrivals in Europe Top 150,000 in 2015’, 10 July 2015; available at <http://bit.ly/1GbCMrT>.

Although particularly interlinked, migrants arriving into Italy are not coming from the same countries of origin as those arriving by boat from Turkey to Greece. According to statistics, as of the first quarter of 2015, Italy still remains the primary destination for migrants and asylum seekers coming from **Eritrea**, **Nigeria**, and **Somalia**, as well as from **Syria**.<sup>118</sup> Most people who reach Europe via Italy depart from Libya and Egypt.

From **Libya**, migrants fleeing human rights abuses, including torture and ill-treatment, arbitrary detention for unlimited periods, as well as unlawful killings, persecution and harassment on account of their religion, have no alternative but to take to the sea.<sup>119</sup> Since the intensification of the Libyan crisis in 2014, due to the ongoing armed conflict, all embassies have been closed, so for migrants and refugees it is impossible to apply for a visa, family reunification or private sponsorship programmes. Reportedly, opportunities for resettlement through UNHCR programmes are also limited. At the same time, Egypt and Tunisia have closed their borders, preventing migrants from leaving the country.<sup>120</sup>

### 5.1.2. Eastern Mediterranean route

In 2014, 44,057 asylum seekers and migrants used the Eastern Mediterranean route.<sup>121</sup> As migrants are blocked by European patrols at the Greek-Turkish land border of Evros, as well as by a 10.5km fence built in 2012, increasing numbers of refugees and migrants are trying to reach Europe through the Eastern Mediterranean route, from Turkey to the Greek islands in the Aegean Sea.<sup>122</sup> The impact of the intensification of border surveillance at the Greek-Turkish land border since 2012 is evident when seeing the drop in the number of arrests in the Evros region due to irregular entry or stay, which in the space of a year decreased from 30,433 arrests to 1,122. The contemporaneous rise in the number of arrests in the islands of the Aegean Sea from 3,651 to 11,447 demonstrated how patterns of irregular entry shift to different areas if more stringent measures are taken elsewhere.<sup>123</sup>

In 2014, of the 170,000 migrants and refugees arrived by sea in **Italy**, only 64,625 applied for asylum. A wider gap has been reported in **Greece**, where in 2014 asylum applicants were only 9,430 out of the 43,500 sea arrivals into the country.<sup>124</sup> During the first semester of 2015, out of the 79,469 persons arriving in **Greece**, only 6,263 applied for asylum.<sup>125</sup> This shows that in most cases, migrants and refugees do not apply for asylum in Italy and Greece, arguably due to the poor reception conditions and scarce integration prospects in these countries or given the existence of family and relatives in other EU countries. In addition, as discussed in Chapter III, Section 1.4, access to asylum procedures in Greece is not guaranteed in practice, due to insufficient administrative capacities, asylum seekers are not registered in a timely manner, putting them at risk of arrest, detention and deportation.<sup>126</sup> Consequently, refugees try to seek protection in other EU Member States.

### 5.2. The Western Balkan route

According to UNHCR's estimations, most refugees and migrants disembarking in **Greece** carry on their journey through the Western Balkan route,<sup>127</sup> which covers the Former Yugoslav Republic of Macedonia (**FYROM**), **Serbia** and **Hungary**. A vivid illustration of this may be found in the forest covering the Hungarian-Serbian border, which is reported to be "littered with torn-up Greek asylum documents".<sup>128</sup> In the first half of 2015, FYROM and Serbia have received 45,000 asylum seekers, accounting for almost a nine-fold increase compared with the same period in 2014. However, it is believed that most refugees who continue this way have not been registered by the authorities.<sup>129</sup> By 22 June 2015, Amnesty International reported that 60,620 refugees and migrants had crossed the

118. Italian Ministry of Interior, 'Immigrazione: improprio parlare di emergenza, è fenomeno strutturale', 23 June 2015, available in Italian at: <http://bit.ly/1GqhxUD>.

119. Amnesty International, "*Libya is full of cruelty*": Stories of abductions, sexual violence and abductions from migrants and refugees, May 2015, available at: <http://bit.ly/1MCCe3l>.

120. Altai Consulting, *Migration Trends Across the Mediterranean: Connecting the Dots*, IOM MENA Regional Office, June 2015, 68.

121. *Ibid*, 12.

122. Human Rights Watch (HRW), 'Greece: Humanitarian Crisis on the Islands. Urgent EU Support Needed to Ensure Basic Rights for Refugees', 11 July 2015, available at: <http://bit.ly/1K0le60>.

123. UNHCR, *UNHCR observations on the current asylum system in Greece*, December 2014, available at: <http://bit.ly/1NP-Niz8>.

124. AIDA Country Report Greece: Third Update, April 2015, available at: <http://bit.ly/1HE5MNf>, 6-7.

125. Greek Asylum Service, *Statistics 1 January – 30 June 2015*, available at: <http://bit.ly/1SwCuDd>.

126. AIDA Country Report Greece: Third Update, 23-24.

127. UNHCR, *The sea route to Europe: Mediterranean passage in the age of refugees*, July 2015.

128. EU Observer, 'Migrant surge creates tension on Hungary-Serbia border', 16 July 2015, available at: <http://bit.ly/1I52Xlz>.

129. UNHCR, 'UNHCR warns of growing asylum crisis in Greece and the Western Balkans amid arrivals of refugees from war', Briefing Note, 10 July 2015.

**Hungarian** border, 60,089 of them coming via Serbia.<sup>130</sup> This number has risen substantially during the summer months as, by the end of August 2015, UNHCR reported over 140,000 persons arriving in Hungary.<sup>131</sup>

According to UNHCR data, up to July 2015, over 90% of persons entering Greece came from **Syria, Afghanistan, Iraq, Eritrea** and **Somalia**, all refugee-producing countries. These figures seem to suggest a correlation with the upward trends reported by Frontex, according to which, in the first quarter of 2015, 38% of the overall detections across Western Balkans borders were non-regional migrants, mainly across the Hungarian-Serbian border (74%). This represents a significant rise compared to the same period in 2014, which has continued to increase, as 91% of migrants crossing the Hungarian-Serbian border from March 2015 came from **Afghanistan** and **Syria**.

Despite the fact that there are increasing numbers of refugees and migrants through the Western Balkan route who come from refugee-producing countries, following their entry into the territory, they face numerous dangers and obstacles in accessing asylum procedures. The majority of persons crossing the dangerous Greek border from Eidomeni are trapped in the frontier line between Greece and FYROM and unable to move onwards or return.<sup>132</sup>

In **FYROM**, push-backs of migrants and asylum seekers are regular practice at the borders.<sup>133</sup> Moreover, migrants and refugees are regularly detained for unlimited periods in order for the authorities to establish their identity, notably in the Gazi Baba Reception Centre for Foreigners, where they are subjected to inhuman and degrading treatment, including overcrowding. Unaccompanied children are also detained, not always separately from adults, without effective legal aid by appointed special guardians.<sup>134</sup> If asylum seekers are able to apply, they do not promptly receive an interview and have to wait for months before the examination of their request, without any information about their claim. In 2014, only 10 of the 1,267 registered asylum seekers were granted refugee status in FYROM, all of them Syrians. Due to the very limited possibility of being granted protection in the FYROM, in 2014, 80% of the 1,249 asylum requests were discontinued because asylum seekers prefer leaving the country and continue the journey.<sup>135</sup> In its latest report on FYROM, UNHCR confirms that the large number of asylum seekers entering the country have insufficient access to the procedure and to quality decisions on their applications. Accordingly, international asylum standards are not currently met in FYROM.<sup>136</sup>

At the Serbian-FYROM borders, refugees and asylum seekers, including women and small children, often are stranded at the borders without protection, lacking food, water and hygiene services.<sup>137</sup>

Moreover, in **Serbia** the effectiveness of access to asylum raises concerns in practice according to a 2014 report by the Belgrade Centre for Human Rights (BCHR). The Serbian Asylum Office often fails to register asylum applications on time, thereby leaving asylum seekers at risk of deportation. More particularly, the Office did not register asylum seekers in the temporary Asylum Centres in Tutin (close to the Kosovo border) and Sjenica (close to the Montenegro border) in January-April 2014, and has not done so regularly since.<sup>138</sup> Moreover, the Asylum Office seems to deny access to the procedure to asylum seekers residing outside the Asylum Centres, even though these persons cannot be accommodated there due to capacity shortages.<sup>139</sup> Asylum seekers left without accommodation are “stranded in forests and abandoned buildings in Serbia in harsh winter temperatures without sufficient food or shelter”.<sup>140</sup>

The European Commission has prompted Serbia to implement a comprehensive asylum reform.<sup>141</sup> Nevertheless,

130. Amnesty International, *Europe's Borderlands Violations against refugees and migrants in Macedonia, Serbia and Hungary*, EUR 70/1579/2015, July 2015, available at: <http://bit.ly/1I545Wg>.

131. UNHCR, 'Bodies found dead in a truck near border, while asylum seekers flow into Hungary', 28 August 2015, available at: <http://bit.ly/1Kxvsya>.

132. GCR, *GCR mission to Eidomeni*, August 2015, available in Greek at: <http://bit.ly/1L5CA39>, 5.

133. Amnesty International, *Europe's Borderlands Violations against refugees and migrants in Macedonia, Serbia and Hungary*, EUR 70/1579/2015, July 2015, 14, available at: <http://bit.ly/1I545Wg>. See also: UN Committee against Torture, Concluding observations on the third periodic report of the former Yugoslav Republic of Macedonia, CAT/C/MKD/CO/3, 5 June 2015, 7.

134. UN Committee against Torture, Concluding observations on the third periodic report of the former Yugoslav Republic of Macedonia, CAT/C/MKD/CO/3, 5 June 2015

135. Figures provided by the Macedonian Young Lawyers' Association (MYLA).

136. UNHCR, *The former Yugoslav Republic of Macedonia as a country of asylum*, August 2015, available at: <http://bit.ly/1M-CxInP>.

137. UNHCR, 'UNHCR warns of growing asylum crisis in Greece and the Western Balkans amid arrivals of refugees from war', Briefing Note, 10 July 2015.

138. BCHR, *Human Rights in Serbia 2014*, March 2015, available at: <http://bit.ly/1HE7kGZ>, 227.

139. *Ibid*, 228.

140. MSF, 'Serbia: Asylum seekers and migrants left in cold', 19 February 2015, available at: <http://bit.ly/1w1fp6L>.

141. European Commission, *Serbia Progress Report*, 57.

the ongoing reform of the Law on Asylum has already raised serious concerns among NGOs.<sup>142</sup> In particular, the list of amendments proposed by BCHR and Group 484 in 2014<sup>143</sup> addresses the vague terms and the narrow scope of the legal provisions of the draft revised Law on Asylum, which do not adequately solve the deficiencies in the Serbian asylum system. Furthermore, the definition of “asylum seeker” is restricted to those who formally submit an application, whilst this status should be recognised to people from the expression of their intention to seek asylum. The NGOs have stressed that the new Law on Asylum does not provide precise criteria and rules to establish the national list of safe countries of origin, which is urgently needed, as Serbia has not updated it since 2009, so it does not take into account the present situation, including the 2011 decision of the European Court of Human Rights (ECtHR) in the case *MSS v Belgium and Greece*.<sup>144</sup>

In 2014, of the 16,500 people expressing their intention to seek asylum in Serbia, only 388 applications were formally registered, and refugee status was only granted once. Most requests have been discontinued, as asylum seekers with very limited access to protection in Serbia have no solution but to continue their journey onwards in Europe.<sup>145</sup>

One of the main entry points to **Hungary** along the Serbian border is Subotica, where asylum seekers and refugees may face ill-treatment and human rights abuses perpetrated by the Serbian police, as it may equally occur in Southern and Eastern Serbia, as well as in Belgrade.<sup>146</sup>

In conclusion, figures confirm that countries along the Western Balkan route are considered a route of transit for refugees and asylum seekers. However, this is due among others to lack of access to international protection as well as of any integration perspectives. Instead of solving deficiencies in the respective asylum systems, national authorities, notably in Hungary, Serbia and FYROM, prefer to acknowledge the unwillingness of asylum seekers to apply for international protection in their country and continue to violate international obligations to ensure access to international protection. At the same time, the lack of access to international protection, as well as insufficient and inadequate reception conditions, place asylum seekers and refugees in vulnerable situations, with high risks of trafficking, forced labour and other forms of abuse and human rights violations, as well as exploitation and deportation.<sup>147</sup>

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142. Amnesty International, *Europe's Borderlands Violations against refugees and migrants in Macedonia, Serbia and Hungary*, July 2015.

143. BCHR, *Right to asylum in the Republic of Serbia 2014*, 2015, available at: <http://bit.ly/1VOXfP4>, 17.

144. ECtHR, *MSS v Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011. See Miroslava Jelačić et al. (Group 484, Belgrade Centre for Human Rights, Belgrade Centre for Security Policies), *Challenges of the Asylum System*, Belgrade, 2014, available at <http://bit.ly/1OQgKln>, 70-170.

145. *Ibid.*

146. HRW, 'Serbia: Police Abusing Migrants, Asylum Seekers Beaten, Extorted, Shoved Back Across the Border', 15 April 2015 available at: <http://bit.ly/1MfdgcO>.

147. See also UN Committee against Torture, *Concluding observations on the second periodic report of Serbia*, CAT/C/SRB/CO/2, 3 June 2015.

## **CHAPTER II**

### **KEY DEVELOPMENTS IN THE EU'S COMMON ASYLUM AND IMMIGRATION POLICY: OCTOBER 2014 – AUGUST 2015**

## II. KEY DEVELOPMENTS IN THE EU'S COMMON ASYLUM AND IMMIGRATION POLICY: OCTOBER 2014 – AUGUST 2015

The end of 2014 and first half of 2015 has been a particularly tumultuous period for the migration and asylum policy of the EU. Ongoing refugee crises in Syria, Eritrea and other parts of the world have kept refugee protection high on the Union's political agenda, as have countless tragic deaths of migrants and refugees attempting to cross the Mediterranean Sea to find safety in Europe. The scale of the tragic loss of life in the Mediterranean and the consequences of increased arrivals by sea, not only for the Southern Member States but for the entire EU, have certainly created a sense of urgency among EU policymakers, which has prompted discussion on substantial reforms in the area of migration and asylum throughout 2015.

As was the case in October 2013 when two shipwrecks caused the death of over 600 migrants off the coast of Lampedusa, it was two shipwrecks in April 2015 close to the Libyan coast, where it is estimated that over 1,100 persons lost their lives,<sup>148</sup> that triggered a number of important developments at the highest political levels in the EU. Within one week of the largest tragedy, both an extraordinary Joint Home and Foreign Affairs Council meeting and a special meeting of the European Council were convened. Ministers of Home and Foreign Affairs agreed on 20 April 2015 on a "10-Point Action Plan" to prevent deaths at sea that was tabled by the Commission.<sup>149</sup> That same week, the European Council adopted a statement listing a set of measures "to prevent further loss of life at sea and tackle the root causes of the human emergency we face, in cooperation with the countries of origin and transit".<sup>150</sup> Finally, the tragic events also speeded up the publication of the Commission's European Agenda on Migration, which had been planned for the end of May 2015.<sup>151</sup>

The Commission's long-awaited and much-discussed European Agenda on Migration was published on 13 May 2015, a policy initiative that was supposed to comprehensively revisit the EU's approach to migration and asylum and to provide new impetus. Such an overhaul of migration policy has been among the first projects promised by the new Commission taking office at the end of 2014. However, as will be discussed, the European Agenda does not seem to constitute a major shift in the thinking on migration and asylum, and the "innovative" parts of the agenda relate mainly to proposals for immediate action triggered by the abovementioned tragic events.

The Commission has envisioned a three-speed process for policy development in the area of migration and asylum, distinguishing between "immediate action" for short-term responses, "four pillars to manage migration better" for medium-term initiatives, and a "moving beyond" section for longer-term debates. The series of events and policy developments show a Union in search of a coherent policy on migration but that is eventually mainly led by a predominantly emergency-driven approach, despite the references to the need for immediate, mid-term and long-term actions in the policy documents mentioned above and discussed below. Confronted with the phenomenon of Mediterranean Sea crossings and a sharp increase in arrivals, immediate action is of course crucial to saving lives, but it should coincide with and not be at the expense of equally needed long-term and innovative measures, in particular with regard to safe and legal routes for refugees to reach protection in the EU.

The following sections discuss the recent proposals at EU level responding to the tragedies in the Mediterranean Sea to prevent deaths at sea, as well as the further steps outlined in the European Agenda on Migration to further develop and deepen the Common European Asylum System. Furthermore, the humanitarian crisis unfolding in Greece due to the significant spike in arrivals over the summer, as well as a number of national responses highlighting the difficulties in establishing a common European response, are discussed in this Chapter.

148. See The Guardian, '700 migrants feared dead in Mediterranean shipwreck', 19 April 2015, available at: <http://bit.ly/1D1Dm-Hi>; ECRE, '400 people feared dead – EU under pressure to do more to prevent further deaths in the Mediterranean', 17 April 2015, available at: <http://bit.ly/1HebG8k>; The Guardian, 'Migrant Boat Disaster: rescue hopes led to sinking in Mediterranean', 15 April 2015, available at: <http://bit.ly/1OBy4dY>.

149. European Commission, 'Joint Foreign and Home Affairs Council: Ten point action plan on migration', IP/15/4813, 20 April 2015. See also ECRE, *ECRE's Ten-point plan to prevent deaths at sea*, 23 April 2015, available at <http://bit.ly/1aUssws>.

150. See European Council, *Special Meeting of the European Council, 23 April 2015 – statement*, available at: <http://bit.ly/1by-WVks> (hereafter "European Council Statement").

151. European Commission, *A European Agenda on Migration*, COM(2015) 240, 13 May 2015.

# 1. Preventing loss of life at sea: the two faces of the EU's response to the tragedies in the Mediterranean

## 1.1. Boosting search and rescue capacity in the Mediterranean

The tragic shipwrecks in April 2015 close to the coast of Libya fuelled the criticism and concerns raised by NGOs and international organisations with regard to the winding down of the Italian Mare Nostrum Operation by the end of 2014, and the fact that the Frontex-led Triton operation that was launched as of November 2014 was too limited both in terms of resources and the geographical area of operation. The Mare Nostrum Operation was launched by the Italian Ministry of Defence in October 2013 with the aim of strengthening both surveillance on the high seas and search and rescue activities. The use of large navy vessels and other equipment resulted in the rescue of over 150,000 migrants in the Mediterranean and their disembarkation in Italian seaports. Whereas the Italian authorities were praised unanimously by NGOs and international organisations for the effectiveness of the operation, the onward movement of those arriving in Italy to other EU Member States was met with criticism by other Member States, while the Italian government faced mounting political pressure from parties in Italy because of the increase in the number of asylum seekers and irregular migrants and the high financial cost of the operation at €9 million per month.

Compared to the resources at the disposal of the Mare Nostrum operation, the Triton operation, which initially had a monthly budget of €2.9 million and could only operate within 30 nautical miles from the Italian coast, could obviously not be seen as a substitute for Mare Nostrum. Moreover, in its external communication, Frontex initially emphasised consistently the fact that the priority of the Triton operation was to strengthen border surveillance and that search and rescue was not at the core of the operation. This was despite the fact that the Maritime Border Surveillance Regulation,<sup>152</sup> laying down rules with regard to joint operations coordinated by Frontex and adopted in May 2014, established for the first time specific safeguards with regard to the respect of the *non-refoulement* principle in joint sea operations, and also rules with regard to search and rescue situations and disembarkation.<sup>153</sup> In fact, according to the Regulation, the concept of border surveillance is not limited to detection and prevention of irregular border crossings and interception activities, but also extends to “arrangements intended to address situations such as search and rescue that may arise during a border surveillance operation at sea and arrangements intended to bring such arrangements to a successful conclusion”.<sup>154</sup> At the same time, in practice, vessels involved in Frontex-coordinated joint operations at sea must in all circumstances comply with their obligation to engage in search and rescue activities under the international law of the sea. Therefore, Member States' vessels participating in joint Frontex operations at sea carry out search and rescue activities when called upon by the competent International Coordination Centre, turning such Frontex-led sea operations in the vast majority of cases into *de facto* search and rescue operations.<sup>155</sup> Moreover, as a result of the Maritime Border Surveillance Regulation, the operational plans of joint sea operations must include specific provisions on search and rescue and disembarkation, as well as further details on the procedural safeguards in place to ensure full respect of the principle of *non-refoulement*.<sup>156</sup>

The European Council Statement of 23 April 2015 and the European Agenda on Migration responded positively to the call of many NGOs to prioritise saving lives at sea and to increase significantly the resources and equipment for search and rescue operations. The European Council Statement committed to reinforcing Frontex joint sea operations Triton (in **Italy**) and Poseidon (in **Greece**) by at least tripling their financial resources in 2015 and 2016 and reinforcing the number of assets allowing to increase the search and rescue possibilities within the mandate of Frontex. The European Agenda on Migration explicitly states that the objective is to step up search and rescue efforts to the level of the Italian Mare Nostrum operation and confirmed that tripling the Frontex budget for Poseidon and Triton will allow Frontex to fulfil “its dual role of coordinating operational border support to Member States under pressure and helping to save the lives of migrants at sea”. This has clarified that search and rescue is an

152. 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 European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2014 L189/93.

153. For a critical analysis, see AIDA, *Mind The Gap*, Annual Report 2013/2014, 28-30.

154. Recital 1 Maritime Border Surveillance Regulation.

155. See for instance, Frontex, ‘Weekend arrivals at 5600 – All Frontex deployed assets engaged in SAR’, 9 June 2015, available at: <http://bit.ly/1fqU7aV>.

156. For an overview of the changes to the operational plans of 2014 Frontex Joint Operations at sea following the implementation of the Maritime Borders Surveillance Regulation see Frontex, *Frontex Annual Report on the implementation of the EU Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external borders*, 9 July 2015.

integral part of the Triton and Poseidon operations and has resulted in immediate changes to the operational plans of in particular the Triton operation, including the expansion of its geographical area.<sup>157</sup>

### Operation Triton: facts and figures

By the end of June 2015, as many as 24 EU Member States and the Schengen Associated States Iceland, Norway and Switzerland were taking part in operation Triton either by deploying equipment or experts to the operation.<sup>158</sup> Triton's operational area is expanded to 138 Nautical Miles south from Sicily, while it now has additional vessels and experts at its disposal. These include nine debriefing teams comprised of four people each and six screening teams composed of four people each.<sup>159</sup> Furthermore, six off shore patrol vessels and twelve patrol boats; four airplanes and two helicopters took part in the operation as of July 2015. In order to coordinate the operation, a regional base has been established in Catania where the operation is coordinated in cooperation with liaison officers from Europol, Eurojust and EASO. According to Frontex the budget for Triton for 2015 is 38 million euros while the Commission will provide an additional 45 million euros for both operations Triton and Poseidon in 2016. As the Mare Nostrum operation was conducted at a financial cost of 9 million euros per month, the budget allocated to Triton for 2015 only allows about four months of operational activity at the level of Mare Nostrum. According to Frontex, the coordination of search and rescue (SAR) operations lies with the Maritime Rescue Coordination Centres but all assets participating in the joint Frontex operation at sea must take all appropriate measures to ensure safety of persons in distress, whether they are in the area of a SAR operation or not. Moreover, when a SAR operation occurs, in or outside the operational area of Triton and upon request of the Maritime Rescue Coordination Centre (MRCC) or the Joint Rescue Coordination Centre (JRCC), the assets (both vessels and aircrafts) deployed under the Triton operation shall be made available to support the SAR activities. This means that, after receiving a request to undertake SAR activities, the assets allocated to Triton, must immediately suspend their border controlling activities and their command and control is transferred from the International Coordination Centre to the competent MRCC/JRCC. This also implies an obligation for Member States to pledge equipment to the Triton operation that is suitable for carrying out SAR activities and according to Frontex the Triton operational plan requires that patrolling vessels are equipped with basic supplies needed in case of SAR, such as adequate medical kits and sufficient quantities of water, food and blankets.

At the same time, some Member States such as the **United Kingdom** also put military vessels at the disposal of the Italian authorities for the purpose of participating in search and rescue operations coordinated by Italy and therefore outside the framework of the Triton operation. Nevertheless, the joint commitment of European States to increase search and rescue capacity in the Mediterranean to the level of the Mare Nostrum operation marks a major shift in the approach towards the Mediterranean Sea crossings. Whereas a country such as the United Kingdom in October 2014 publicly stated that it would not support any attempt to fill the gap left by the Mare Nostrum operation as it considered it to be a pull factor encouraging migrants risking their lives at sea,<sup>160</sup> it is currently actively contributing to search and rescue activities in the Mediterranean.

## 1.2. Declaring a “War on smuggling”

If saving lives at sea in the Mediterranean has finally become a key priority for the EU, dismantling smuggling networks has become the predominant political objective. Following the tragic events in April 2015, Commissioner Avramopoulos stated that Europe is declaring a “war on smuggling”<sup>161</sup> and the European Agenda on Migration envisaged the possibility of launching a Common Security and Defence Policy (CSDP) operation to “systematically

157. See Frontex, Frontex expands its Joint Operation Triton, 26 May 2015, available at: <http://bit.ly/1LISjnY>.

158. The following EU Member States deploy either experts or technical equipment: Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom. Information provided by Frontex to the Frontex Consultative Forum, 22 June 2015.

159. Debriefing teams conduct interviews with migrants with the objective of gathering information mainly on their travel routes and those who facilitated their trip and are only conducted with the consent of the migrants concerned. Screening teams assist the authorities of the host Member State of Frontex Operations in identifying the nationality and identity of the migrants apprehended at the border. All migrants apprehended during Frontex operations are subjected to screening and is mandatory for the migrants.

160. See European Voice, ‘UK will not participate in EU migrant rescue mission’, 29 October 2014, available at <http://politi.co/1Pjo6y7>.

161. European Commission, *Remarks by Commissioner Avramopoulos at the press conference in Castille Place*, SPEECH 15/4840, Malta, 23 April 2015.

identify, capture and destroy vessels used by smugglers”.<sup>162</sup> Whereas the “fight” against smuggling and trafficking of migrants has long been a key focus of the EU’s policy in addressing irregular migration, the launch of a military operation certainly adds a highly controversial new dimension to the EU’s policy with regard to irregular migration.

The speed with which the Council agreed to launch such an operation is remarkable. Already on 18 June the Council agreed in principle to launch operation EUNAVFOR MED, a military operation aimed at “breaking the business model of smugglers and traffickers in the Mediterranean. The operation, the costs of which are estimated at nearly €12 million, should comprise 4 phases:

- An initial phase of surveillance and assessment of human smuggling and trafficking networks in the South Central Mediterranean;
- A second phase of seizure of smugglers vessels;
- A third phase of disrupting and destroying the vessels; and
- A phase of mission withdrawal.

All phases are to be carried out in partnership with the Libyan authorities. At the Foreign Affairs Council of 22 June 2015, the operation was finally launched.<sup>163</sup>

The launch of a military operation to destroy boats and vessels used by migrants and refugees to reach Europe is questionable in many respects. First, even if such an operation is targeting the vessels and not the migrants using the vessels, the use of military force is never without risks of casualties and could have major repercussions for the region and lead to even greater instability. Moreover, destroying boats may have unintended consequences as it may result in migrants being forced to use even less safe options such as inflatable boats, thus increasing the risk of fatalities. Second, it may prove very difficult to “identify” boats used for smuggling before migrants and refugees have boarded, as in many cases the boats are being sold for that purpose and until that moment they are used for legitimate activities. Thirdly, in order for such military operation to be successful it would need to include military action on the territory of Libya, which would require a mandate of a UN Security Council Resolution.<sup>164</sup> At the time of writing, this has proved to be impossible. Finally, even if it were successful, destroying boats in Libya would not solve much as it is only addressing the symptoms of the problem. In absence of legal alternatives, it will not prevent those fleeing conflict, persecution and other serious human rights violations or extreme poverty from trying to cross the Mediterranean through other, possibly longer and more dangerous routes.

Another worrying trend in this respect is that the EU policy discourse tends to conflate the terms “smuggling” and “trafficking”. In its 23 April 2015 Conclusions, the European Council spoke of initiatives to “undertake systemic efforts to identify, capture and destroy vessels before they are used by traffickers.”<sup>165</sup>

In sharp contrast, in both statements issued *before* and *after* the meeting of EU leaders,<sup>166</sup> European Council President, Donald Tusk, branded the ostensible “traffickers” as “smugglers” in the same context. Rather than endorsing Member States’ view that underlying the tragic deaths in the Mediterranean are trafficking networks, President Tusk spoke of destroying “smugglers’ vessels before they can be used”. The Commission’s 10-point Action Plan on Migration, on the very basis of which the European Council’s “anti-trafficking” Conclusions were formulated, also carefully framed the situation in the Mediterranean as an issue of smuggling rather than trafficking. For its part, the European Agenda on Migration refers to smuggling and trafficking as “two diverse yet interlinked criminal activities perpetrated by criminal networks.”<sup>167</sup>

162. European Commission, *European Agenda on Migration*, 3. The European Council statement makes a similar call but with reference to trafficking, mentioned below.

163. See Council Decision (CSFP) 2015/972 of 22 June 2015 launching the European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), *OJ* 2015 L157/51; Council of the European Union, ‘Council launches EU naval operation to disrupt human smugglers and traffickers in the Mediterranean’, Press Release, 22 June 2015, available at <http://bit.ly/1P4Q8g2>. See also European Commission, *Non-paper on Operation Navfor Med*, 18 May 2015, available at: <http://bit.ly/1KnGQe7>.

164. According to Article 2(2) of the Council Decision of 22 June 2015, an assessment must be made whether the conditions for transition beyond the first phase of the operation have been met, taking into account any applicable UN Security Council Resolution and consent by the coastal states concerned.

165. European Council, *Conclusions 23 April 2015*, para 3(c). The term “traffickers” is also mentioned in para 2, while para 3(g) makes a broad reference to combating “the smuggling and trafficking of human beings”.

166. Council of the European Union, ‘Remarks by President Donald Tusk ahead of the Special European Council’, 23 April 2015, available at: <http://bit.ly/1K957DQ>; ‘Remarks by President Donald Tusk following the special European Council meeting on migratory pressures in the Mediterranean’, 23 April 2015, available at: <http://bit.ly/1byYe3m>.

167. European Commission, *European Agenda on Migration*, 8, fn. 15.

The conceptual boundaries between trafficking and smuggling are clearer than what EU officials portray. A person can be smuggled with his or her consent and without coercion. Moreover, smuggling does not involve exploitation *per se*, as it merely consists in assisting people cross borders, even though it may lead to detrimental situations and create risks of violence and exploitation for those smuggled. Crucially, smuggling is by nature a cross-border phenomenon, while trafficking can equally occur within the frontiers of a single state.<sup>168</sup>

Yet the difference is not only one of semantics. Equating smugglers to traffickers has significant normative consequences on the nature of the Mediterranean debate at EU level. As scholars have highlighted, labelling smugglers as traffickers adds “sinister effect” to hostile discourse against those encouraging irregular migration into the EU and tends to harness the negative image of migration as a criminal phenomenon.<sup>169</sup>

Orienting the issue of access to protection towards the “trafficking” sphere of discourse shifts focus from protection and reception initiatives to external intervention and security-driven measures. Against that backdrop, the EU builds broader support for the desirability of a “war on smugglers” and military operation to destroy vessels on the Libyan shores and other assets, before they may be used for smuggling purposes.<sup>170</sup>

### 1.3. The missing link: legal channels to reach Europe safely beyond resettlement

The war on smuggling risks not only enhancing the dangers for persons fleeing persecution, conflict and poverty trying to reach safety in Europe, but it will also fail to disrupt the “business model” of smuggling rings if it is not accompanied by measures offering refugees and migrants credible alternatives to smugglers’ services. The most effective way to “fight” smuggling networks is to take away their reason for existence. Refugees and migrants are increasingly forced to make use of irregular ways to enter the EU and apply for international protection as there are hardly any ways to do so in a legal manner. Whereas the Commission’s communication on the Task Force Mediterranean published in December 2013 had identified Regional Development and Protection Programmes (RDPPs), resettlement and reinforced legal ways to access protection in the EU as one of the five main strands of action to address the situation in the Mediterranean,<sup>171</sup> the European Agenda on Migration clearly puts forward the resettlement path, either as part of or outside an RDPP, as the only one to be pursued at EU level.<sup>172</sup>

The Commission proposal for a non-binding recommendation for an EU-wide resettlement scheme offering 20,000 places to be allocated among 28 Member States on the basis of a distribution key over two years is certainly a welcome step in the right direction.<sup>173</sup> The overall share of EU Member States in global resettlement efforts remains embarrassingly low so far and it is hoped that this can constitute an important push towards significantly raising the resettlement places in the EU. However, as the world is facing the largest refugee crisis since World War II, 20,000 places over two years is a very modest first step and can hardly be considered as a ground-breaking move that will have a major impact on refugee flows and the use of irregular channels to reach safety.

In this regard, it should be noted that the United Nations (UN) Special Rapporteur on the human rights of migrants, François Crépeau, observed that:

“Through resettlement programmes for refugees and other humanitarian visas and opportunities, it is well within the European Union’s means to develop the mechanisms necessary for providing refuge, over a number of years, for 1 million of refugees displaced by the Syrian and other major conflicts. Together with partner States in the global North and elsewhere, creating a reliable long-term programme will ensure that a large number of refugees will line up for resettlement rather than spend thousands of euros and risk their lives and that of their children in smuggling operations; this would considerably reduce the market for

168. For a concise overview, see The Guardian, ‘Migrant Crisis: Smuggling or Trafficking? Politicians don’t seem to know’, 22 April 2015, available at: <http://bit.ly/1DAQPrv>.

169. See e.g. K Long, ‘Immigration: Replace the Migration Security Complex with an “Integration Industry”’ (2015) *The Conversation* 29 January 2015; N Paszkiewicz, ‘The danger of conflating migrant smuggling with human trafficking’, *Middle East Eye* 2 June 2015.

170. European Commission, *Non-paper on Operation Navfor Med*, 18 May 2015; S Peers, ‘The EU’s Planned War on Smugglers’ (2015) *Statewatch*, available at: <http://bit.ly/1Lg3WTK>.

171. European Commission, *Communication on the work of the Task Force Mediterranean*, COM(2013) 869, 4 December 2103.

172. It should be noted that the Commission acknowledges the need for other legal pathways such as visas: *European Agenda on Migration*, 6.

173. European Commission, *Recommendation of 8 June 2015 on a European resettlement scheme*, C(2015) 3560, 8 June 2015.

smugglers and the cost of refugee status determination procedures in Europe.”<sup>174</sup>

Nevertheless, even the 20,000 resettlement target of the Commission has proved to be too ambitious an objective for the EU Member States to reach by themselves alone. Following negotiations within the Council, Member States reached an agreement at the extraordinary Justice and Home Affairs Council of 20 July 2015 on the distribution of resettled refugees under the scheme.<sup>175</sup> The following table illustrates the resettlement pledges by the different Member States, contrasted to their respective share under the distribution key initially proposed by the Commission:

Member State	Share under resettlement distribution key in Commission proposal	Final resettlement pledge
Austria	444	1900
Belgium	490	1100
Bulgaria	216	50
Croatia	315	150
Cyprus	69	69
Czech Republic	525	400
Denmark	345	1000
Estonia	326	20
Finland	293	293
France	2375	2375
Germany	3086	1600
Greece	323	354
Hungary	307	0
Ireland	272	520
Italy	1989	1989
Latvia	220	50
Lithuania	207	70
Luxembourg	147	30
Malta	121	14
Netherlands	732	1000
Poland	962	900
Portugal	704	191
Romania	657	80
Slovakia	319	100
Slovenia	207	20
Spain	1549	1449
Sweden	491	491
UK	2309	2200
Switzerland		519
Iceland		50
Liechtenstein		20
Norway		3500
<b>Total</b>	<b>20,000</b>	<b>22,504</b>

Out of the 28 EU Member States, 17 ultimately pledged lower resettlement numbers than those corresponding to their relative distribution share under the Commission proposal. More particularly, **Hungary** has refused to resettle any refugees. More worrying is the fact, however, that the 20,000 target would not have been met but for the participation of Schengen Associated States, namely **Norway**, which has agreed to resettle 3,500 persons.

Beyond resettlement, the European Agenda on Migration deals with legal channels for persons in need of international protection in one sentence in which Member States are encouraged to use “other legal avenues available

174. See UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau: Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*, 8 May 2015, 13.

175. Council of the European Union, *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*, 11130/15 ASIM 62 RELEX 633, 22 July 2015.

to persons in need of protection, including private/non-governmental sponsorships and humanitarian permits, and family reunification clauses".<sup>176</sup> This is disappointing, as a joint approach to the use of humanitarian visas for protection reasons either under national legal provisions or on the basis of Article 25 of the Union Visa Code,<sup>177</sup> currently under revision by the Council and the European Parliament,<sup>178</sup> could encourage Member States to make effective use of such channels. Member States often refer to the lack of administrative capacity and the bureaucratic burden on their embassies, or to the fact that other Member States do not have such procedures for issuing humanitarian visas for protection reasons or establishing protected entry procedures. Here the EU could provide added value through common guidelines and logistical and technical support for Member States by EU delegations for instance, an idea that had been raised by Commissioner Avramopoulos during the hearings of the new Commission in the European Parliament. This would further support and enhance already existing good practice at the national level such as the granting of humanitarian visas to a group of about 140 Syrians of a Christian minority group in Lebanon and to two vulnerable Syrian families in Turkey by the **Belgian** government in July 2014.<sup>179</sup>

Moreover, regular migration or mobility schemes, in addition to refugee-specific legal channels, can be used for persons in need of international protection. Family reunification, for instance, remains an important legal avenue for refugees with family members who found protection in the EU. However, recent research conducted by the Red Cross and ECRE has shown that in practice refugees face many practical and bureaucratic obstacles such as lengthy and expensive procedures at embassies, difficulties in proving family links in absence of the necessary documents etc.<sup>180</sup> In addition, existing labour mobility schemes or programmes for researchers and students could include a special focus on persons in need of international protection and constitute an alternative for persons in need of international protection who would otherwise be tempted to use irregular migration routes to find safety or better conditions in Europe.<sup>181</sup>

By almost exclusively focussing on resettlement as a legal avenue for refugees to enter the EU, the European Agenda on Migration missed the opportunity of giving renewed impetus at EU level to the use of other creative solutions to access protection in the EU in a safe and legal manner. All procedures and tools available will have to be used if the EU is serious about preventing loss of life during the migratory process and disrupting the business model of smugglers or combatting human trafficking.

## 2. A fairer Common European Asylum System

With regard to the CEAS, the European Agenda on Migration reflects the primarily emergency-driven approach that breathes throughout the entire document, although it indicates a number of additional steps in further developing the EU's common policy on asylum in the mid and long term.

The increasing number of arrivals of asylum seekers and migrants at the EU's Southern and Eastern borders and the growing discrepancy between the small number of EU Member States receiving the majority of asylum applications lodged in the "common area of protection and solidarity" have become the political "hot potato" in Brussels and in many capitals in recent months.

The Commission proposal for the relocation of 40,000 asylum seekers from **Italy** and **Greece** was in the first place a response to the mounting pressure on the asylum systems of both countries but it was at the same time a way to test whether the key feature of the system, a distribution key to determine the share of each Member State in the common efforts, which was also central to the proposal on resettlement, could become a central piece of a more structural reform of the current Dublin system.

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176. European Commission, *European Agenda on Migration*, 5.

177. Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ 2009 L243/1.

178. European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Union Code for Visas (Visa Code) (recast)*, COM(2014) 164, 1 April 2014. For an overview of the Council's position, see: Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council on a Union Code for Visas (Visa Code) (recast)*, 9450/15, 9 June 2015, available at: <http://bit.ly/1HNdCnY>.

179. See Caritas International, 'The Humanitarian and Moral Obligation to Protect Syrian Refugees', 13 July 2015, available at: <http://bit.ly/1L4E8gy>.

180. See Red Cross EU Office and ECRE, *Disrupted Flight – The Realities of Separated Refugee Families in the EU*, November 2014, available at: <http://bit.ly/1MreiKi>.

181. On legal entry channels see FRA, *Legal entry channels to the EU for persons in need of international protection: a tool-box*, February 2015, available at: <http://bit.ly/1BwnxuK>.

However, after the European Council of 25-26 June 2015, the discussion on the Commission proposal on relocation changed fundamentally, as EU leaders made it clear that discussions on relocation from Italy and Greece would have to be conducted on the basis of voluntary contributions from Member States to reach the objective of relocation of 40,000 persons from both countries. This weakened considerably the initial Commission proposal which was based on the principle that all EU Member States would be under an obligation to take in a pre-determined quota of persons established on the basis of a distribution key taking into account four criteria to calculate each Member State's relative share in the common effort.

Although the distribution key was eventually not used as a binding instrument, it nevertheless remains politically relevant as an indication of the relative efforts of Member States in the area of asylum. Therefore, this section reflects in more detail on the impact of the distribution key debate and its wider implications for the future of the CEAS and discusses the key aspects of the draft Council Decision on relocation as a solidarity instrument. Furthermore, two other key debates generated by the European Agenda on Migration will be discussed: the renewed focus on the safe countries of origin concept as a way to address "abuse" of the asylum system and the possible revision of the Dublin system.

## 2.1. Relocation of asylum seekers as a blueprint to address large arrivals?

Only two weeks after the publication of the European Agenda on Migration, the European Commission presented its proposal for a Council Decision on relocation of asylum seekers from Italy and Greece.<sup>182</sup> It is part of a broader approach with respect to relocation, as the Agenda also envisages a legislative proposal for "a mandatory and automatically triggered relocation system to distribute those in clear need of international protection when a mass influx emerges" by the end of 2015.<sup>183</sup>

The goal of the Commission to establish a relocation mechanism for 40,000 persons that would be mandatory for all EU Member States, with the exception of Ireland, the United Kingdom and Denmark,<sup>184</sup> turned out to be too ambitious. In fact, it revealed a fundamental lack of solidarity among EU Member States in the area of asylum and migration, as manifested in the political agreement reached at the Justice and Home Affairs Council of 20 July 2015, where Member States confirmed their respective relocation pledges:<sup>185</sup>

Member State	Relocation distribution key in Commission proposal	Relocation pledge
Austria	1213	0
Belgium	1364	1364
Bulgaria	572	450
Croatia	747	400
Cyprus	173	173
Czech Republic	1328	1100
Denmark	-	-
Estonia	738	130
Finland	792	792
France	6752	6752
Germany	8763	10500
Hungary	827	0
Ireland	-	600
Latvia	517	200
Lithuania	503	255
Luxembourg	368	320
Malta	292	60
Netherlands	2047	2047

182. European Commission, *Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, COM(2015) 286, 27 May 2015.

183. European Commission, *European Agenda on Migration*, 4.

184. The UK, Ireland and Denmark shall not take part in the adoption by the Council of measures pursuant to Title V of the TFEU. However, as the UK and Ireland can use their 'opt-in' option should they wish to take part in the application of proposed measures, Ireland has effectively opted into the relocation scheme.

185. Council of the European Union, *Resolution of the representatives of the governments of the Member States meeting within the Council on relocating from Greece and Italy 40 000 persons in clear need of international protection*, 11131/15 ASIM 63, 22 July 2015.

Poland	2659	1100
Portugal	1701	1309
Romania	1705	1705
Slovakia	785	100
Slovenia	495	230
Spain	4288	1300
Sweden	1369	1369
United Kingdom	-	-
<b>Total</b>	<b>40,000</b>	<b>32,256</b>

The outcome of the Council negotiations so far on the relocation commitments is disappointing in many respects. Despite the best efforts of the Luxembourg Presidency of the Council to secure pledges from Member States, the EU failed to meet its 40,000 target and only agreed at this stage on the relocation of 32,256 persons. For that reason, the Council agreed to revisit the issue of pledges at the end of 2015, with a view to reaching the 40,000 target.<sup>186</sup>

More specifically, only 9 out of the 24 countries participating in the scheme pledged a number in line or above their relative share: **Belgium, Cyprus, Finland, France, Germany, Ireland** (that has opted into the Decision), the **Netherlands, Romania** and **Sweden**. **Germany** has substantially exceeded its proportional share by taking up 10,500 asylum seekers alone, approximately 1/3 of the total number that will be relocated from Italy and Greece. At the other end, **Austria** and **Hungary** have refused to relocate any person in need of international protection, driven by concerns around the increasing pressure faced by their asylum systems.

More generally, in light of the dramatic increase of arrivals in **Greece** over the summer and the emergency situation it has created, in particular on the Greek islands, as discussed in Section 5 below, it is clear that the total number of 40,000 for both Italy and Greece agreed upon by the Council will be largely insufficient. While any relocation from Greece and Italy is obviously helpful and will provide some relief to both Member States concerned, the relocation of 16,000 persons over two years is a very modest effort in light of the numbers arriving in Greece. In particular, given the dire economic and financial situation of the country, relocation will have to involve dramatically higher numbers in order to assist Greece in coping with the situation and at the same time taking the necessary structural measures to set up adequate systems for registration, processing and reception of asylum seekers.

Below, the key aspects of the voluntary relocation mechanism, as it was agreed upon by the Council by the end of July 2015, are discussed. At the time of writing, the Council Decision has not yet been formally adopted as the European Parliament's Opinion on the Commission proposal was expected to be adopted only in September 2015. The draft report of the Rapporteur of the European Parliament, Ska Keller, included a number of important amendments aiming at strengthening the position of the applicant in the relocation procedure by providing: (a) a possibility to applicants to rank their preference for five Member States of relocation which would be matched by Member States' preferences for a particular applicant; (b) access to information for applicants; and (c) requiring the consent of the applicant to increase successful integration in the Member State of relocation.<sup>187</sup> The draft report also proposes to increase the total number of persons to be relocated for Italy and Greece to 50.000, with a total of 30.000 persons from Italy and 20.000 from Greece.

However, it should be noted that the draft Council Decision on a temporary relocation scheme is based on Article 78(3) of the Treaty on the Functioning of the European Union (TFEU). This provision allows the Council to adopt provisional measures "in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries" and to do so after consultation with rather than upon consent of the European Parliament.

### 2.1.1. *The draft Council Decision on relocation from Italy and Greece: key aspects and scope*

It is important to note that the relocation measures in the draft Council Decision entail a temporary and partial derogation from the Dublin III Regulation. The draft Council Decision derogates in particular from Article 13(1) of the Dublin Regulation, the provision allocating responsibility for examining an asylum application to the Member State where the applicant crossed the external border irregularly, as well as a number of procedural steps, mainly

186. *Ibid.*

187. See European Parliament, *Draft Report on the proposal for a Council decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, 2015/0125(NLE), 2 July 2015.

time-limits laid down in three other provisions of the Regulation.<sup>188</sup> As the Dublin criteria must be applied in hierarchical order, this means that only persons for whom none of the criteria preceding Article 13(1) – such as the presence of family members in other EU Member States or the issuance of a visa – apply fall within the scope of the Decision. All the other provisions of the Dublin III Regulation, including the provisions with regard to the procedural guarantees for asylum seekers in Dublin procedures but also rules relating to the costs of the transfer to the Member State of relocation, which must be met by the transferring Member State, remain applicable in the context of the relocation procedure.

The latter reference was added by the Council and implies that Italy and Greece are responsible for the financial costs of the actual transfer of the applicants concerned, as they would be under the Dublin III Regulation. However, in the statements of the Council and the Commission to the Council Decision, it is explicitly acknowledged that this may constitute a significant financial burden for Italy and Greece and therefore Member States are encouraged to share those costs, while the Commission points at the possibility of funding under the Asylum, Migration and Integration Fund (AMIF) to meet at least some of the transfer costs. The specific statements made on this issue indicate that the financial cost of the actual transfer constitutes a potential obstacle in practice for the effective implementation of the Decision and it remains to be seen how much financial solidarity the Member States of relocation will be prepared to show with both countries in practice.

The scope of the draft Council Decision is limited in two respects. On the one hand, the Decision will only apply to those applicants who are *prima facie* in need of international protection, and on the other hand it will only apply in respect of applicants arriving in Italy and Greece for whose applications one of the two countries would otherwise be responsible under the Dublin III Regulation as mentioned above.

#### *Territorial scope of relocation: a moving target?*

The existence of an emergency situation in Italy and Greece was not contested as such by Member States but the situation in both countries is rapidly shifting both with regards to the numbers of arrivals and the nationalities arriving, while **Hungary** was also facing a significant increase in the number of arrivals at its external borders at the time the proposal was discussed.

Based on the assessment of the situation prevailing at the end of May 2015, the Commission therefore proposed a larger relocation effort from Italy (24,000 persons “in clear need of international protection”) than from Greece (16,000). By the time the actual technical discussions on the Commission proposal started, it was clear that the dramatic increase of arrivals of refugees and migrants on the Greek islands no longer justified this distinction and that both countries are facing similar challenges in terms of the numbers involved and the need for emergency support with regard to reception accommodation, access to the asylum procedure and other relevant procedures.

The initial Commission proposal also referred to the “unique” migratory landscape in Italy and Greece and the fact that none of the other Member States currently appear in an emergency situation like the one experienced in those countries. While acknowledging the growing importance of the Western Balkan route as a point of entry into the EU, illustrated by the peak of arrivals at the Hungarian-Serbian border, the Commission clearly distinguishes both situations on the basis of the profile of the persons arriving. Whereas Italy and Greece receive peaks of arrivals with a high proportion of persons who arguably are *prima facie* in need of international protection, the majority of migrants using the Balkan route are not *prima facie* in need of international protection, according to the Commission, referring to the high percentage of Kosovars applying for asylum in the EU.

However, such assessment is to be nuanced with regards to **Hungary**. For instance, the number of persons from Kosovo applying for international protection decreased significantly after the first two months of 2015 as a result of strengthened border controls as well as information campaigns in Kosovo.<sup>189</sup> Overall in 2015, Syrian and Afghan nationals constituted the first and second largest group arriving in Hungary.<sup>190</sup> However, it has been estimated by the Hungarian Office of Immigration and Nationality (OIN) that approximately 80% of asylum seekers leave Hungary within less than 10 days after making their asylum application and lodge an application in other EU Member States, which is supported by the high number of “take back” requests from other EU Member States to Hungary

188. See Council of the European Union, *Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece – General approach* (hereinafter ‘draft Council Decision’), 11132/15 ASIM 34, Brussels, 24 July 2015, recital 16.

189. See Hungarian Helsinki Committee, ‘Hungarian government reveals plans to breach EU asylum law and to subject asylum-seekers to massive detention and immediate repatriation’, Media Information Note, 4 March 2015.

190. See UNHCR, ‘Bodies found dead in a truck near border, while asylum seekers flow into Hungary’, 28 August 2015, available at: <http://bit.ly/1Kxvsya>.

on the basis of the Dublin III Regulation.<sup>191</sup>

Whereas there are, indeed, good reasons to focus on relocation efforts from Italy and Greece as the emergency is most tangible in both countries, the Commission proposal does acknowledge that such situations, and therefore the need for relocation, may also emerge in other EU Member States and may require similar measures, although only **Malta** was exclusively mentioned as an example in this regard. This observation was significantly strengthened by the Council, which referred specifically to the Western Balkan route as a “specific situation” concerning certain Member States.<sup>192</sup>

#### *The personal scope of relocation: persons in clear need of international protection*

The approach taken in the Commission proposal to limit the personal scope of its relocation proposal to “persons in clear need of international protection” may be understandable from a political perspective, as it avoided in any case that the effectiveness and speed of the relocation procedure would be jeopardised from the start by long discussions about who should be eligible for relocation. If the aim is to alleviate the pressure on both Member States by taking over a limited number of applicants present on the territory of both countries swiftly, it is logical to focus on those applicants for whom all EU Member States largely agree that they are in need of international protection. This would also prevent those who are likely to receive a negative decision on their application from unduly prolonging their stay in the Union.

However, this choice at the same time implies that the “fair and balanced participation of all Member States to this common effort” will only concern a potentially limited number of straightforward cases of manifest international protection needs, which may be rapidly decided in the frontline Member States already, as will be discussed in Chapter III, Section 2.2 below. Yet the less straightforward cases, which may mobilise reception systems and resources of asylum authorities for several months, will still be left for individual Member States to deal with alone. Accordingly, the practical potential of the relocation scheme in alleviating pressure on the asylum systems of Member States located at the external borders of the EU seems by definition limited. A system which would focus on fast-tracking the granting of international protection status, combined with a system of mutual recognition and transfer of protection status between EU Member States allowing beneficiaries of international protection to take up residence in other EU Member States under the same conditions as EU nationals, would most probably achieve the same result more quickly and more effectively in practice.<sup>193</sup> However, it is acknowledged that also in absence of mutual recognition of positive asylum decisions and provided relocation procedures are carried out swiftly, the relocation mechanism *de facto* results to a certain extent in freeing resources at the national level to more effectively deal with other caseloads.

Only applicants belonging to nationalities for which the EU-wide average proportion of decisions granting international protection among decisions taken at first instance is 75% or higher come within the scope of the draft Council Decision, according to the latest quarterly Eurostat data.<sup>194</sup> The Commission had initially left the reference period open-ended, thereby suggesting that annual statistics would be used. While this presents probably the most objective criterion possible to establish who is in “clear need of international protection” for the purpose of relocation, an average recognition rate may be subject to changes within a limited period of time and there may be Member States where the recognition rate is below the EU average. At the time of the publication of the Commission proposal, this was the case with regard to applications from Eritrea, for which the recognition rate in **France** in 2014 was as low as 26%, whereas the recognition rate in most of the other EU Member States was indeed above 75%.<sup>195</sup> However, on the basis of Eurostat statistics for the first quarter of 2015, for instance, the nationalities falling within the “clear need of international protection” scope are **Syria**, **Eritrea** and **Iraq**, as well as the **Central African Republic**.<sup>196</sup>

191. According to EASO, Hungary received over 5,000 incoming Dublin requests in 2015 until mid-March. See EASO, *Description of the Hungarian Asylum System*, May 2015, 2. On the decision of the Hungarian Government in June 2015 to “suspend temporarily” the application of the Dublin III Regulation as a reaction to the migratory flows, see Section 6 below.

192. Recital 5b draft Council Decision on Relocation.

193. On the legal origins of the concept of mutual recognition of positive asylum decisions in international refugee law and EU asylum law and the issue of transfer of protection status between EU Member States, see ECRE, *Mutual Recognition of positive asylum decisions and the transfer of international protection status within the EU*, Discussion Paper, November 2014.

194. Article 3(2) draft Council Decision on relocation.

195. OFPRA, *Rapport d'activité 2014*, April 2015, available at: <http://bit.ly/1eljAS9>, 87.

196. Only Belgium (10), France (145), Italy (10) and the UK (5) issued decisions concerning nationals of the Central African Republic during the first quarter of 2015. The average recognition rate was 88.2%. See Eurostat, *First instance decisions on applications by citizenship, sex and age Quarterly data*, migr\_asydcfstq, available at: <http://bit.ly/1dBazYR>.

### 2.1.2. The relocation procedure

The relocation procedure included in the draft Council Decision seems to be sufficiently flexible to address those ongoing changes but it would mean that the outcome of the procedure for the Member States of relocation becomes less predictable, which may complicate the functioning of the relocation mechanism in practice.

#### *A primarily interstate procedure*

The actual relocation procedure is primarily a procedure between Member States. However, whereas the Commission had proposed that Italy and Greece would submit at regular intervals a number of applicants for international protection who can be relocated first and the other Member States would indicate how many they would be able to relocate immediately, the order is simply reversed in the draft Council Decision. All other EU Member States should first indicate how many persons they wish to relocate at regular intervals not exceeding 3 months.<sup>197</sup> Based on that information, Italy and Greece must identify the individual applicants who could be relocated to the other Member States and only following approval of the Member State of relocation, Italy and Greece shall take a decision to relocate each of the identified applicants to a specific Member State. Furthermore, the procedure must in principle be completed within 2 months from the indication given by the Member State of relocation although it can be extended where Italy and Greece can justify practical obstacles. However, where the relocation procedure is not completed within this time limit, Italy and Greece remain responsible for examining the claim and thus the relocation to another Member State is cancelled.

Furthermore, Member States only have a right to refuse to relocate an applicant on grounds of national security or public order or where there are serious reasons for applying the exclusion provisions in the recast Qualification Directive provisions. The latter would require an in-depth examination of the individual asylum application before relocating the applicant, which is difficult to reconcile with the overall objective of the rapid completion of the procedure. A balanced approach will be needed in this regard in order to avoid that the purpose of the relocation mechanism is *de facto* jeopardised by concerns with regard to national security and exclusion. As the responsibility for granting international protection eventually lies with the Member State of relocation, the procedure to be conducted on the territory of that Member State also provides an opportunity to exclude those not deserving international protection where necessary.

Specific support from Member State experts to Italy and Greece is foreseen with the process of screening and identification and even initial assessment where this is necessary.<sup>198</sup> This is additional to the role of liaison officers Member States may wish to send to Italy and Greece to assist in the implementation of all aspects of the relocation procedure and the national contact points in all Member States who should facilitate the administrative cooperation required to implement the Decision.

#### *Excluding consent but taking into account vulnerability and “skills which facilitate integration”*

As is the case with the Dublin procedure, applicants cannot actively choose the Member State of relocation, as this is not part of the objective criteria to determine the Member State of relocation. Moreover, the applicant's consent with the relocation decision is excluded in the draft Council Decision. It is stated explicitly in the preamble that the decision entails a derogation from the consent of the applicant for international protection which is referred to in Article 7(2) of the AMIF Regulation.<sup>199</sup> The latter provision foresees the possibility to fund actions in relation to the transfer of applicants for international protection between EU Member States in the context of relocation-type of programmes but states that such operations “shall be carried out with their consent” and does not allow for any exception. The fact that the draft Council Decision explicitly excludes this aspect of the relevant provision in the AMIF Regulation on the first occasion to apply an EU wide relocation scheme is worrying, as it undermines the important principle of the asylum seeker's consent with regard to relocation within the EU laid down in EU law and may set a bad precedent for the future.

However, at the same time, the importance of taking duly into account the individual circumstances of the persons eligible for relocation in the process is emphasised at two levels. Firstly, not only should priority be given to vulnerable applicants, within the meaning of Article 22 of the recast Reception Conditions Directive,<sup>200</sup> among the

197. Article 5 Council Decision on relocation.

198. Article 7 Council Decision on relocation.

199. Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, OJ 2014 L150/68.

200. 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), OJ 2013 L180/96.

larger group of nationalities eligible for relocation,<sup>201</sup> but the special needs of applicants, including health, should even be of *primary concern*.<sup>202</sup> This reflects the trend in the recast EU asylum legislation to increase the standards and guarantees for particularly vulnerable applicants not only with regard to special reception needs that such applicants may have but also with regard to specific procedural guarantees that may be required.<sup>203</sup> The improved standards for particularly vulnerable asylum seekers must, however, also be read in light of the jurisprudence of the ECtHR which considers asylum seekers as such to belong to a “particularly underprivileged and vulnerable population group in need of special protection.”<sup>204</sup>

Secondly, for the purposes of deciding which Member State should be the Member State of relocation, the draft Council Decision maintains the reference in the Commission’s proposal to the need to take into account the persons’ specific qualifications “which could facilitate their integration into the Member State of relocation, such as their language skills” and to the availability of adequate support to address potential specific vulnerabilities. In fact, this reference, albeit in the Preamble to the Decision, has even been strengthened by the Council in a passage worth reciting in full:

“In addition, in order to decide which specific Member State should be the Member State of relocation, specific account should be given to the specific qualifications and characteristics of the applicants concerned, such as their language skills and other individual indications based on demonstrated family, cultural or social ties which could facilitate their integration into the Member State of relocation. In the case of particularly vulnerable applicants, consideration should be given to the capacity of the Member State of relocation to provide adequate support to those applicants and to the necessity of ensuring a fair distribution of those applicants among Member States.”<sup>205</sup>

Although the relocation scheme is designed as a partial derogation from the Dublin Regulation, it still essentially concerns the allocation of applicants for international protection to a specific Member State and therefore the determination of the Member State that will ultimately be responsible for the examination of the asylum application and taking a final decision. In that respect, the proposal marks a shift in the approach as it makes a start with designing a system of allocation of responsibility for examining applications for international protection which incorporates not only the individual’s particular vulnerabilities, but also his or her integration prospects. As the Commission has stated in the European Agenda on Migration that the evaluation of the Dublin system in 2016 will be able to draw from the relocation and resettlement mechanisms, the inclusion of both elements in the proposal is important. It shows that a system whereby the individual’s circumstances, skills and social ties become the starting point – or are at least weighed in – is no longer considered as impossible and should be explored.

#### *Further testing of joint processing?*

The draft Council Decision also foresees an active role for national experts of Member States of relocation in Italy and Greece as part of the relocation process and of the support to both countries to cope with the increased pressure on their external borders. Such activities are to be coordinated by EASO and Frontex in particular and include identification, fingerprinting and registration of third country nationals; their initial processing and the preparation and organisation of return operations from Italy and Greece. The meaning of initial processing is not defined but arguably could include an initial examination of asylum applications of persons falling within the scope of the Council Decision as well as other asylum seekers arriving in Italy and Greece. In this regard, the relocation mechanism also provides an opportunity for the EU Member States and EU agencies to further test the concept of joint processing, whereby national experts of Member States participate in the examination of asylum applications on the territory of another Member State. A number of pilot projects in this field are currently coordinated by EASO or have recently been concluded,<sup>206</sup> but whereas these pilot projects were all limited in scope and duration and on an *ad hoc* basis, the draft Council Decision provides the legal basis for a systematic use of joint processing during a period of two years. The involvement of national experts in the processing of asylum applications in another EU Member State may contribute to further harmonisation of decision-making practice but obviously also entails

201. Article 5(3) Council Decision on relocation.

202. Recital 24 Council Decision on relocation.

203. See Article 24 recast 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 2013 L180/60 (hereafter “recast Asylum Procedures Directive”), which imposes an obligation on Member States to assess whether an applicant is an applicant in need of special procedural guarantees and where this is the case to ensure that they are “provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure”.

204. See ECtHR, *MSS v Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011, para 251.

205. Recital 25 draft Council Decision on Relocation.

206. See EASO, *Newsletter June 2015*, available at: <http://bit.ly/1Ui3WYf>, 7.

risks of exporting restrictive national interpretations of international protection obligations. This is in particular the case where joint processing includes a substantive role for the national experts from other Member States in the individual decision-making such as conducting interviews and drafting recommendations for decisions to be taken by the authorities of the responsible Member State. Also, the different legal tradition and legal framework and language in which the applications are being processed may in practice have an adverse impact on the quality of decision-making in the asylum procedure.<sup>207</sup> In sum, caution is needed with regard to joint processing of asylum applications and the outcome of EASO's evaluation of the pilot projects already conducted, announced for the second half of 2015, will hopefully contribute to a better understanding of the practical challenges related to joint processing, including from a protection perspective.

### *2.1.3. The other side of the relocation coin: preventing secondary movements at all costs?*

Reflecting the concerns of many Member States about the high number of secondary movements of asylum seekers and persons granted international protection within the EU, the draft Council Decision on relocation strongly emphasises the need to avoid situations where relocated persons travel on from the Member State of relocation to other Member States. Whereas this was flagged in the Commission proposal by simply referring to the need to inform applicants of the consequences of onward movement after relocation, the draft Council Decision introduces concrete suggestions as to how to avoid such secondary movements, albeit only in the Preamble. In line with the recast Reception Conditions Directive, Member States should consider imposing reporting obligations on applicants for international protection and they should only be provided with material reception conditions in kind. During the examination of their application, those applicants should not be provided with travel documents, except for serious humanitarian reasons<sup>208</sup> or any other, in particular financial ones, which might encourage them to travel on irregularly to other Member States.

Furthermore, those granted international protection should on the one hand be informed about the conditions for legally entering and staying in another Member State while they could also be subjected to reporting obligations in the Member State of relocation. According to the draft Council Decision, in case beneficiaries of international protection are present irregularly on the territory of another Member State, their return to the Member State of relocation should be enforced if they refuse to do so voluntarily, while Member States that enforced return in such case are also encouraged to issue national entry bans preventing the person concerned to re-enter that Member State for a certain period of time. In particular, the latter suggestion seems disproportionate in particular as even in the case of entry bans with limited duration, it may in practice be difficult for the persons concerned to enter the territory of the Member State that issued the entry ban even after expiry of the entry ban.

The overemphasis on preventing secondary movement of applicants and those granted international protection is also indicative of a continuing lack of trust of Member States in each other's systems and even intentions, which may have been fuelled by low pledges made by certain Member States as discussed above. The emphasis on the need to prevent also those granted protection from moving to other Member States is particularly concerning as it may be indicative of the continuing resistance to engage in a broader debate on enhancing free movement rights for protection beneficiaries as a necessary step in completing the CEAS in the coming years.

### *2.1.4. The next step: A mandatory and permanent system of relocation in case of mass influx?*

As mentioned above, in addition to a temporary system of relocation as a provisional measure on the basis of Article 78(3) TFEU, the European Agenda on Migration also announced a proposal by the end of 2015 for a "mandatory and automatically-triggered relocation system to distribute those in clear need of international protection within the EU when a mass influx emerges". This is described as a lasting solution as there is a need for a permanent system of sharing the responsibility for large numbers of refugees and asylum seekers among Member States, according to the Commission. Whereas such proposal was initially scheduled for the end of this year, the Commission is now expected to present such proposal already in September, given the significant increase of refugees arriving at the external borders of the EU over the summer.

207. For a detailed discussion, see ECRE, *Enhancing Intra-EU Solidarity Tools to improve Quality and Fundamental Rights Protection in the Common European Asylum System, January 2013*, available at <http://bit.ly/1IXgigc>.

208. This is a reiteration of the content of Article 6(5) of the recast Reception Conditions Directive, which provides that Member States may provide applicants with a travel document when serious humanitarian reasons arise that require their presence in another Member State, whereas the draft Council Decision reverses the logic and discourages explicitly the issuance of travel documents.

As a study on the Temporary Protection Directive,<sup>209</sup> including possible options for amending it, was launched by the Commission before publication of the Agenda, the reference to a permanent relocation system in situations of mass influx may be understood as part of a legislative initiative to amend that Directive. The Temporary Protection Directive has never been used so far and the Commission had in the past already stated its intention to look into the possibility of amending the Directive to take away the obstacles that have prevented its use so far.<sup>210</sup>

In this regard, it is remarkable that the Commission already states that obligatory and automatically-triggered relocation of those in clear need of international protection in such situations must be part of a system of responsibility-sharing. It suggests that, in the Commission's view, the weak solidarity mechanism between Member States in the Temporary Protection Directive is part of the problem and that mandatory relocation and distribution of such persons among EU Member States is the (only) adequate and appropriate response.<sup>211</sup> However, as discussed below, it is exactly the mandatory nature of the Commission proposal on emergency relocation that proved to be a bridge too far for many Member States, no doubt also anticipating discussions relating to the further reform of the Dublin system.

## 2.2. Measuring Member States' efforts in providing protection: the distribution key debate revisited

A key aspect of the initial Commission proposals on relocation and resettlement was the distribution key to delimitate Member States' respective reception capacities, based on "objective, quantifiable and verifiable criteria".<sup>212</sup> While several proposals for distribution keys have been made over the past years,<sup>213</sup> the Commission's key differs from all distribution models discussed so far. The distribution key used in the Commission proposals on relocation and resettlement weighted the following criteria to define national quotas: population size (40%); total GDP (40%); unemployment rate (10%); and the average number of asylum applications received and the number of resettled refugees per 1 million inhabitants in 2010-2014 (10%),<sup>214</sup> which did not figure in previous proposals.

As mentioned above, notwithstanding the fact that eventually the role of the distribution key in the operation of both the relocation and resettlement mechanisms has become less decisive in view of the voluntary pledges by Member States, it still serves as an indicator of what the share of each Member State should be. From this perspective it remains a useful tool to measure and demonstrate the (under)performance of certain Member States in the "joint" effort to assist Italy and Greece or the resettlement of refugees from countries outside the EU.

Moreover, beyond the limited scope of the EU relocation and resettlement efforts, the distribution key also allows to assess the current share of Member States in receiving asylum seekers by comparing it to the number they could objectively be expected to take in, based on the objective criteria.

In 2014, the 28 EU Member States received a total of 626,710 applications, *de facto* distributed as seen below. Under the distribution key as defined above, the distribution of this overall number of asylum claims would have been as follows:

Member State	Share in 2014 (%)	Relocation quota (%)	Number of applications in 2014	Number of applications under relocation quota
Austria	4.47	2.62	28,065	16,402
Belgium	3.64	2.91	22,850	18,218
Bulgaria	1.76	1.25	11,080	7,825
Croatia	0.07	1.73	450	10,830
Cyprus	0.27	0.39	1,745	2,441

209. 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.

210. European Commission, *An open and secure Europe: making it happen*, COM(2014) 154, 11 March 2014, 7.

211. Article 25 Temporary Protection Directive defines solidarity as the obligation of Member States to receive persons eligible for temporary protection "in a spirit of Community solidarity". The non-committal system laid down in Article 25 and 26 of the Directive consists of Member States indicating their capacity to receive persons falling within the scope of temporary protection, additional support for Member States when the number exceeds the reception capacity that was indicated and cooperation between Member States with regard to the transfer of the residence of those persons from one Member State to another with the consent of the persons concerned.

212. European Commission, *European Agenda on Migration*, Annex, 19.

213. For a recent overview of 6 distribution keys, see International Centre for Migration Policy Development (ICMPD), *An Effective Asylum Responsibility-Sharing Mechanism*, October 2014.

214. European Commission, *Proposal for a Council Decision on relocation*, Annexes.

Czech Republic	0.18	2.98	1,155	18,657
Estonia	0.02	1.76	155	11,018
Finland	0.57	1.72	3,625	10,768
France	10.26	14.17	64,310	88,713
Germany	32.36	18.42	202,815	115,321
Greece	1.50	1.90	9,435	11,895
Hungary	6.82	1.79	42,775	11,206
Italy	10.31	11.84	64,625	74,126
Latvia	0.05	1.21	375	7,575
Lithuania	0.07	1.16	440	7,262
Luxembourg	0.18	0.85	1,150	5,321
Malta	0.21	0.69	1,350	4,319
Netherlands	3.91	4.35	24,535	27,233
Poland	1.28	5.64	8,025	35,310
Portugal	0.07	3.89	440	24,353
Romania	0.24	3.75	1,545	23,477
Slovakia	0.05	1.78	330	11,143
Slovenia	0.06	1.15	385	7,199
Spain	0.89	9.10	5,615	56,971
Sweden	12.97	2.92	81,325	18,281

Source: Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex Annual data (rounded)*, migr\_asyappctza; European Commission, *European Agenda on Migration*, Annex.

On one hand, the establishment of a distribution key allows for a number of evident observations. For instance, 19 out of 25 Member States are currently receiving and processing less asylum applications than their respective share under the distribution key. For a number of these countries, namely **Croatia, Czech Republic, Estonia, Finland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia** and **Spain**, the quota model would entail a tremendous relative increase in asylum applications.

The introduction of quotas would thus be 'beneficial' in numerical terms only for **Sweden, Germany, Hungary, Austria, Belgium** and **Bulgaria**. More specifically, out of the two countries receiving the highest numbers of asylum applications, **Sweden** would be responsible for approximately  $\frac{1}{4}$  of the number of applications currently processed, while **Germany** would receive a little more than  $\frac{1}{2}$  of its number in 2014.

On the other hand, a closer look at the abovementioned distribution model against the current state of distribution of asylum applications across the EU helps to challenge assumptions on the efforts made by different Member States in the asylum field. By way of example, **Italy** and **France** were the third and fourth destinations of asylum seekers in 2014, receiving over 10% of the overall number of applications each, but did not receive more than their respective capacity that year.

Accordingly, the distribution key indicates that even frontline Member States such as **Italy**, as well as **Malta, Greece** and **Cyprus** for that matter, are not hosting more asylum seekers than their share under the objective criteria used in the distribution key. Yet, while the pressure on national asylum systems in the Mediterranean region is not solely a numbers issue, it has predominantly been presented as such. Interestingly, if the same distribution key is to be applied to a permanent relocation mechanism, frontline Member States will not be relieved of pressure stemming from high numbers of asylum applications. On the contrary, they will receive more. However, this may also be influenced by the fact that the number of registered asylum applications in countries such as **Italy** and **Greece** is far lower than the number of asylum seekers arriving or actually present in such countries as many asylum seekers do not want to apply for asylum there or are face obstacles in having their application registered, as discussed in Chapter I, Section 5.

The central role of a distribution key in initial proposals of the Commission on relocation and resettlement as a means to measure the required effort from each Member State illustrates how politically sensitive the uneven distribution of asylum seekers has become within the EU. As the concentration of the vast majority of the total number of asylum applications lodged in the EU in only a handful of Member States has become a steady trend for some years now, this is, at least from a political perspective, not sustainable in the long run. The EU institutions' mantra of a CEAS based on solidarity and fair responsibility-sharing increasingly loses credibility as it could not be more distant from the truth. The reality is that a number of countries located at the external borders of the EU are *de facto*

transit countries for asylum seekers and that little is being done to change that.

In addition to statistical data on the application of the Dublin system discussed in Chapter I, Section 4, this is the clearest illustration of the fact that the Dublin system is not working and even close to collapsing. As the Dublin system, including under the revised Dublin III Regulation, remains based on the principle that the Member State responsible for the applicant's entry into the common territory is responsible for examining their asylum application, with the exception of family provisions, a strict application of its criteria would most likely result in Member States located at the external borders of the EU becoming responsible for a disproportionately high number of asylum applications.

Combined with the persistent discrepancies between EU Member States in the level of reception conditions, procedural guarantees and recognition rates, despite 15 years of harmonisation, this leads to the conclusion that there is not much common nor European about the CEAS.

The use of a distribution key in the Commission proposals may in that sense be a sign of the times and a clear indication that a number of Member States will no longer tolerate a system that allows for "free riders". Moreover, also from an NGO perspective, the current situation is not acceptable as there are very little real incentives for Member States currently receiving low numbers of asylum seekers to invest sufficiently in their asylum systems and create the conditions in which asylum seekers can assert their rights and entitlements under EU and international law. While many asylum seekers manage to move on to other Member States, others remain stuck in the first country of arrival in the EU and become the victim of the perverse logic that is built into the system. This is not acceptable as all EU Member States have legal obligations vis-à-vis persons in need of international protection under EU and international human rights and refugee law.

### **2.3. Implementation of the CEAS: in search of mutual trust while addressing "abuse": the recurring debate on safe countries of origin**

The implementation of the recast standards agreed in 2013 is reiterated as a priority in the European Agenda on Migration,<sup>215</sup> echoing the European Council's strategic guidelines in June 2014.<sup>216</sup> The Commission intends to prioritise transposition and implementation in practice of the recast asylum legislation including through infringement proceedings. As will be seen in Chapter III below, the current status of implementation after the expiry of the transposition deadline would give the Commission quite a rich field for such proceedings.<sup>217</sup>

It furthermore considers the lack of mutual trust between Member States as a result of the continued fragmentation of the system as one of the key weaknesses of the CEAS. Restoring such trust is a major objective for the Commission in the coming years. The "new systematic monitoring process", which remains further undefined, and guidance to improve standards on reception conditions and asylum procedures providing Member States with specific and simple quality indicators, are explicitly mentioned as key tools to achieve more mutual trust and to enhance the resilience of the system. Although the nature of such guidance is not specified, its main purpose is to improve standards on reception conditions and asylum procedures and reinforcing the protection of fundamental rights of asylum seekers.

Whereas the objective of enhancing the quality of standards in the Member States and the protection of fundamental rights is obviously to be welcomed, this is counterbalanced by the overemphasis on the so-called "abuses" in the asylum field.

It is striking that the Commission stresses the fact that in 2014 55% of the asylum applications resulted in a negative decision, which is considered as simply too much, without explaining that the EU-wide recognition rate has actually never been higher. As highlighted in EASO's 2014 Annual Report on the Situation of Asylum in the European Union, the overall recognition rate at first instance in 2014 was 47%, a 12% increase compared to the 35% recognition rate in 2013.<sup>218</sup> While the Commission does not specify what rejection rate would be acceptable, the sharp increase in positive decisions on asylum applications puts the "abuse" language into perspective and should

215. European Commission, *European Agenda on Migration*, 13.

216. European Council, *Conclusions 26-27 June 2014*, EUCO 79/14 CO EUR 4 CONCL 2, para 7. For a critical analysis see AIDA, *Mind the Gap*, 32-34.

217. The Commission has reportedly initiated infringement proceedings against 18 Member States on the implementation of the asylum *acquis*: EU Observer, '18 EU countries face possible court action on asylum', 25 August 2015, available at: <http://bit.ly/1PxQxHX>.

218. EASO, *Annual Report on the Situation of Asylum in the European Union 2014*, July 2015, 23.

be part of the equation in order to avoid stereotypes. The European Agenda on Migration in this respect risks fueling the worrying trend of increasingly defining asylum policies in antithetical terms, between those who deserved to enter the system because they have eventually been granted a status and those who should have never entered the system in the first place as their asylum applications were ultimately rejected.<sup>219</sup> The aim of the asylum system should be exactly to make a careful assessment of each individual's need for international protection against the standards laid down in EU and international refugee and human rights law in a fair and efficient procedure that respects the fundamental rights of the applicant. This necessarily implies that a number of applications will not meet the criteria and will have to be rejected, but this does not necessarily mean in all of those cases the claim was totally unrelated to international protection and was submitted for the "wrong" reasons. Asylum applicants may be found not to be in need of international protection because of the existence of an internal protection alternative, or because the situation in the country of origin has improved since the application was lodged etc. Moreover, an extremely low recognition rate, or for that matter extremely high rejection rate in a Member State or with regard to particular nationalities, is not *per se* to be interpreted as "abuse" but may also point to quality gaps and deficiencies in the procedure as was illustrated by the discrepancies in recognition rates between the EU Member States discussed in Chapter I, Section 3.

A "more effective approach to abuses" is proposed in the Agenda by developing guidelines to maximise possibilities for swiftly processing manifestly unfounded applications. One approach proposed in this context relates to strengthening the "safe country of origin" concept with a view to applying accelerated procedures more frequently.<sup>220</sup> In a letter to the Justice and Home Affairs Ministers, Commissioner Avramopoulos mentions that this may include a proposal to provide for a common EU list of safe countries of origin. According to the recast Asylum Procedures Directive, a country can be considered safe where it can be shown that there is generally and consistently no persecution as defined in the recast Qualification Directive, no torture or inhuman or degrading treatment or punishment and no situation of indiscriminate violence. The safe country of origin concept introduces a presumption of safety on the basis of the nationality of the applicant but according to the recast Asylum Procedures Directive such presumption is rebuttable and can only be applied after an individual examination of the application.<sup>221</sup> Whereas the procedural safeguards in the recast Directive have improved, the compatibility of the concept with international refugee law standards in itself remains questionable as it may result in discriminatory treatment of refugees based on their country of origin, which is prohibited under Article 3 of the 1951 Refugee Convention,<sup>222</sup> and results in particular in an increased burden of proof on the applicants concerned.

The safe country of origin concept has proved to be problematic in particular, where it is applied in the context of accelerated procedures with reduced procedural safeguards, such as the lack of an automatic suspensive effect of the appeal in such cases. As highlighted in the 2013/2014 AIDA Annual Report<sup>223</sup> and in Chapter III, Section 2.1 below, EU Member States have no common understanding of which countries can be considered as safe, as states using national lists of the safe countries of origin all have different countries on those lists. Following a judgment of the CJEU partly annulling Article 29 of the 2005 Asylum Procedures Directive<sup>224</sup> on a minimum common list of safe countries of origin,<sup>225</sup> the recast Asylum Procedures Directive no longer contains a legal basis for establishing a common EU list. The Commission's announcement of such common list therefore would require an amendment of the recast Asylum Procedures Directive, which is expected to be tabled in September 2015. Despite the legislation "fatigue" after the adoption of the asylum package, this would constitute the second amendment of a second generation EU asylum instrument, after the Commission's proposal to amend Article 8(4) of the Dublin III Regulation following the judgment of the CJEU in the case of *MA*.<sup>226</sup>

The European Agenda on Migration furthermore links this discussion to the issue of the number of asylum applications from third countries benefiting from visa exemption or visa liberalisation for travel to the EU. Without this being explicitly stated in the European Agenda on Migration, it is clear that mainly the six countries in the Western Balkans, **Albania, Kosovo, Serbia, Montenegro, FYROM and Bosnia-Herzegovina** are targeted. According to

219. For a discussion of this binary approach, see C Costello and E Hancox, 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee' in V Chetail et al. (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Martinus Nijhoff 2015, Forthcoming).

220. European Commission, *European Agenda on Migration*, 12-13.

221. Article 36 recast Asylum Procedures Directive.

222. Which states "The Contracting Parties shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

223. AIDA, *Mind The Gap*, Annual Report 2013/2014, 48-53.

224. Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005 L326/175.

225. CJEU, Case C-133/06 *Parliament v Council*, Judgment of 6 May 2008.

226. CJEU, Case C-648/11 *MA v Secretary of State for the Home Department*, Judgment of 6 June 2013.

EASO, “the vast majority of EU+ countries considered these countries as safe countries of origin and therefore most of the Western Balkans applications were rejected”.<sup>227</sup> The July 2015 Council Conclusions also agree that “the Western Balkans countries could be considered as safe countries of origin by all the Member States”,<sup>228</sup> while a joint declaration of 20 August 2015 by the French and German Ministers of Interior calls the EU to act more swiftly in the definition of a common approach to safe countries of origin.<sup>229</sup>

However, as seen in Chapter III, Section 2.1, despite the Commission and EASO’s contentions, these countries are not unanimously considered safe amongst Member States. For instance, currently **Belgium, Hungary, Denmark, Luxembourg, the UK and Switzerland** are the only countries which have listed all six countries as “safe countries of origin”. This illustrates once more that considering the six “Western Balkan” countries as a homogeneous group of countries or as one “nationality” to analyse the flows of people seeking international protection in the EU is not very useful and potentially misleading, as it disregards the specific circumstances and human rights situation in each of those countries.

#### *Reintroducing a common list of safe countries of origin*

Establishing an EU common list of safe countries of origin through an amendment of the recast Asylum Procedures Directive, soon to be proposed by the Commission, will likely become a troublesome and cumbersome undertaking, as such amendment will have to be adopted by the Council and the European Parliament according to the ordinary legislative procedure. Whereas EU Member States clearly disagree about which countries can be considered safe, the issue is also politically sensitive within the European Parliament and in any case may lead to very heated debates about which countries to include in the list.

In anticipation of such a legislative amendment, however, the EU has already launched a process of political endorsement of a common approach to safe countries of origin. Following the June 2015 European Council, the Commission explained that an indicative list of safe countries of origin was to be agreed by the EASO Management Board, which would be a “living document” that can be relied upon by Member States.<sup>230</sup> The Commission’s Information Note on safe countries of origin refers to “many Western Balkan countries” as an example of third countries for which there is a “broad consensus” that they should be designated as safe countries of origin. The Council Conclusions on “safe countries of origin” adopted on 20 July 2015 fully endorse this approach and recommend explicitly that priority be given to an assessment by all Member States of the safety of the Western Balkans, suggesting that the Western Balkan countries could be considered as safe countries of origin by all the Member States.<sup>231</sup> However, as mentioned above, it seems that the initially envisaged timing to establish such a common list has been abandoned as the Commission is expected to present a proposal on the Common list of safe countries of origin already in September, as countries such as Germany and France have increasingly urged for such list to be adopted.<sup>232</sup>

The establishment of either national lists or an EU common list of safe countries of origin raises questions from a human rights perspective as the safe country of origin concept is at odds with the central focus of refugee law on a thorough assessment of the individual circumstances of the applicant. The safe country of origin concept inevitably increases the burden of proof on the applicant in the procedure, who must overcome this additional procedural hurdle by rebutting the presumption of safety in his or her individual circumstances. Moreover, if a common list could be established at EU level it would require those EU Member States that currently do not apply the safe country of origin concept or do not make use of national lists to start using the concept in practice, whereas this is currently only optional for Member States. Finally, the adoption of such common list of safe countries of origin may also reopen the debate about establishing a common list of “European Safe Third Countries”, an even more questionable concept laid down in the recast Asylum Procedures Directive.<sup>233</sup>

227. EASO, *Annual report on the situation of asylum in the EU 2014*, July 2015, 27.

228. Council of the European Union, *Council Conclusions on safe countries of origin*, 5.

229. See Tagesschau, ‘Berlin and Paris make the EU pressure’, 21 August 2015, available in German at: <http://bit.ly/1E9vVpl>.

230. European Commission, *Information note on the follow-up to the European Council Conclusions of 26 June 2015 on “safe countries of origin”*, available at: <http://bit.ly/1MCLLb3>.

231. Council of the European Union, *Council Conclusions on safe countries of origin*, 11133/15 ASIM 65 COWEB 75, 22 July 2015.

232. See Deutsche Welle, ‘Hollande backs Merkel’s call for a common EU refugee policy’, 24 August 2015, available at: <http://bit.ly/1MSS3W9>.

233. This concept allows Member States not to examine applications from applicants entering an EU Member State irregularly from a country that has ratified and observes the 1951 Refugee Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms and has an asylum procedure prescribed by national law. As it was the case with the minimum common list of safe countries of origin, the provision in the 2005 Asylum Procedures Directive requiring the Council to adopt a common list of European Safe Third countries was never implemented and was deleted in the recast Asylum Procedures Directive.

## 2.4. Rethinking the Dublin system at last

Whereas the Dublin system was considered to be the cornerstone in building the Common European Asylum System in the Stockholm Programme,<sup>234</sup> the European Agenda on Migration openly acknowledges that “the mechanism for allocating responsibilities to examine asylum applications (the “Dublin system”) is not working as it should”.<sup>235</sup> This is still largely an understatement in light of the evidence as regards the effectiveness of the system and the fundamental rights concerns related to it that are discussed in Chapter I, Section 4 and Chapter III, Section 3. The latter rather seems to indicate that the Dublin system is not working at all and that its flaws are beyond repairing, given the fact that also the considerable changes of the recast Dublin III Regulation that are applicable since January 2014 do not seem to have improved the Regulation’s functioning in practice.

Nevertheless, the European Agenda on Migration appears rather ambiguous about the need for fundamental changes to the system of allocating responsibility. On the one hand, its emphasis on better implementation of the Dublin rules and investing more resources to increase the number of transfers and reducing delays, and as well as the enhanced focus on fingerprinting (followed by specific guidance issued soon after the Agenda),<sup>236</sup> seem to suggest that better implementation of the existing rules rather than fundamental reform is needed. A proactive use of the family provisions and broader and more regular use of the discretionary provisions should thereby assist in alleviating the pressure on the frontline Member States. On the other hand, the possibility of a “revision of the legal parameters of Dublin”<sup>237</sup> is also envisaged as one of the possible outcomes of the Commission’s evaluation of the Dublin system that has started in July 2015 and that must, according to the terms of reference of the call for proposals, not only include a comprehensive fitness check as envisaged in the Dublin III Regulation itself,<sup>238</sup> but also include an assessment of the political and practical feasibility of alternative models to the current Dublin system.

Whatever the outcome of such exercise may be, it is clear that the *status quo* is no option and that further steps are needed to fundamentally rethink the key features and underlying principles of the current system. This exercise necessarily must be guided by the jurisprudence of the ECtHR and the CJEU which has consistently held that a system of allocating responsibility for examining asylum applications between states cannot be based on a conclusive presumption of safety of the states that are party to such arrangement and that it does not absolve states from complying with their obligations under international human rights law.<sup>239</sup> Moreover, in its case-law concerning Dublin cases, the ECtHR has consistently held that it considers asylum seekers as members of “a particularly underprivileged and vulnerable population group in need of special protection”,<sup>240</sup> whereas in certain circumstances individual guarantees may be required with regard to the way in which fundamental rights of applicants will be respected in practice in the responsible Member State, for a Dublin transfer to be compatible with States’ obligations under Article 3 ECHR.<sup>241</sup> The Dublin III Regulation already includes additional guarantees to better ensure compliance with the principle of *non-refoulement* and to take specific vulnerabilities of applicants better into account in transfer procedures.<sup>242</sup>

However, these improvements do not alter the key principles underlying the Dublin system and its key features. Even though the system provides possibilities for applicants to submit elements that relate to their personal circumstances, including specific needs and vulnerabilities, it remains based on the presumption that the level of protection and compliance with EU asylum standards is the same in all Dublin States. Therefore, the responsibility for examining an asylum application is still mainly determined on the basis of responsibility for the applicant’s first entry into the territory of the EU, with the exception of family provisions. Finally, whereas the procedural safeguards to challenge decisions to transfer asylum seekers to another Member State in the Dublin III Regulation may have significantly improved, this does not mean that the asylum seeker’s preference for a particular Member

234. European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ 2010 C115/32, 6.2.

235. European Commission, *European Agenda on Migration*, 13.

236. European Commission, *On implementation of the Eurodac Regulation as regards the obligation to take fingerprints*, SWD(2015) 150, 27 May 2015. For a critique, see ECRE, *ECRE Comments on the Commission Staff Working Document “on implementation of the Eurodac Regulation as regards the obligation to take fingerprints”*, June 2015, available at: <http://bit.ly/1CYNZBs>.

237. European Commission, *European Agenda on Migration*, p. 13.

238. See Recital 9 recast Dublin III Regulation.

239. ECtHR, *MSS v Belgium and Greece*; CJEU, *Joined Cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and ME v Refugee Applications Commissioner*, Judgment of 21 December 2011.

240. ECtHR, *MSS v Belgium and Greece*, para 251.

241. ECtHR, *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014. See, however, *AS v Switzerland*, Application No 39350/13, Judgment of 30 June 2015.

242. Moreover, the ECtHR has consistently held that the adoption of EU asylum standards and the increased level of protection it creates for asylum seekers implies *inter alia* that providing adequate reception conditions to asylum seekers has become a positive obligation for Member States and is an inherent part of their obligations under Article 3 ECHR.

State has to be taken into account.

Whereas the Dublin Convention<sup>243</sup> and the Dublin II Regulation<sup>244</sup> were exclusively conceived as a procedure between states, the Dublin III Regulation already incorporates safeguards to protect those subject to Dublin procedures from fundamental rights violations resulting from the system. The EU institutions must take the opportunity to build on the jurisprudence and the increased overall fundamental rights protection laid down in the EU asylum *acquis* and the EU Charter of Fundamental Rights to further enhance the rights of individuals in the Dublin system and take the respect for fundamental rights and individual circumstances and skills of the asylum seeker as the starting point in designing a system of allocating responsibility for examining asylum applications. The past 25 years of Dublin practice have shown that a system that does not sufficiently take into account the applicant's wishes or specific connections with a particular Member State and the varying levels of protection between EU Member States, simply does not work as it inevitably results in unfairness, increases the risk of human rights violations, works against solidarity between EU Member States and delays integration. It is therefore paramount that alternative models or further reform of the Dublin system take the asylum seeker's personal preferences or links with a specific Member State as much as possible into account.<sup>245</sup>

## 2.5. Moving beyond: the completion of the CEAS

The European Agenda on Migration refers to the promise of a “uniform asylum status, valid throughout the Union” under the Treaties<sup>246</sup> as a topic for future debate. In the context of the completion of the CEAS, the Commission introduces the prospect of a broad debate encompassing issues such as mutual recognition of positive asylum decisions and a common Asylum Code, while leaving an open door to the establishment of a “single asylum decision process... aiming to guarantee equal treatment of asylum seekers throughout Europe.”<sup>247</sup> A number of remarks are worth highlighting in light of this open-ended ‘invitation to discuss’ the consolidation of the Union's common asylum policy.

Firstly, the discussion of mutual recognition of positive asylum decisions seems unsurprisingly postponed to a later, undefined date. Mutual recognition has not yet occupied a place on the Union's negotiating table in any formalised manner, despite consistent calls for such a debate in 2008 by the Commission,<sup>248</sup> in 2010 by the European Council's Stockholm Programme,<sup>249</sup> in 2012 by the Council's Presidency trio,<sup>250</sup> and again in 2014 by the Commission<sup>251</sup> and the then incoming Council Presidency trio.<sup>252</sup> Seven years after its appearance in the Commission's Policy Plan on Asylum, mutual recognition is still seen as a debate for another day.

However, mutual recognition and transfer of international protection status between EU Member States is the next logical step in the completion of the CEAS. It would rectify the current anomaly whereby Member States recognise each other's negative decisions on asylum applications through the Dublin Regulation and are even allowed to carry out each other's return decisions that result from it, yet there is no systematic and automatic recognition of each other's positive decisions. While there is already some basis for mutual recognition of positive asylum decisions in international law and EU law, the principle is currently not implemented in practice. This constitutes an important obstacle to the free movement of beneficiaries of international protection, who can only settle in another EU Member State than the one that granted them international protection after 5 years of lawful residence under the con-

243. Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention, OJ 1997 C254/1.

244. 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, OJ 2003 L50/1.

245. See E Guild *et al*, *Enhancing the Common European Asylum System and alternatives to Dublin*, European Parliament, Civil Liberties, Justice and Home Affairs, PE 519.234, 3 July 2015.

246. Article 78(2)(a) TFEU.

247. European Commission, *European Agenda on Migration*, 17.

248. European Commission, *Policy Plan on Asylum*, COM(2008) 360, 17 June 2008, 6.

249. European Council, *Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ 2010 C 115/1, para 6.2.1. Note, however, that the European Council called the Commission to consider transfer of protection “once the second phase of the CEAS has been fully implemented”.

250. Council of the European Union, *18-month programme of the Council (1 January 2013 – 30 June 2014)*, 17426/12 POL-GEN 213, 7 December 2012, 111.

251. European Commission, *An Open and Secure Europe: Making it Happen*, COM(2014) 154, 11 March 2014, 7-8.

252. Council of the European Union, *18-month programme of the Council (1 July 2014 – 31 December 2015)*, 10948/1/14 REV1 POLGEN 97, 17 June 2014, 13, 51.

ditions laid down in the amended Long Term Residents Directive,<sup>253</sup> and not as beneficiaries of international protection as such. The 1951 Refugee Convention obliges Contracting Parties to treat refugees as the most favoured foreigners with respect to access to a number of rights attached to refugee status. Under EU law, EU citizens are the most favoured foreigners and therefore, refugees should be able to move, reside and work throughout the EU subject to the same conditions and restrictions as EU Citizens. As the status of beneficiaries of subsidiary protection is increasingly aligned with that of refugees, this should obviously also apply to this category of beneficiaries of international protection under EU law. Moreover, the transfer of their protection status is explicitly excluded from the scope of the Long Term Residents Directive and is currently only dealt with through an agreement concluded in the context of the Council of Europe, which only 11 EU Member States have ratified.<sup>254</sup>

The adoption of a legal instrument or the amendment of already existing instruments such as the recast Qualification Directive or the Long Term Residents Directive would be necessary to give legal effect to the principle and would be a way to establish a uniform status of asylum, valid throughout the Union as is required under Article 78(2)(a) TFEU.<sup>255</sup> Enhancing free movement rights of persons granted protection in one of the EU Member States would be an important tool for their integration and would finally acknowledge refugees' potential to contribute to the society not only of the Member State which granted the status but also of other EU Member States. The EU should tap into the skills and potential of beneficiaries of international protection rather than prevent them from utilising them.

Conversely, the idea of a common Asylum Code appears for the first time in EU policy discourse. The Commission does not clearly demarcate what form of codification process could be envisaged for the EU's asylum *acquis*, however. It is therefore unclear whether the European Agenda on Migration envisions a *stricto sensu* consolidation of existing legislation, similar to the one currently endeavoured for the Schengen *acquis*, or a legislative overhaul to regroup *and* develop existing laws, as would be done under the Commission's plans for an "EU Immigration Code".<sup>256</sup> Strikingly, the Agenda has seemingly dropped the idea of an EU Immigration Code from the Commission's migration initiatives, to opt for an "Asylum Code" instead.

### 3. The "Hotspot" approach

In its European Agenda on Migration, the Commission also launched the so-called "hotspot" approach as one of the tools to assist frontline Member States in dealing with the challenges faced in light of the increased number of arrivals at their borders and on their territory. The lack of a clear definition thereof in the Agenda and subsequent statements by Commissioner Avramopoulos, as well as a joint Declaration of the French and German Ministers of Interior in June 2015 on the topic, created a lot of confusion as regards its meaning and purpose. The European Agenda on Migration refers to the hotspot approach as improved inter-agency cooperation between EASO, Frontex and Europol together with frontline Member States to ensure swift identification, registration and fingerprinting of migrants in those States without providing further details as to the location where such activities would be carried out.<sup>257</sup> The joint Franco-German declaration reacting to the initial Commission proposal on relocation defined hotspots as "waiting centres" for migrants arriving in frontline Member States where migrants would be quickly registered, identified and referred to the appropriate procedure.<sup>258</sup> In a letter addressed to the Member States ahead of the Justice and Home Affairs Council meeting of 15 June 2015 on efforts to enhance return or irregular migrants, the Commissioner also referred to the hotspot approach, linking it to the role of Frontex in identification and obtaining of documents for irregular migrants for the purpose of readmission and the use of detention during and after the process of identification, albeit as a measure of last resort.<sup>259</sup> Finally, the European Council, in its conclusions of 25 and 26 June, referred to the "setting up of reception and first reception facilities in the frontline Member States, with the active support of Member States' experts and of EASO, Frontex and Europol to ensure

253. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2003 L16/44, as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011, OJ 2011 L132/1.

254. European Agreement on Transfer of Responsibility for Refugees of 16 October 1980, CETS No. 107.

255. For a detailed analysis see ECRE, *Mutual Recognition of positive asylum decisions and the transfer of international protection status within the EU*, Discussion Paper, November 2014.

256. See S Peers, 'An EU Immigration Code: Towards a Common Immigration Policy', in S Carrera, E Guild and K Eisele (eds), *Rethinking the Attractiveness of EU Labour Immigration Policies: Comparative perspectives from the EU, the US, Canada and beyond* (CEPS 2014), Chapter 14.

257. European Commission, *European Agenda on Migration*, p. 6.

258. Joint Declaration of Federal Minister de Maizière and Minister Cazeneuve on the relocation mechanism regarding asylum seekers in clear need of protection, 1 June 2015.

259. European Commission, *Letter of Commissioner Avramopoulos, Brussels*, 1 June 2015, Ares(2015) 2397724.

the swift identification, registration and fingerprinting of migrants (“hotspots”).

However, a Commission explanatory note responding to the European Council’s request for a roadmap on the legal, financial and operational aspects of these facilities, mainly defines the hotspot approach as providing a platform for four agencies, the three aforementioned and Eurojust, to intervene rapidly “in an integrated manner, in frontline Member States when there is a crisis due to specific and disproportionate migratory pressure at their external border”.<sup>260</sup> It is to be triggered at the request of a Member State to the Commission and the Agencies, and operational coordination is to be organised by an EU Regional Task Force which is supposed to coordinate the national expert teams deployed through the various Agencies and the national authorities. The operational activities envisaged include the usual list of activities including registration, screening and debriefing activities, as well as coordination of return of migrants supported by Frontex, investigations and information and intelligence gathering on facilitation of irregular entry supported by Europol and Eurojust and asylum-related activities, including joint processing, where relevant linked to relocation supported by EASO. These activities are to be carried out in already existing reception and detention centres of the Member States and therefore the creation of additional facilities for migration and border management purposes is not part of the hotspot approach, according to the explanatory note.

So far, implementation of the hotspot approach is only foreseen in **Italy** and **Greece** with very limited staff and resources. The EU Regional Task Force for Italy is located in a police station in Catania with for the time being 4 Frontex staff members and EASO, Europol, Eurojust and EUNAVFOR Med each having one representative, while the Frontex Regional Office in Piraeus will host the EU Regional Task Force in Greece. However, **Hungary** is increasingly cited as a potential third Member State where a hotspot approach should be implemented. The European Commission was quoted as “offering” Hungary to set up a hotspot in order to deal with the extraordinary increase of refugees and migrants arriving in the country. However, at the time of writing the Commission has not received an official request from Hungary for the establishment of such a hotspot.<sup>261</sup>

Whether the hotspot approach will provide any added value for the Member States concerned remains to be seen, as does its impact on the fundamental rights of the asylum seekers, refugees and migrants arriving at the EU’s external borders. The information available today suggests on the one hand that the hotspot approach as envisaged in the Commission explanatory information note may result mainly in repackaging already existing forms of inter-agency cooperation, which may complicate rather than enhance such cooperation by creating another layer of coordination through the EU Regional Task Forces.

On the other hand, the hotspot approach, as increasingly pushed for by certain EU Member States as mentioned above, would essentially consist of an EU supported system of first reception facilities in the frontline Member States. Much will depend on the duration of the first reception procedures, the level of reception conditions and the nature of those facilities to assess whether this would constitute a positive development in ensuring adequate conditions and access to the procedure for those arriving at the external borders of the EU. Experience with the First Reception Centre in Fylakio at the **Greek-Turkish** land border is not encouraging in this respect. As is further discussed in Chapter III, Section 5.1, a recent AIDA report on the first reception system in Fylakio revealed serious shortcomings resulting in lack of access to the asylum procedure and prolonged detention, including of those wishing to apply for international protection, caused by the general lack of reception accommodation and facilities to address the needs of vulnerable asylum seekers. As the hotspot approach is to be implemented in existing reception and detention centres, it may result in increased use of detention, including of asylum seekers during initial screening and registration procedures. The active and operational involvement of national experts from other Member States may have a positive impact on the respect of fundamental rights of individuals subjected to such procedures but may at the same time increase the pressure on Greece and Italy to use coercive measures, including detention to avoid secondary movements to other EU Member States. To that effect, the emphasis placed by the Commission’s explanatory note on the use of detention throughout the various stages of first reception renders those risks even more significant.<sup>262</sup> Effective monitoring of the facilities where the hotspot approach is implemented and regular and transparent reporting, including to the European Parliament, will be crucial in this regard.

The call for setting up large-scale centres at the entry points in the EU with the purpose of processing asylum applications was repeated at various occasions by **Germany** and **France** since the abovementioned joint Declaration and supported by other countries such as the **United Kingdom**. This will no doubt be further the subject of further debate at the extraordinary Justice and Home Affairs Council Meeting convened by the Luxembourg Presidency

260. European Commission, *Explanatory note on the “Hotspot” approach*, July 2015, available at: <http://bit.ly/1N46jcT>, 2.

261. Deutsche Welle, ‘EU ready to help Hungary with migrant influx’, 25 August 2015, available at: <http://bit.ly/1hOwpY3>.

262. See European Commission, *Explanatory note on the “Hotspot” approach*, July 2015, 12.

on 14 September 2015.<sup>263</sup>

## 4. Cooperation with third countries: the case of Turkey

Cooperation with countries of transit and origin in the area of migration is strongly emphasised in the European Agenda on Migration as well as in the June 2015 European Council conclusions. It should be noted that, in line with its overall security and emergency-driven approach, the European Agenda on Migration explicitly includes such cooperation in the immediate action it envisages “to tackle migration upstream”. Among the concrete measures to be implemented together with partner countries, the Agenda calls for the establishment of a multi-purpose centre to be set up in Niger by the end of 2015 where “the provision of information, local protection and resettlement opportunities for those in need” will be combined. Moreover, migration will be included in ongoing Common Security and Defence Policy (CSDP) missions with countries such as **Niger** and **Mali**, while a dedicated summit to be organised in Malta in November 2015, the Valletta Summit, is expected to bring key third countries and partners together to discuss root causes or irregular migration, international protection and of course smuggling and trafficking. At the same time initiatives taken by individual Member States such as Italy as well as the visit of Commissioner Avramopoulos to **Tunisia** and **Egypt**<sup>264</sup> has fed speculations about renewed efforts from the EU side to explore once more the possibility of “external processing” of asylum applications in countries neighbouring the EU, an idea that has been discussed at various occasions in the past but so far never materialised. Most recently, the German Minister of Interior, Thomas De Maizière, also referred publicly to the possibility of engaging in external processing of asylum applications in **Turkey**. In light of the increasing number of asylum seekers and refugees arriving in Greece through that country, he suggested to “use European funds to build a large refugee camp to decide there who can come to Europe”.<sup>265</sup>

It would go beyond the scope of this Annual Report to analyse in detail the various initiatives launched by the EU with third countries in various regions of the world. Here, a number of recent developments of the EU’s cooperation with Turkey are highlighted as well as key features of its new asylum law that entered into force in 2014 as a concrete example of the how EU asylum standards are being exported beyond the EU Member States and Schengen Associated States.

The importance of reinforced cooperation with **Turkey** in the area of migration and asylum for the EU is self-evident in light of it being a transit country for increasing numbers of refugees and migrants trying to enter the EU through Greece as well as the country hosting the highest number of Syrian refugees in the region. Accordingly both the June European Council conclusions and the European Agenda on Migration prioritise cooperation with Turkey as a “good example of where there is much to be gained by stepping up cooperation” in this area.<sup>266</sup> In this regard it is worth mentioning that Turkey has received €79m from the EU to increase asylum capacity and to prevent people from engaging in hazardous journeys in the Eastern Mediterranean. The EU funds a large part of border-related projects aimed at increasing Turkey’s capacity for migration control and has funded the construction of existing and prospective Reception and Accommodation Centres and Pre-Removal Centres in the country.<sup>267</sup> Moreover, Frontex is increasingly engaging with the Turkish authorities including through the deployment of a Frontex liaison officer in Turkey.

Moreover, the EU-Turkey Readmission Agreement<sup>268</sup> entered into force on 1 October 2014.<sup>269</sup> Under its terms, Turkey has an obligation to readmit persons who hold a Turkish visa or residence permit or who have stayed on or transited through Turkey, and are irregularly residing on the territory of EU Member States.<sup>270</sup> In practical terms, the entry into force of the Readmission Agreement enables Member States to return persons who have applied for protection in the EU to Turkey, if this is deemed compatible with the principle of *non-refoulement*. It should be emphasised, however, that Turkey’s obligation to readmit third-country nationals has *not* yet entered into force: it is

263. See EU Observer, ‘EU Ministers to hold emergency talks on migrants’, 31 August 2015, available at: <http://bit.ly/1UnnjwY>; Luxembourg Presidency of the Council of the European Union, available at <http://bit.ly/1VrRcyF>.

264. EU explores new ‘migration zone’ in North Africa, EU Observer, 13 March 2015, available at <http://bit.ly/1LNSouv>.

265. Euronews, ‘Germany wants camps in Italy, Greece, Turkey to sort through migrants seeking asylum’, 28 August 2015, available at: <http://bit.ly/1LNS8vG>.

266. European Commission, *A European Agenda on Migration*, COM(2015) 240, 13 May 2015, 8.

267. See Global Detention Project, *Turkey Detention Profile*, April 2014, available at: <http://bit.ly/1Bltf6z>.

268. Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ 2014 L134/3.

269. Information relating to the entry into force of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ 2014 L267/1.

270. Article 4(1) EU-Turkey Readmission Agreement.

only to enter into force in 2017, 3 years following the entry into force of the agreement.<sup>271</sup> Accordingly, readmission of non-nationals is not currently taking place under the agreement, although bilateral readmission agreements between individual Member States and Turkey may remain in place.

The pre-accession framework of the EU-Turkey relations has also triggered a substantial change in Turkey's asylum and migration policies with a view to aligning its legal framework with EU Directives in this field. This has among others resulted in a new Law on Foreigners and International Protection (LFIP) which entered into force on 4 April 2014 that mirrors many legal concepts laid down in the EU asylum *acquis* and is therefore a vivid manifestation of the export value of both positive and less positive aspects of the CEAS. This is illustrated for instance by the procedural tools allowing for expedited examination of certain asylum applications. For instance, the LFIP broadly mirrors the grounds listed in the recast Asylum Procedures Directive for accelerating the processing of applications or declaring applications inadmissible and allows for an accelerated procedure to be completed within a reduced 8 day-period at the first instance. Furthermore, the definition of the concepts of "first country of asylum" and "safe third country" mirrors the wording of the relevant provisions in the recast Asylum Procedures Directive. As regards detention, the LFIP sets out 4 grounds for detention of asylum seekers pending the examination of their claim which mirror the corresponding grounds listed in the recast Reception Conditions Directive. In practice so far, the majority of applicants in Turkey are not detained but there may be indications that detention could be applied more systematically to asylum seekers, as Turkey is currently planning the construction of 10 additional pre-removal detention centres across its territory, in addition to the existing 13 pre-removal centres. The new facilities would offer a further capacity of 3,400 places as of 2016-2017, in addition to the 1,740 detention places in the 13 removal centres currently operating in the country. At the same time, six Reception and Accommodation Centres are to be built in order to boost Turkey's reception capacity by an additional 5,250 places. These centres are likely to contain closed quarters where asylum seekers would be detained, however.<sup>272</sup>

On the other hand, it should be noted that the LFIP does not include the concept of "safe country of origin" concept, while it does contain a number of procedural guarantees aiming at enhancing quality of the asylum interview, such as with regard to interpretation. Furthermore, administrative instructions regulate the possibility for asylum seekers to rectify or complement the transcript of the personal interview before a decision is being taken, all of which can be cited as examples of the positive influence of the EU asylum *acquis*. Furthermore, the LFIP also introduces a subsidiary protection status, defined in similar terms as the Qualification Directive.<sup>273</sup>

Similar to many EU Member States, as further discussed in Chapter III, Section 7, effective access to quality free legal assistance is lacking for the vast majority of asylum seekers in Turkey due to the scarcity of legal aid funding, the low number of private lawyers that are sufficiently trained and interested in refugee law and the resource constraints of NGOs. The involvement of NGOs in providing legal information and counselling is crucial, but their activities are mainly limited to the larger cities and their operational capacity is highly insufficient to cover the need for legal assistance in light of the high number of asylum seekers and refugees in Turkey and their dispersal over the territory.<sup>274</sup>

## 5. The unprecedented refugee crisis unfolding in Greece: the one that got away?

The year 2015 has seen an unprecedented number of refugees arriving in Greece. According to UNHCR, nearly 205,000 refugees had arrived in the country between January and August 2015,<sup>275</sup> while more than 50,000 arrived in July alone. Among those, the vast majority have arrived by sea from Turkey on the Greek islands with the highest numbers arriving in Lesbos, Chios, Kos, Leros and Samos at that time. In July, UNHCR reported that on average 1,000 refugees were arriving every day on the Greek islands, creating an unprecedented emergency crisis in the country. The vast majority of the third-country nationals arriving are from refugee-producing countries. UNHCR reported in mid-July that 90% of the persons arriving on the islands were from Syria, Eritrea, Somalia, Afghanistan and Iraq.

271. Article 24(3) EU-Turkey Readmission Agreement.

272. AIDA Country Report Turkey, 58-59.

273. Articles 2(d) and 15 Qualification Directive. Maintaining Turkey's geographical limitation to the 1951 Refugee Convention, the LFIP sets out 3 international protection statuses: (a) "refugee status" for persons originating from Council of Europe states; (b) "conditional refugee status" for persons originating from countries outside the Council of Europe; and (c) "subsidiary protection status".

274. AIDA, Country Report Turkey, 31-33.

275. UNHCR, *Sea Arrivals to Greece*, available at: <http://bit.ly/1KqflSU>, accessed 31 August 2015.

Additional resources have been allocated by the national authorities, local authorities and police and coast guard authorities on the islands but this is not sufficient to address the immediate needs. Local NGOs, private citizens, church communities and numerous volunteers have been helping with the distribution of food, water and clothes to the refugees, but their resources are also limited. Both Doctors of the World and MSF are providing medical assistance on the main islands of arrival, while the Greek NGO Medical Intervention (MedIn) is providing psycho-social support services for the First Reception Mobile Units that are deployed on **Samos**. Legal information is provided by UNHCR and NGOs, including ECRE member Greek Council for Refugees (GCR) – in the framework of *ad hoc* missions – but capacity is limited and certainly not sufficient to meet the needs.

The lack of adequate infrastructure and reception conditions to address the immediate needs of those arriving is extremely worrying in this regard. On **Lesvos**, the island where most refugees are arriving, the screening centre in Moria, run by the police, is overcrowded. About 1,000 refugees were reported by UNHCR to be camping outside in substandard conditions, while more than 3,000 refugees were staying in the makeshift accommodation of Cara Tepe, waiting to register at the Moria screening centre, which is a closed centre. Moreover, only by the end of July was a bus transport organised from the Northern shore of the island, where refugees arrive, to the Cara Tepe camp. Before that time, refugees had to walk the 70km long distance to reach the makeshift camp, namely due to the fact that supportive actions of citizens such as rescuing people at sea or transferring people inside the country in order for them to apply for asylum were penalised. The amendment of that law in July 2015 has allowed locals to assist refugees arriving on the island in reaching the camp.<sup>276</sup>

Lack of initial reception capacity was also reported in mid-June by UNHCR with regard to **Chios**, where the screening centre in Mersinidi with a maximum capacity of 98 persons was housing three times as many people, with more than 400 persons staying in tents provided by the local municipality, which were meant to accommodate only 100.

**Kos** alone has received over 18,000 persons since the beginning of the year.<sup>277</sup> In a border monitoring mission report published in August 2015, GCR details that Kos is in complete lack of any reception structure for refugees and migrants. Whilst the First Reception Service has been considering the use of a deserted barracks in a remote location away from the town and port, the local population and the municipality of Kos are opposed to creating accommodation structures on the island.<sup>278</sup> Refugees have to walk, escorted by the Coastguard, to the “Captain Elias” hotel, which has been informally accommodating the newly arriving in squalid conditions, without water, electricity or access to bathrooms, and under severe overcrowding.<sup>279</sup> Delays in the registration of persons hinder their access to the necessary documents to leave the island. Even following registration and fingerprinting by the police, a number of refugees have insufficient funds to purchase boat tickets to Athens. Often, the civil society initiative “Solidarity Kos” had to collect money to provide refugees with tickets.<sup>280</sup> The provision of basic assistance such as food on the island is on the brink of collapse.<sup>281</sup> “Solidarity Kos”, which was providing food during June and July, has had to stop its operations in August for want of resources, while no official authority has stepped in to undertake the provision of food for those arriving on the island.<sup>282</sup>

MSF has also sharply criticised the situation spiralling out of control on Kos, where approximately 2,000 refugees were locked on 11 August 2015 for 18 hours inside a stadium without access to food, water or shade, ostensibly to be registered by police authorities.<sup>283</sup> In response to the escalated situation on the island, the Greek government has announced that a vessel will be arriving on Kos to accommodate 2,000 to 2,500 persons, who will also be registered there.<sup>284</sup>

Other islands, such as **Leros** or even the small island of **Tilos**, face equally severe difficulties in hosting arriving refugees due to the lack of appropriate structures. As of the end of July 2015, Leros only had a temporary accommodation centre.<sup>285</sup>

276. Law 4332/2015 of 9 July 2015. See also ECRE, ‘ECRE members respond to asylum crisis on the islands’, 17 July 2015, available at: <http://bit.ly/1KcxMvj>; GCR, ‘Intervention of the GCR for the decriminalisation of solidarity’, 9 July 2015, available at: <http://bit.ly/1JTQRIQ>.

277. UNHCR, *Sea Arrivals to Greece*, available at: <http://bit.ly/1KqflSU>, accessed 31 August 2015.

278. GCR, *GCR mission to Kos*, August 2015, available in Greek at: <http://bit.ly/1TtMY6K>, 3.

279. *Ibid.*, 4-7.

280. *Ibid.*, 15-16.

281. For more information on food provision in Kos, as well as Lesvos and Samos, see GCR, ‘Problems with food provision to the newly arriving in the Northern Aegean’, 6 August 2015, available in Greek at: <http://bit.ly/1p6fjp>.

282. Efsyn, ‘No more food for Kos refugees’, 2 August 2015, available in Greek at: <http://bit.ly/1M6pXru>.

283. MSF, ‘Greece: Authorities’ inaction equal to abuse of refugees in Kos’, 11 August 2015, available at: <http://bit.ly/1N97I9v>.

284. in.gr, ‘MSF: Unacceptable living conditions for refugees in Kos’, 12 August 2015, available in Greek at: <http://bit.ly/1P6lphx>.

285. in.gr, ‘Tsipras: Accommodation of refugees from Pedion tou Areos in a matter of days’, 31 July 2015, available in Greek at: <http://bit.ly/1MHwnxn>.

Despite their numerous and laudable efforts, local and national authorities are unable to cope with the situation and NGOs from outside Greece as well as international humanitarian assistance organisations have been exploring the need to start deploying operations on the islands in order to assist with the provision of basic services. ECRE member organisation International Rescue Committee (IRC) provided 10 water drinking points and 10 showers in the abovementioned Cara Tepe transit camp in Mytilene, the capital of **Lesvos**, in an effort to “start to bring the transit camp to international standards” while it was discussing at the end of July with local authorities about additional measures to upgrade the site, which is unmanaged and holds severe risks of outbreaks of disease, according to the organisation. At the same time, the organisation called for a coordinated effort of all European countries to address the basic needs of refugees in Lesvos and to ensure that they are properly informed and can access assistance, a call echoed by ECRE and other organisations.<sup>286</sup>

Syrian refugees are transported by the Greek authorities on a ferry from the Aegean islands to the mainland. Over 2,400 Syrian refugees who left the islands of Kos, Leros, Kalymnos and Lesvos on the “**Eleftherios Venizelos**” ferry disembarked at the port of Piraeus on 20 August. The ferry was initially scheduled to arrive at the port of Thessaloniki, where refugees would be transported to the city’s bus station to travel to Eidomeni, near the Greek-FYROM border.<sup>287</sup>

However, the ferry arrived in Piraeus on 20 August and its passengers were directed to Athens. The ferry returned to Lesvos and transported another 2,100 Syrian refugees to Piraeus on 21 August, given that the majority of commercial ferries are currently at full capacity until the end of the summer season. The ferry has continued transporting refugees from Lesvos and other islands.<sup>288</sup>

The Greek government has also announced the establishment of first reception facilities on the islands. First Reception Mobile Units are to be immediately set up on Kos and Leros, according to the Head of the First Reception Service.<sup>289</sup> The Greek government is currently designing a permanent First Reception Centre on Kos, while an abandoned public building (PIKPA) on Leros will be requested for the accommodation of refugees. A First Reception Mobile Unit will also be established on the island of Chios at a later stage. According to the Alternate Minister for Immigration, Tasia Christodouloupoulou, reception centres accommodating a total of 2,500 refugees are to be established by the end of 2015 with AMIF funding.<sup>290</sup>

At the same time, the conditions faced by refugees once they are transferred from the islands to mainland Greece is no less deplorable. In **Athens**, an emergency accommodation centre made up of container facilities was set up in **Votanikos** to host up to 700 persons, namely the approximately 450 refugees who were previously residing in a makeshift camp in the city’s **Pedion tou Areos** park.<sup>291</sup>

Further afield, in **Eidomeni**, near the Greek-FYROM border, refugees and migrants seeking to leave Greece and continue their journey onward are prevented from crossing the border by the police, according to a controversial June 2015 order by the Police Director of Kilkis worth reciting:

“Bearing in mind the situation in Eidomeni – Kilkis, near the frontier, during the last 24 hours, where there has been an accumulation of a very large number of economic migrants, who wish to enter the country of FYROM, without this being possible however, and in order to relieve the current situation, please act [...] by making available as many police forces as possible, go to the area of Eidomeni and control the economic migrants there and, if the legality of their stay in the country has been established, transport the persons on the [...] police bus and direct them to the boundaries of our region with the region of Thessalonica, in order to allow for their readmission within the country.”<sup>292</sup>

A border monitoring report by GCR in Eidomeni documents numerous testimonies of violent forcible returns from FYROM to Greece. During the first half of the year, only 61 were formally readmitted under the Greece-FYROM

286. IRC, ‘No water, no food, no healthcare – refugees arriving on Lesbos not receiving help is a “serious concern”, say aid agency’, 29 July 2015, available at <http://bit.ly/1M6kZv3>.

287. AIDA, ‘Greece: Ferry for refugees to leave the Aegean islands’, 21 August 2015, available at: <http://bit.ly/1Nq30jw>.

288. *Ibid.*

289. *Ibid.*

290. Greek Ministry of Interior and Administrative Reconstruction, *Statement by Minister Christodouloupoulou on the “creation of 2,500 places of open reception for refugees until the end of 2015”*, 12 August 2015, available in Greek at: <http://bit.ly/1fuGwyY>.

291. AIDA, ‘Greece: Pedion tou Areos refugees relocated to open reception centre in Votanikos’, 17 August 2015, available at: <http://bit.ly/1PIO0AE>.

292. Order of the Police Director of Kilkis, cited in Efsyn, ‘The order for sweep operations’, 29 June 2015, available in Greek at: <http://bit.ly/1VWCuAU> (unofficial translation provided by ECRE).

readmission agreement.<sup>293</sup> On 20 August, the Macedonian government declared a state of emergency and called on military forces to secure its border with Greece. Tear gas was fired yesterday at refugees attempting to enter the country, while over 1,000 persons remain stranded in a ‘no man’s land’ area between Greece and FYROM.<sup>294</sup>

The solidarity shown by the majority of Greek citizens, despite the dire economic and financial situation in Greece, is remarkable and in sharp contrast with the complete lack of solidarity from certain EU Member States unwilling to engage meaningfully in relocation efforts from Italy and Greece and to undertake concrete additional actions to address the immediate humanitarian situation on the Greek islands. Also, additional support with regard to the emergency situation on the Greek islands by Commission or EASO has been modest so far. The Commission has funded 4 projects relating to the situation on the Greek islands for €4.8 million as emergency funding under the Internal Security Fund (ISF) Borders and Visa annual work programme, of which two projects are carried out by the Hellenic Coast Guard aiming to strengthen search and rescue activities, and the other two projects carried out by the First Reception Service in Greece and UNHCR to enhance first reception response, including access to legal information and interpretation.<sup>295</sup> Mid-August 2015, the Commission also announced that it was fast-tracking a Greek request for €2.74 million in emergency funding under the 2015 ISF annual work programme to support UNHCR’s first reception response to newly arriving migrants and refugees on the Aegean Islands.<sup>296</sup> EASO was at the time of writing mainly discussing with the Greek authorities in the context of the “hotspot” approach. In this respect, the fact that organisations such as IRC, that focus on relief activities for refugees in the poorest regions of the world, as well as NGOs from other European countries, have to come to the assistance of an EU Member State, shows how serious the situation is.

At the same time, the lack of a concerted immediate EU response to the humanitarian crisis unfolding on the islands in Greece, in particular in light of the hard-hitting economic and financial crisis, is not acceptable. It should be recalled that the country remains unsafe for asylum seekers over 4 years after the ECtHR ruled in *MSS v Belgium and Greece* that transfers thereto under the Dublin Regulation amount to refoulement. As was mentioned before, the objective to relocate 16,000 persons from Greece over a period of 2 years from the entry into force of the Council Decision on relocation, the date of which still remains uncertain, seems futile in light of the current numbers of arrivals on the Greek islands. A much more significant effort will be needed for relocation to have a meaningful impact on the situation in Greece and to alleviate the pressure on the Greek asylum system. If not, all efforts to reduce the numbers of refugees leaving Greece, trying to make their way to other EU Member States irregularly, will continue to be in vain, as shown by the increasing number of persons taking the Western Balkan route as discussed in Chapter I, Section 5.2. The laudable efforts of European civil society organisations and Greek citizens to actively address the dire needs of those coming to Europe to seek protection contrast sharply with the measures taken at EU level.

For these reasons, ECRE made a solidarity call on 27 August 2015 urging the EU and Member States to take more robust measures to address the refugee crisis in Greece by (a) increasing relocation efforts to at least 70,000 persons within a year as an initial step; (b) immediately and substantially increase emergency support to those assisting newly arriving refugees and (c) making a proactive and protective use of the family reunification and discretionary clauses of the Dublin III Regulation, to ensure that persons who have family links in other EU countries may effectively be transferred thereto.<sup>297</sup>

The dire situation of refugees in Greece is summarised by a powerful testimony by A.E.A., a Syrian refugee, collected by GCR in Eidomeni:

“Why are you doing this to us? You can’t even live here, why aren’t you letting us leave? Why are you pushing us to them? [...] I was an assistant surgeon in Syria, now I was in the war, I worked in blood, in terror, I left my wife and children behind to be able to take them with me in Europe. To save them. Does Europe not know? Do you not care? Shall we all die? If you want, we will pay you, but protect us from them [...]

They want us for traffic, meat, they don’t care if they kill us on the street, they are only after our money. Why are you letting them? [...] I’ve been here for a month and have tried to cross 6 times, €1,000 each

293. GCR, *GCR mission to Eidomeni*, August 2015, available in Greek at: <http://bit.ly/1L5CA39>, 17-20.

294. AIDA, ‘Greece: Ferry for refugees to leave the Aegean islands’, 21 August 2015.

295. Information received from the European Commission, DG HOME.

296. European Commission, ‘A European Response to Migration: Showing solidarity and sharing responsibility’, SPEECH/15/5498, 14 August 2015.

297. ECRE, *ECRE calls for on the EU and Member States for more robust solidarity as the refugee crisis in Greece deepens*, 27 August 2015, available at: <http://bit.ly/1i4ypei>.

time, 6 times [...] I have money for 3 more months in Greece. Can you promise me that I will have applied for asylum and be recognised in these 3 months? Can you promise me that I will find work and be able to bring my children here to finish their studies? [...] Bring them to live where? On the street? What are you proposing to me?

You can't help us. I will stay up here. I will go alone as many times as needed until I arrive. I will go through that road and yes, I may even die, but they will be punished by God."<sup>298</sup>

## 6. Unilateral responses to European challenges: the wider repercussions of the asylum and migration debate

The sections above have drawn the picture of a European Union that is more than ever struggling with the challenges posed by the increasing numbers of asylum seekers, refugees and migrants. In addition to and at times in parallel with the key political debates at the EU level, a number of varying national responses and initiatives with potentially wider repercussions for the future of the EU's policies in this area are worth mentioning here, as they further add to the complexity of the debate and the ability to address the challenges in a concerted and rights-respecting manner at the EU level.

Firstly, as it has been the case at the time of the increased arrivals in Italy following the Arab Spring in 2011, the increased mixed migration flows to Europe have again triggered the temporary reintroduction of identity checks at the borders between **France** and **Italy**. The imposition of strict border checks at the border crossing point of **Ventimiglia** by the French authorities, according to a recent report by the Association on Legal Studies on Immigration (ASGI), raises tensions with the Schengen Borders Code, as well as the Dublin Regulation to the extent that some unaccompanied children wishing to apply for asylum in France are returned to Italy.<sup>299</sup> The Ventimiglia border checks were challenged before the French *Conseil d'Etat*. However, in a decision on the legality of these controls, the Council of State found that neither the degree nor the frequency nor the methods carried out during the border checks exceeded the exercise of checks provided for in Article 21 of the Schengen Borders Code.<sup>300</sup> This was principally because the French controls were not devised or executed in a systematic manner and did not have border control as an objective.<sup>301</sup> However, the Council of State's reasoning seems to be very questionable in light of reports stating that every train from Ventimiglia is stopped at Menton Garavan in France, where third-country nationals are systematically removed and, where proof of papers is not furnished, they are driven or escorted back to the Italian border.<sup>302</sup> Indeed, the refusal of entry is clear from testimonies of persons being returned from France more than 10 times.<sup>303</sup>

Contrary to the situation in 2011 where the Italian authorities encouraged the secondary movement of third-country nationals arriving at sea by issuing residence permits allowing them to travel for 3 months to other EU Member States, now Italy eventually seemed to support the French approach of stopping people at the internal borders, as media reports about the removal of third-country nationals from Ventimiglia by the Italian authorities show.<sup>304</sup> This may be explained by the fact that, unlike in 2011, concrete initiatives were taken at EU level to come to the support of the Italian government, as discussed above.

Moreover, in a similar effort to prevent migrants from accessing its territory, **Germany** and **Austria** have been stopping third-country nationals, mainly Eritreans, at the **Italian Alps**,<sup>305</sup> following a temporary reintroduction of intra-Schengen border controls between 26 May and 15 June 2015, ostensibly related to the G7 summit held in

298. GCR, *GCR mission to Eidomeni*, August 2015, 40 (unofficial translation from Greek provided by ECRE).

299. ASGI, *Le riammissioni di cittadini stranieri a Ventimiglia (Giugno 2015) profilo di illegittimità*, 31 July 2015, available in Italian at: <http://bit.ly/1N3osuq>.

300. Council of State, *GISTI and Others*, Order of 29 June 2015, available in French at: <http://bit.ly/1CLaSs6>.

301. *Ibid*, para 7.

302. *Ibid*, 15.

303. *Ibid*.

304. Al Jazeera, 'Italy drags migrants away from French-Italian border', 17 June 2015, available at: <http://bit.ly/1TGQ0GX>; Politico, 'For them, there is no Schengen', 23 July 2015, 14.

305. The Independent, 'From Eritrea and Syria to Bolzano: The trapped migrants who can't get out of Italy', 16 June 2015, available at: <http://ind.pn/1gF6Fwe>; Euronews, 'Tighter border controls block African migrants in Italian Alps', 29 May 2015, available at: <http://bit.ly/1Obm01Z>.

Germany in early June 2015.<sup>306</sup> Following a tragic incident in late August 2015, when the dead bodies of 71 people were found inside an abandoned lorry near the Hungarian border, **Austria** reintroduced controls on its Eastern Schengen borders on 30 August 2015 for an indefinite period of time.<sup>307</sup> While the Austrian Minister of Interior has reassured that the Schengen *acquis* has not been infringed, it remains to be seen whether this recently introduced practice will in fact be compatible with the Schengen Borders Code.

Secondly, the growing tension in **Calais** in July 2015 over the growing number of migrants trying to reach the **United Kingdom** through the Chunnel in some cases causing their death, despite huge investment in strengthening the fences and other security measures, has once more become the symbol of a failing European policy in this area. The migrants and refugees arriving in Calais have the United Kingdom as their main destination but have transited through other EU Member States. The motivations of the persons stranded in Calais to go to the United Kingdom are varied, but it is clear that they increasingly come from countries ranking high in the nationalities with high recognition rates in many EU Member States such as Eritrea, Iraq or Sudan, pointing at the lack of access to fair and effective asylum procedures, adequate reception conditions and integration prospects in other EU Member States.

In this regard, the relentless efforts of the UK government to contain migrants and refugees in Calais together with the French authorities are another example of the preoccupation of governments with avoiding secondary movements within the EU almost exclusively through stepping up repressive security measures. This was also one of the core messages of the French and British Ministers of the Interior in a joint article which pointed unambiguously at the fact that those stuck in Calais and trying to cross to the UK have made their way there through Italy, Greece or other countries and called for other Member States and the whole of the EU to “address this problem at root”.<sup>308</sup>

### Calais – A never-ending story?

The presence of refugees and migrants in Calais was again subject to controversy following new measures adopted by the United Kingdom and France in July and August 2015. Whilst exact numbers of third-country nationals in Calais, as well as attempted and successful journeys, are not known, statistics from the French ministry show that approximately 2,000 persons were in camps in Calais in January 2015 and attempts on 1 December 2014 along the channel tunnel and the port of Calais totalled approximately 310.<sup>309</sup> In terms of successful crossings, reports indicate that in the third trimester of 2014 an average of 30 successful crossings a day to the UK took place.<sup>310</sup> Due to French lorry strikes the number of attempts appears to have increased.<sup>311</sup> However numbers of successful arrivals are unknown but are presumably lower given the re-enforced security measures at various locations in Calais.<sup>312</sup> In June and July 2015, local observers in Calais have reported 9 deaths of migrants trying to cross the Channel.<sup>313</sup>

Funding and security measures have indeed proliferated in recent years and months following on from an increase in the number of attempts and tragic deaths when boarding lorries and trains heading to the UK.<sup>314</sup> £6 million has already been spent on “security fencing, infra-red cameras and anti-intrusion measures” at Calais, Coquelles and Dunkirk. Additional funding has been given for “detection technology and dog searching capabilities” as well as “buffer zones” or secure waiting zones for lorries, intended to minimise the risk of attempts to board.<sup>315</sup> These measures continue to have a dual objective of preventing entry to the port as well as any

306. See Council of the European Union, German Delegation, *Temporary reintroduction of border controls at the German internal borders in accordance with Article 23(1) of the Schengen Borders Code*, 8323/15 FRONT 90 COMIX 195, 28 April 2015, available at: <http://bit.ly/1gF6Uaw>.

307. AIDA, ‘Austria: Border controls reintroduced on Eastern frontiers’, 31 August 2015, available at: <http://bit.ly/1hOkV6C>.

308. The Telegraph, ‘Calais crisis: “This is a global migration crisis”’, 1 August 2015, available at: <http://bit.ly/1ITfiQe>.

309. French Ministry of Interior, *Rapport à Monsieur le Ministre de l’intérieur sur la situation des migrants dans le Calais*, July 2015, available at: <http://bit.ly/1P0r7Dc>, 41-42.

310. *Ibid.*, 61.

311. Reports have surfaced documenting that between 300 and 1,700 attempts (not persons) have taken place a night towards the end of July, available at: <http://bbc.in/1SATAFk>.

312. French Ministry of Interior, *Rapport à Monsieur le Ministre de l’intérieur sur la situation des migrants dans le Calais*, July 2015, 61. Documentation has surfaced that 70% of third country nationals who are processed at Calais leave within a four month period, however it is unknown where these persons leave to and whether they are successful in their attempts: UK Home Affairs Select Committee, 16 July 2015, available at <http://bit.ly/1DnrI0o>.

313. La Croix, « A Calais mort d’un migrant et 1 500 tentatives d’intrusion sur le site d’Eurotunnel », 29 July 2015, available at: <http://bit.ly/1JxHhU5>.

314. The UK has allocated £12 million over a period of three years on security measures at Calais: UK Home Affairs, First Special Report, The Work of the Immigration Directorates Calais, Government Response, 24 July 2015, available at: <http://bit.ly/1UhOgUP>.

315. *Ibid.*

onward journey to the UK. Alongside this funding the UK continues to operate highly ambiguous juxtaposed controls at several ports including at the port of Calais and Coquelles where no asylum claim can be made to the UK authorities.<sup>316</sup> This has resulted in 4,485 persons on French soil being refused entry to the UK up until September 2014.<sup>317</sup> According to a recent report on the situation in Calais to the French Minister of the Interior, the main nationalities present in the area are Eritrea and Sudan, followed by persons from Syria and Egypt, while also Afghans, Iranians and Albanians are present.<sup>318</sup>

The migrants and refugees who are stuck in makeshift camps in the Calais area continue to face insalubrious, polluted and even toxic conditions,<sup>319</sup> although some efforts were made to address the immediate basic needs through the establishment of the day Centre Jules Ferry where migrants can have one meal a day and have access to showers and toilets.<sup>320</sup> Research has found that 44% of the population in the camps have deteriorated physical and psychological health.<sup>321</sup> According to the UK government 1,700 returns from Calais were undertaken by French authorities in 2014 and 750 returns in joint operations between the UK and French authorities from April 2014 to May 2015 were carried out.<sup>322</sup> It is clear that as the majority of those currently present in Calais come from some of the major refugee-producing countries, return would not be an option as it would amount to refoulement. In an effort to facilitate access to asylum, the French Office for the Protection of Refugees and Stateless Persons (OFPRA) conducted two field missions in June 2014 and April 2015 to register asylum seekers and processed these claims by priority.<sup>323</sup>

A recent development is the Joint Declaration of the UK and French Ministers of Interior adopted on 20 August 2015 which includes a long list of measures to address the situation in Calais and step up the cooperation between both countries there.<sup>324</sup> Unsurprisingly, additional security measures are announced with regard to the Channel Tunnel and the Port of Calais and well as strengthened cooperation between law enforcement agencies of both countries. The latter include the setting up of a joint command and control centre in Calais, as well as stepping up joint efforts on returning migrants from Calais and the fight against trafficking, with a particular focus on vulnerable groups such as women and children. Measures relating to access to international protection are aimed at moving those wanting to apply for international protection away from the area of Calais and at improving cooperation on the Dublin III Regulation. A permanent contact group will be set up for the latter, while the UK will support France in setting up facilities at a significant distance from Calais. Finally, both countries are determined to work together in pushing at EU level for the implementation of the June 2015 European Council conclusions as regards more effective cooperation with third countries of transit and origin with regard to tackling smuggling networks, setting up information campaigns etc. However, no mention is made of efforts to open up more legal avenues for refugees and migrants as part of a strategy to effectively tackle smuggling networks, as was highlighted as well in UNHCR's first reaction to the Joint Declaration.<sup>325</sup>

The impact of the detailed set of measures announced in the Joint UK-French Ministerial Declaration on access to protection for the refugees and migrants stuck in the Calais area remains to be seen. The European

316. Several international agreements have been signed between the UK and France outlining the manner in which these controls take place on both French and British territory. The latest Treaty, the Touquet Treaty expands juxtaposed controls to the ports of the Channel Tunnel and North Sea. Article 9 of said treaty specifies that "Lorsqu'une personne émet une demande d'asile ou sollicite toute autre forme de protection prévue par le droit international ou le droit national de l'Etat de départ au cours d'un contrôle effectué dans l'Etat de départ par les agents en poste de l'Etat d'arrivée, la demande est examinée par les autorités de l'Etat de départ conformément à la procédure nationale de cet Etat. Les mêmes dispositions sont applicables lorsque la demande est faite après l'accomplissement des formalités d'un tel contrôle et avant le départ du navire." Whilst the UK is not bound by the recast Asylum Procedures Directive, Article 9 of the Touquet Treaty may well be in violation of Article 6 of the recast Asylum Procedures Directive.

317. AIDA Country Report UK: Third Update, 32.

318. French Ministry of Interior, *Rapport à Monsieur le Ministre de l'intérieur sur la situation des migrants dans le Calais*, July 2015, 32.

319. *Ibid*, 57.

320. The Guardian, 'At night it's like a horror movie – Inside Calais's official shanty town', 6 April 2015, available at: <http://bit.ly/1DaBoZR>.

321. Secours Catholique – Caritas France, « Je ne savais même pas où allait notre barque », April 2015. See also Council of Europe Commissioner for Human Rights, Report following the visit to France from 22 to 26 September 2014, CommDH(2015) 1, 17 February 2015.

322. UK Home Affairs, First Special Report, The Work of the Immigration Directorates Calais, Government Response, 24 July 2015, available at: <http://bit.ly/1UhOgUP>.

323. See Forum Réfugiés-Cosi, *Annual Report 2014*, available in French at: <http://bit.ly/1Q5HBe1>, 115-117.

324. French Ministry of Interior and UK Home Office, *Managing Migratory Flows in Calais: Joint Ministerial Declaration on UK/French Co-Operation*, Calais, 20 August 2015, available at: <http://bit.ly/1JffTGY>.

325. See UNHCR, 'UNHCR welcomes the joint Franco-British declaration to address the situation in Calais', 20 August 2015, available at: <http://bit.ly/1WIPsmj>.

Union's reaction to the situation in Calais so far seems understated and has remained limited to further financial support and call for more solidarity.<sup>326</sup> However, while UNHCR showed support to the UK-French agreement, the UN has generally been less lenient with France, the UK and EU Member States in general, reminding that the situation in Calais is nothing insurmountable and is reflecting the more global move of refugees seeking protection in Europe that needs to be collectively addressed.<sup>327</sup>

From the UK side, the call for more joint EU action contrasts sharply with the country's refusal to participate in the relocation effort from Greece and Italy and shows the double standards that are being applied. Joint EU action is advocated for if it suits the purpose of keeping refugees and migrants as far away from UK territory as much as possible while the UK is eager to use its opt out from any measure in the asylum and migration field that may result in refugees entering the UK's territory. While this is unsurprising given the UK's long standing position with regard to its participation in the EU's asylum and migration policies in general and its non-participation in the Schengen area in particular, it is symbolic of the direction the debate on the EU's common asylum and immigration policy is taken.

Thirdly, both the Austrian and Hungarian authorities have responded to the evolving debate on the uneven distribution of asylum seekers through measures related to the application of the Dublin III Regulation. **Austria** announced in June 2015 that it would suspend the processing of new asylum applications made in the country with the aim of giving priority to the backlog of pending Dublin cases.<sup>328</sup> In addition, it also agreed with the Slovak authorities to accommodate a group of 500 asylum seekers in a University building in Gabčíkovo, **Slovakia** pending the examination of their asylum application by the Austrian authorities to address the overcrowding of the initial reception centre (EAST) of Traiskirchen near Vienna.<sup>329</sup> This initiative, unprecedented in the history of the CEAS, would constitute a first example ever of the pooling of reception capacity between EU Member States, an idea raised by the Commission in the past but never tried in practice so far. Whereas this was apparently considered as mutually beneficial for both Member States involved, it raises a number of critical questions as to the possible consequences for the asylum seekers concerned and the protection of their fundamental rights under national and EU asylum law, which were raised by ECRE member organisation Asylkoordination Austria. In particular the legal position of the asylum seekers on Slovakian territory during the procedure and the practical implications of the arrangement on the observance of Austria's obligations under its national legislation and the EU asylum *acquis* have been raised.<sup>330</sup> It is particularly unclear how the asylum seekers would be able to assert their right to reception conditions and procedural guarantees under Austrian law in Slovakia, as Austria would remain the Member State responsible for examining the asylum application under this arrangement. The population of Gabčíkovo, where the asylum seekers from Austria would be accommodated, strongly rejected the idea in a non-binding referendum.<sup>331</sup> At the time of writing, it was unclear whether or not the accommodation of the 500 asylum seekers in Gabčíkovo would be further pursued by the two governments concerned.

The **Hungarian** authorities announced in June 2015 that they would temporarily stop receiving asylum seekers sent back by other EU Member States on the basis of the Dublin III Regulation.<sup>332</sup> Invoking their lack of technical capacity to deal with requests for transfers from other EU Member States in light of the increasing number of arrivals in the country, the announcement also included a broader political signal to other EU Member States and the Commission and anticipated the country's refusal to participate in the relocation effort from Italy and Greece. Eventually, after being pressured by the European Commission and other EU Member States, the Hungarian authorities agreed to resume receiving Dublin transfers but at a very slow pace.<sup>333</sup> These and other measures that are discussed in more detail in Chapter III, Section 1.1 must be seen in the context of overall repressive policies implemented by the Hungarian government and the anti-immigrant rhetoric that has been fuelled by the launch of its "National consultation on Immigration and Terrorism". The latter consisted of a list of biased questions which seemed to have no other purpose than to simply stigmatise all immigrants and refugees as potential terrorists and was immediately condemned by human rights organisations as well as the UN High Commissioner for Human

326. European Commission, *Statement from Migration and Home Affairs Commissioner Dimitris Avramopoulos*, Statement/15/5472, 4 August 2015.

327. UN News Center, 'Calais: le HCR appelle la France et l'UE à faire preuve d'une plus grande solidarité envers les migrants', 7 August 2015, available at: <http://bit.ly/1hFBt0x>.

328. AIDA, 'Austria: Bundesasylamt 'suspends' processing of new asylum applications', 15 July 2015, available at: <http://bit.ly/1LmHxGj>.

329. See also AIDA, 'Austria: Problematic reception conditions in the Traiskirchen initial reception centre', 17 August 2015, available at: <http://bit.ly/1V9bE7h>.

330. See Asylkoordination Austria, 'Flüchtlinge in die Slowakei', 9 July 2015, available at: <http://bit.ly/1IEFYWo>.

331. AIDA, 'Austria: Plans to relocate 500 asylum seekers to Slovakia rejected by local population', 3 August 2015, available at: <http://bit.ly/1WgpbLJ>.

332. AIDA, 'Hungary: Application of Dublin Regulation suspended indefinitely', 23 June 2015, available at: <http://bit.ly/1IEgF22>.

333. ECRE, 'Hungary reverses suspension of Dublin Regulation', 26 June 2015, available at: <http://bit.ly/1KgCiiU>.

Rights which described the consultation as extremely biased and shocking.<sup>334</sup>

The abovementioned examples of national responses raise fundamental questions about the future of the EU's common asylum and immigration policy in the medium to long term and what can realistically be expected in the coming years from the EU level in this area. The steady increase in the numbers of asylum seekers, refugees and migrants arriving in the EU seems to trigger a series of ad hoc measures at the national level responding first and foremost to immediate national concerns and interests, going against a much needed European approach that respects the fundamental rights of the individuals concerned and is based on genuine solidarity between EU Member States.

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334. See Reuters, 'UN outraged by "biased" Hungarian survey on migration', 22 May 2015, available at: <http://reut.rs/1lQQasD>.

**CHAPTER III**  
THE IMPLEMENTATION OF THE COMMON EUROPEAN ASYLUM  
SYSTEM

### III. THE IMPLEMENTATION OF THE COMMON EUROPEAN ASYLUM SYSTEM

With the exception of the recast Qualification Directive, which was adopted on 13 December 2011, the conclusion of the second-phase harmonisation of asylum standards was marked on 26 June 2013 upon the adoption of four legislative instruments: the recast Asylum Procedures Directive, the recast Reception Conditions Directive, the Dublin III Regulation and the recast Eurodac Regulation.<sup>335</sup>

The implementation phase of the recast Common European Asylum System was not scheduled as a single process. By virtue of the time of their adoption, as well as certain provisions meriting a special transposition regime, the new standards on qualification, procedures and reception were to be implemented into Member States' national law by the following different deadlines:

- 21 December 2013 for the recast Qualification Directive;<sup>336</sup>
- 19 July 2013 for the Dublin III Regulation;<sup>337</sup>
- 20 July 2015 for the recast Eurodac Regulation;<sup>338</sup>
- 20 July 2015 for the recast Reception Conditions Directive;<sup>339</sup>
- 20 July 2015 for the recast Asylum Procedures Directive,<sup>340</sup> except for the provisions below;
- 20 July 2018 for the provisions of the recast Asylum Procedures Directive relating to the maximum duration of the asylum procedure.<sup>341</sup>

At the time of writing, the transposition deadline for all CEAS measures apart from Article 31(3)-(5) of the recast Asylum Procedures Directive has therefore expired. So far, however, the implementation of these standards in national law seems to be a slow and far from complete endeavour in several countries covered by AIDA. While certain Member States have adopted legislative changes – particularly over recent months – while others have announced reforms to amend their legislation in line with the recast instruments, a number of domestic legal frameworks have not yet been brought up to speed with the second-phase asylum *acquis*.

A preliminary observation is important to recall prior to examining the state of transposition across countries covered by AIDA in greater detail. While EU law does not confer direct effect on Directives while Member States are transposing their provisions into national law, sufficiently clear and unconditional provisions of a Directive may benefit from direct effect following the expiry of the transposition deadline.<sup>342</sup> This means that asylum seekers may invoke such provisions of the asylum Directives to assert their rights under the asylum *acquis*, where those have not been transposed at all or have been wrongly transposed by the Member State concerned.

A look at the table of legislative amendments in Annex I illustrates the efforts of the EU Member States covered in the AIDA Database to implement EU asylum standards in national legislation within the requisite transposition deadlines. Given that this Chapter focuses more generally on the implementation of the EU asylum *acquis*, reference is made only to the AIDA countries bound by the entirety or part of these instruments.

The recast Qualification Directive has been transposed by the majority of countries. However, the substantial modifications to reception, detention and procedures, laid down in the recast Asylum Procedures Directive and Reception Conditions Directive, as well as relevant provisions of the Dublin III Regulation, which require the adoption of national legislation, are still debated before national legislatures in a number of Member States. In June and July 2015, comprehensive reforms transposing these instruments were passed in **Austria, Croatia, France and the Netherlands**. In **Belgium, Germany, Hungary and Malta**, only partial transposition reforms have been adopted so far.<sup>343</sup>

335. Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac', OJ 2013 L180/1.

336. Article 39(1) recast Qualification Directive.

337. Article 49 Dublin III Regulation. Although Regulations have direct effect in EU law, the recast Dublin Regulation contains provisions on matters such as detention, which need be laid down in national legislation.

338. Article 46 recast Eurodac Regulation.

339. Article 31(1) recast Reception Conditions Directive.

340. Article 51(1) recast Asylum Procedures Directive.

341. Article 51(2) recast Asylum Procedures Directive, citing Articles 31(3), (4) and (5) recast Asylum Procedures Directive.

342. CJEU, Case 41/74 *Van Duyn v Home Office*, Judgment of 4 December 1974; Case 148/78 *Ratti*, Judgment of 5 April 1979.

343. For more detailed information, see Annex I.

This section will provide an in-depth examination of seven areas lying at the heart of crucial reforms brought about by the recast Asylum Procedures Directive, Reception Conditions Directive and Dublin Regulation, drawing from the latest up-to-date information on AIDA countries complemented with important developments in other EU Member States not covered by AIDA where relevant. These issues of particular focus concern: (1) access to the territory and the procedure; (2) the application of prioritised and accelerated procedures; (3) the application of the Dublin III Regulation responsibility criteria and detention provisions; (4) developments relating to detention; (5) reception capacity and the provision of special reception conditions for families and children; (6) the rules on asylum seekers' access to the labour market; and (7) access to quality free legal assistance and representation.

## 1. Access to the territory and the procedure

Effective access to the asylum procedure for all applicants, without any exception,<sup>344</sup> is provided for in the recast Asylum Procedures Directive. Clarification as to what effective access entails is furnished in several provisions of the recast Directive such as those that relate to information dissemination, appropriate knowledge and necessary training of the examining authorities of the asylum claim, border guards, police, immigration authorities and personnel of detention facilities.<sup>345</sup> Indeed, a heavier accent in the recast is placed on Member States creating the conditions necessary for an applicant to effectively access procedures. For example, the requirement for national authorities to register an asylum application within a specific time,<sup>346</sup> and to provide the applicant with an effective opportunity to lodge the application as soon as possible,<sup>347</sup> arguably facilitates such access. Much of the recast Directive therefore hinges on national authorities providing applicants access to legally safe, efficient and effective procedures in addition to establishing the means to conduct a rigorous examination of international protection applications.<sup>348</sup>

As a matter of Treaty obligations, these provisions cannot be decoupled from EU primary law and international human rights treaties. Indeed, Member States are obliged to interpret secondary legislation in accordance with the EU Charter of Fundamental Rights so as to give effect to the rights and obligations guaranteed within it, such as the right to asylum, the prohibition of refoulement and collective expulsions.<sup>349</sup> Additionally, not only does the recast's content draw upon and is informed by the ECHR, including the standards developed by the ECtHR, the implementation and interpretation of the recast must be in accordance with the 1951 Refugee Convention, its Protocol, other relevant treaties and the constitutional traditions common to Member States.<sup>350</sup>

### 1.1. Access to the territory

Effective access to the asylum procedure along with the procedural guarantees which are required to pursue an asylum application is clearly predicated on access to the territory. In this manner the recast Asylum Procedures Directive not only foresees that the applicant is to be provided with information on the logistics of lodging an application for international protection at the external border, transit zones and territorial waters,<sup>351</sup> but also obliges Member States officials' to bring and disembark applicants on land where they are present on the Member State's territorial waters so that they may effectively access the examination procedure.<sup>352</sup> Facilitation of access as well as actual access to the territory is therefore part and parcel of the recast Directive. Indeed, Article 8, relating to the placement of third parties providing advice and counselling at external borders as well as Article 12 which provides

344. Recital 25 recast Asylum Procedures Directive. Conversely, Recital 13 Council Directive 2005/85/EC allowed exceptions to effective access to procedures, restricting the scope to not all applicants.

345. Article 4(1), (3)-(4), Article 6(1), Article 8(2) recast Asylum Procedures Directive.

346. 3 days if the application is made to a national authority competent under national law for registering an application for international protection and six days for authorities which are not competent. Member States may extend this to 10 working days where there is a large number of third country nationals simultaneously applying for international protection. Article 6(1)-(5) recast Asylum Procedures Directive.

347. Article 8(2) recast Asylum Procedures Directive.

348. For example, consultation with third party experts where advice is needed on the examination of an application (Article 10(3)(d)), as well as knowledge of problems which may affect the applicants ability to be interviewed (Article 14(1)), and the opportunity within the interview for the applicant to substantiate his or her application and give an explanation as to any contradictions or gaps in the application (Article 16). See Recital 34 and Recital 8, which cites from the Stockholm programme.

349. Article 78 TFEU; Article 6(1) TEU; Article 51(1) Charter.

350. Article 6(1) TEU; Article 78 TFEU; Recitals 15, 31, 33, 39 and 60 recast Asylum Procedures Directive.

351. Article 8 recast Asylum Procedures Directive.

352. Recital 26 recast Asylum Procedures Directive.

guarantees for applicants, notably the means for an applicant to properly communicate facts of the case,<sup>353</sup> would be rendered null and contrary to the Directive's *effet utile*<sup>354</sup> if effective access to the territory were stymied by a barrier or fence.

This reading is in line with the ECtHR's assessment in *Hirsi Jamaa v Italy*<sup>355</sup> and, more recently, *Sharifi v Italy and Greece* which concerned the immediate interception and return of third country nationals by Italian border authorities to Greece, without an examination of their personal situation being undertaken or access to national procedures/ information on their rights being provided.<sup>356</sup> Reiterating that Convention rights must be concrete and not illusory, the Court, in line with *MSS v Belgium and Greece*, stated that a procedure is only effective where it is practically accessible and that all guarantees under EU asylum law are dependent on the introduction of an asylum application.<sup>357</sup> Given that the applicants were concretely prevented from applying for asylum and benefitting from the procedural and substantive guarantees which accompany such access, the Court found violations of Article 13 ECtHR read in conjunction with Article 4 Protocol 4, Articles 2 and 3 of the Convention as well as separate violations of the latter articles.<sup>358</sup>

In light of Article 6(3) of the Treaty on European Union (TEU) and Article 52(3) of the Charter which defines the scope of Charter rights and general principles of EU law as those which are enumerated by the ECHR and consequentially the ECtHR, it is particularly disconcerting that 2014-2015 has been marked by a multifaceted use of barriers leading to *de facto* policies of *non-entrée*.<sup>359</sup> These include the proliferation of fences, intensified border patrols as well as refusal of entry, not only at the EU external borders but also between EU Member States and continuously on the high seas. In contradiction to the recast Asylum Procedures Directive's provisions cited above, as well as Member States international obligations, including the obvious implication that where entry is refused or a border is too onerous to cross a Member State is at risk of violating the principle of *non-refoulement*,<sup>360</sup> several EU Member States have, nonetheless, continued to rely on border control practices that undermine asylum seekers' access to the territory and to the asylum procedure in response to relatively large numbers of arrivals.

The 10.5km (approx.)<sup>361</sup> fence constructed between Nea Vissa to Kastanies at the Greek-Turkish land border as well as the 33km fence on the Bulgarian-Turkish border which, according to reports, is due to be extended to a 100km stretch, has set a worrying precedent within the EU, which has recently been replicated by Hungary. In July 2015, the Hungarian Parliament adopted new legislation which, amongst other provisions, provides a domestic legal basis to construct a 175km fence on the border between Hungary and Serbia.<sup>362</sup> During the same month, con-

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353. Recital 25 recast Asylum Procedures Directive.

354. CJEU, Case C-213/89, *Factortame*, Judgment of 19 June 1990, para 20; Case C-118/00, *Gervais Larys and Institut national d'assurances sociales pour travailleurs indépendants (Inasti)*, Judgment of 28 June 2001.

355. ECtHR, *Hirsi Jamaa and Others v Italy*, Application No 27765/09, Judgment of 23 February 2012.

356. ECtHR, *Sharifi v Italy and Greece*, Application No 16643/09, Judgment of 21 October 2014, paras 8-11.

357. ECtHR, *Sharifi v Italy and Greece*, Application No 16643/09, Judgment of 21 October 2014, paras 183-184; ECtHR, *MSS v Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011, para 318.

358. ECtHR, *Sharifi*, para 242; *Hirsi*, para 185. It is also to be reminded that in CJEU, Case C-528/11 *Halaf*, Judgment of 30 May 2013, UNHCR issued a statement on Article 18 of the Charter which, based on the Executive Committee (EXCOM) Conclusion No. 82, listed access to the territory for the purpose of admission to fair and effective processes for determining status and international protection needs as one amongst other elements of the right to asylum. Safeguarding Asylum, No. 82 (XLVIII)(d), 1997 EXCOM Conclusions, 17 October 1997. As EXCOM conclusions are those which reflect the consensus of states a strong argument could be made for these conclusions to fall under general principles of EU law as defined in Article 6(3) of the TEU.

359. For example asylum claims cannot be made to UK authorities operating in the control zones of France and Belgium. These agreements with the French and Belgium authorities are expressly done to prevent people from travelling to the UK to claim asylum: AIDA Country Report UK: Third Update, January 2015, available at: <http://bit.ly/1J5MFyP>, 32. Additionally, the Hungarian Ministry of Interior has specifically said that the planned fence between Hungary and Serbia has the "aim of preventing illegal crossing": see <http://bit.ly/1DkcVhQ>. For further information, see J Hathaway and T Gammeltoft-Hansen, 'Non-refoulement in a world of cooperative deterrence' (2014) Law & Econ Working Paper 106.

360. Article 33 Refugee Convention; Article 19(2) Charter; Article 3 ECHR; Article 3 Schengen Borders Code; Article 4 Maritime Surveillance Regulation.

361. Reports differ between the length of the fence, ranging from 10.5-12.5km. Moreover, it appears that in February 2015 part of the fence was destroyed due to bad weather with no agreement to reconstruct it as of yet. See media report at: <http://bit.ly/1gF0BDX>.

362. Act CXXVII of 2015, available in Hungarian at <http://bit.ly/1CWxANR> which also relate to applications being fast-tracked and an increase in time limits for detention, including for women and children. The amendment to Act CVI of 2015, available in Hungarian at: <http://bit.ly/1KaJZO8>, 83 authorises the government to adopt a safe third country and safe country of origin list. This has been adopted by the government in a resolution of the 21 July 2015 <http://bit.ly/1MmzQQN>. See below for more details on safe third countries.

struction at Mórahalom of a 150 metre sample of the fence was carried out,<sup>363</sup> while a barb-wire fence across the entire border was erected by the end of August.<sup>364</sup> Whilst having the effect of re-directing migratory routes (often to far deadlier ones)<sup>365</sup> the sealing of land borders does not shield Member States from legal liability with regards to their international and European obligations. Given that the aforementioned fences are situated on the respective territories of **Greece**, **Bulgaria** and, in the near future, **Hungary**, all Member States must ensure that a person's right to life, the right not to be subjected to torture or inhumane treatment and the right to a rigorous examination of an application for protection before removal are respected.<sup>366</sup> Additionally and crucially, these States must adhere to the principle of *non-refoulement* under the Refugee Convention which applies to instances of exclusion or non-admission at the border.<sup>367</sup>

Alongside physical bars to access there have been numerous reports of intensified border patrols and maritime interception leading to immediate turn backs at certain States' borders and territorial waters. Most notably, and as a consequence of the Greek-Turkish fence which has forced many to undertake sea crossings to the **Greek** islands and mainland territory, there has been a steady increase in the number of interceptions and allegations of informal forced returns carried out by the Greek coastguard and special force officers in the territorial waters of Greece and Turkey.<sup>368</sup> According to serious allegations registered with regard to such push-back practices by NGOs in Greece throughout 2014, in direct contravention of Article 4 of Protocol 4, Article 13, Article 3 ECHR and Article 8 of the recast Asylum Procedures Directive, individuals who had been returned to Turkey (the vast majority of whom were Syrians, Afghans, Somalis and Eritreans) were not given information on the asylum procedure or an opportunity to lodge a claim for protection,<sup>369</sup> There was no registration of the individuals or an assessment of the risk of arbitrary (direct or indirect) refoulement as required by *MSS v Belgium and Greece*.<sup>370</sup>

**Italy's** repatriation of third country nationals via readmission agreements to third countries as well as to Greece in particular has also been well documented,<sup>371</sup> not least in ECtHR jurisprudence. Indeed, notwithstanding the ECtHR's rulings in *Hirsi* and *Sharifi*, repatriation to Egypt and Tunisia is still occurring, particularly with regards to nationals of the latter country who are immediately placed in Identification and Expulsion Centres (CIEs) without information on their rights or an opportunity to lodge an asylum application being furnished.<sup>372</sup> Also, in a recent incident, Italian authorities initially delayed a search and rescue ship operated by MSF from disembarking approximately 700 people in Sicily due to a lack of capacity in the reception centres on the island.<sup>373</sup>

Along both sea and land borders there seems to be an ongoing trend to militarise, refuse entry and commit push-backs against persons trying to access the territory. As has been discussed in Chapter II, Section 6, the securitisation of the border between **France** and the **UK** at Calais has resulted in a bottle-necking of persons into insalubrious conditions and has led to a refusal of entry into the UK for persons arguably entitled to protection in the country.<sup>374</sup> Indeed, the exercise has been an extremely costly one, with the UK allocating £12 million over a period of three years to security measures. Moreover, the UK has also recently received a pre-instalment of €27

363. Hungarian Ministry of Interior, 'Construction of temporary border control fence begins', 13 July 2015, available at: <http://bit.ly/1DkcVhQ>.

364. Deutsche Welle, 'Hungary completes anti-refugee fence on Serbian border', 30 August 2015, available at: <http://bit.ly/1NIYBID>.

365. 61,474 refugees arrived on the Greek islands from January to June 2015. See Chapter I, Section 5 for statistics on crossings between the land borders of Greece and Turkey. Indeed the closing off of these land borders has set off a domino effect with the result that Hungary has seen approximately 72,000 migrants enter the territory with the majority crossing over the Hungarian-Serbian border. See ECRE, 'Hungary passes legislation severely limiting access to asylum', 10 July 2015, available at: <http://bit.ly/1HjXZUx>.

366. Recital 37 of the recast Asylum Procedures Directive

367. ECtHR, *Hirsi*, paras 173-175 and 185; EXCOM Conclusion No. 6 (XXVIII), para (c).

368. AIDA Country Report Greece: Third Update, 30: Approximately 2,000 cases of individuals having been towed back to Turkey. Reports also document that in 2014 over 12,000 individuals trying to reach Greece were "captured" by the Turkish Coast Guard command teams. The involvement of Greece as well as the location of these returns are unclear. See Migrants at Sea, 'Turkish Coast Guard reports intercepting 12,872 migrants in Aegean Sea in 2014', 5 January 2015, available at: <http://bit.ly/1Leu2tg>.

369. AIDA Country Report Greece: Third Update, 30

370. ECtHR, *MSS v Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011, para 286; *Hirsi*, para 146. See also AIDA Country Report Greece: Third Update, 30.

371. Medici per i dritti umani, Unsafe Harbours. Report on the readmissions to Greece from Italian ports and the violations of the migrants' basic human rights, November 2013, available at <http://bit.ly/1JAs8gU>.

372. AIDA Country Report Italy: Third Update, 19.

373. It was not until three days later that the boat was re-directed and allowed to disembark passengers in Reggio Calabria in Southern Italy. MSF, Italy: MSF Rescue Ship Carrying Nearly 700 People Unable to Land in Sicily, July 2015, available at <http://bit.ly/1JAx1qi>.

374. Either due to family reunification provisions under the Family Reunification Directive or Articles 8-11 of the Dublin III Regulation.

million from the Commission of their allocated AMIF funding in response to the “Calais situation”.<sup>375</sup> This raises a question mark as to how and for what purposes funding provided to Member States under AMIF is in fact spent on.

Accounts of informal returns by national border guards have been registered at the Greek-Turkish land border,<sup>376</sup> as well as at the Bulgarian-Turkish border, where the alleged severe ill-treatment by Bulgarian border guards against two Iraqi refugees attempting to cross into **Bulgaria** resulted in their deaths in March 2015.<sup>377</sup> Analogous reports have also been furnished documenting the use of violence by Turkish border guards to informally return refugees to Syrian territory.<sup>378</sup> Moreover, direct refusal of entry has been particularly apparent in Bulgaria where the Migration Directorate has reported that in 2014 6,400 third-country nationals (principally Syrians, Iraqis and Afghans) were officially refused access to the territory, and in 2015 police patrols dispatched along the Bulgarian-Turkish border were replaced by army staff.<sup>379</sup> Furthermore, in **Spain**, approved amendments to domestic legislation have allowed for rejection at the border of Ceuta and Melilla where a person attempts to cross without authorisation.<sup>380</sup> It is to be reminded that the Refugee Convention presupposes that refugees will enter territories irregularly and thus cannot be penalised for doing so.<sup>381</sup> Therefore, whilst asylum offices at border posts have been set up to process asylum applications at Ceuta and Melilla, this does nothing to insulate Spain from its legal liability where entry is refused.

Particularly pertinent cases which illustrate the effect of refusal of entry and raise interesting questions of jurisdiction, as defined by contemporary human rights jurisprudence, are border patrols which take place at the **Hungarian-Serbian border** as well as those on **French** soil between UK and French authorities, discussed in Chapter II, Section 6. In the former instance, joint border patrols between both national authorities have the explicit aim of preventing Kosovar nationals from crossing into Hungary via Serbia.<sup>382</sup> Indeed, a Memorandum of Understanding between Hungary and Serbia allows for the transport of Kosovar nationals back to the administrative line boundary between Kosovo and Serbia.<sup>383</sup> In addition and according to Frontex, **Germany** has supported these activities by providing personnel and surveillance equipment, presumably as a reaction to high numbers of asylum applications in the country in 2014. Whilst exact numbers on refusals are unknown,<sup>384</sup> organised expulsion of this kind risks violating procedural rights as well as Article 3 ECHR and the principle of *non-refoulement*. It also presupposes that Kosovar nationals are in no need of protection, when in fact State practice is highly divergent on the matter.<sup>385</sup> Moreover, in light of reports which have surfaced documenting summary returns of individuals by Serbian authorities to FYROM, leading to a heightened risk of subsequent chain refoulement to Greece and beyond,<sup>386</sup> consequences of removal at the Hungarian-Serbian border has a ricocheting effect whereby individuals are essentially ping-ponged back and forth, with a majority being bottle-necked into Serbia and FYROM.<sup>387</sup> Given widespread flaws within the refugee status determination procedure as well as extensive use of detention in inhumane conditions and a lack of access to an effective remedy in both of these countries,<sup>388</sup> returning individuals to Serbia and, as a consequence, FYROM could well be in dereliction of Hungary’s responsibility under international and European law. Moreover and in line with the *de facto* or *de jure* control understanding of jurisdiction,<sup>389</sup> as well as responsibility for aiding or

375. Statement from Migration and Home Affairs Commissioner Dimitris Avramopoulos, 4 August 2015, available at <http://bit.ly/1IXeaew>.

376. UNHCR, *UNHCR observations on the current situation of asylum in Greece*, December 2014, available at: <http://bit.ly/1NPNiz8>, 7.

377. UNHCR, ‘UNHCR concerned by border practices after deaths of two Iraqis at the Bulgaria-Turkey border’, 31 March 2015, available at: <http://bit.ly/1CsEzZA>; Human Rights Watch (HRW), ‘Dispatches: Stopping “Pushbacks” at Bulgaria’s Border’, 31 March 2015, available at: <http://bit.ly/1DkpRnH>.

378. AIDA Country Report: Turkey, May 2015, 73.

379. AIDA Country Report Bulgaria: Third Update, January 2015, 9 and 17.

380. Organic Law 4/2015 of 30 March 2015 on the protection of security of citizens (Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana), available in Spanish at: <http://bit.ly/1adkdf>.

381. Article 31 Geneva Convention.

382. Frontex reports that in 2014 approximately 24,000 Kosovar nationals crossed over the Serbian-Hungarian border: Frontex, *Western Balkan Risk Analysis*, 2015, 5. Amnesty International, however, quotes 21,453: Amnesty International, *Europe’s Borderlands, violations against refugees and migrants in Macedonia, Serbia and Hungary*, EUR 70/1579/2015, 6 July 2015, 54.

383. Frontex, *Western Balkan Risk Analysis*, 2015, 40.

384. Frontex has reported 1, 779 refusals of Kosovars by Western Balkan and neighbouring countries: Frontex, *Western Balkan Risk Analysis*, 2015, 49.

385. See section 2.1 below.

386. Amnesty International, *Europe’s Borderlands, violations against refugees and migrants in Macedonia, Serbia and Hungary*, 6 July 2015, 19 and 34. Committee against Torture (CAT), *Concluding Observations: on the second periodic report of the Republic of Serbia*, Advance Unedited Version, March 2015, para 15; GCR, *GCR mission to Eidomeni*, August 2015.

387. *Ibid.*, 66.

388. *Ibid.*

389. ECtHR, *Bankovic v Belgium*, Application No 52207/99, Judgment of 12 December 2001, para 73; *Medvedyev v France*, Application No 3394/03, Judgment of 29 March 2010, para 65.

assisting another state's wrongful conduct under international law,<sup>390</sup> **Germany**, in its contributions of personnel and equipment to Hungary, could also be held liable for violations of EU and international rights.

## 1.2. Access to the procedure: Border procedures

### 1.2.1. Border guard competences

Article 43 of the recast Asylum Procedures Directive allows for procedures relating to the admissibility and/or the substance of an asylum application to take place at the border for up to a period of 4 weeks.<sup>391</sup> Read alongside Article 4 of the Directive, it is clear that this procedure must be undertaken by a responsible determining authority which is obliged to carry out an appropriate examination of an international protection claim. Said authority must be provided with the appropriate means, sufficient competent personnel, relevant training on international human rights and asylum law and relevant jurisprudence, interview techniques use of medical, legal and country of origin reports as well as knowledge of applicants' specific vulnerabilities.<sup>392</sup> It is to be noted that whilst the recast Directive provides for a different authority than the determining one to process Dublin related cases, unlike the 2005 Directive,<sup>393</sup> it does not explicitly say that this also applies to procedures which take place at the border. Notwithstanding that provision is made in Article 34(2) for the admissibility interview (which appears to be undertaken frequently at the border, see below) to be conducted by personnel of authorities other than the determining authority, this does not insulate such personnel from complying with the training conditions under Article 4 as well as the interpretation, language, legal and procedural information guarantees under Articles 12 and 19 which Member States are bound to provide in procedures at first instance.<sup>394</sup> Moreover, following on from the ECtHR's ruling in *Tarakhel v Switzerland*,<sup>395</sup> where border guards are responsible for a case which involves a possible Dublin transfer they are under a procedural obligation to obtain guarantees on the adequacy of reception conditions in the receiving country before the transfer, failing which said transfer would be in breach of Article 3 ECHR.<sup>396</sup>

It is with the above in mind that the increase of police and border guard officials who can receive and perform initial processing of asylum applications at the Aliens Unit in **Estonia** is particularly disquieting.<sup>397</sup> The proposed new reforms in **Lithuania**, which foresee the examination of asylum applications to be transferred from the Migration Department to the State Border Guard Service, are equally troublesome.<sup>398</sup> Indeed, examining asylum applications at the border gives rise to several issues, not least because a number of AIDA countries appear to have ignored Articles 6 and 8 of the recast Asylum Procedures Directive concerning information and counselling at the border crossing points, which is essential to ensuring access to the procedure. In **Bulgaria**, where information is supplied at the border, it is overly complex.<sup>399</sup> In light of the ECtHR judgment in the case of *Sharifi*, which assesses the accessibility of an asylum procedure through the lens of necessary information and clear advice, the lack of information at borders substantially prevents a person from applying for asylum.<sup>400</sup>

Additionally, the risk of allowing border officials to (preliminarily or substantively) examine claims has been perfectly demonstrated by reports from UNHCR which specify that applicants must expressly state their intention to apply for asylum before **Estonian** border guards will process their claim.<sup>401</sup> There have been similar reports from **France** and **Poland** whereby an applicant must explicitly use the word "asylum" for his or her application to be registered, for example, at Charles de Gaulle airport,<sup>402</sup> while further information on the reasons for asylum might need to be

390. Article 16 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001) which is considered as the ICJ to be a principle of customary international law, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 26 February 2007, para 420.

391. Article 43(1) recast Asylum Procedures Directive. Where this time elapses and no decision has been taken the applicant will be granted access to the territory, although a derogation seems to be possible for an indefinite period of time where there are a large number of third country national arrivals.

392. Article 4(3) recast Asylum Procedures Directive.

393. Article 4(2)(d) Directive 2005/85/EC.

394. Articles 12 and 19 recast Asylum Procedures Directive.

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

396. *Tarakhel plus Swiss case*.

397. EASO, *Annual Report on the Situation of Asylum in the EU 2014*, 85.

398. Draft resolution No.15-3612(3).

399. AIDA Country Report Bulgaria: Third Update, 31.

400. ECtHR, *Sharifi v Italy and Greece*, Application No 16643/09, Judgment of 21 October 2014, para 168.

401. See UNHCR, *Observations by UNHCR Regional Representation for Northern Europe on the Draft Law Proposal of 05 December 2014 amending the Act on Granting International Protection to Aliens*, January 2015, available at: <http://bit.ly/1J1JCGw>.

402. AIDA Country Report France: Third Update, January 2015, 33.

provided before the Border Guards in Poland.<sup>403</sup> Proving to be as much as a hindrance to procedural access as a physical barrier to territorial access, imposing these requirements also misconstrues much of the recast Asylum Procedures Directive's guarantees necessary to ensure effective access,<sup>404</sup> as well as the interpretation given to Article 3 by the ECtHR in *Hirsi*, namely that the failure to request asylum does not exempt a signatory state to the Convention from abdicating from their obligations under Article 3.<sup>405</sup> Practices are to change in **France**, where following the recent asylum reform border officials have the obligation to inform migrants stopped at the border of their right to apply for asylum.<sup>406</sup>

Moreover, even where an explicit demand for asylum is made, there have been reports of **Estonian** border guards carrying out returns to Russia, before a full examination of the claim has been carried out.<sup>407</sup> This has also been documented by the EU Fundamental Rights Agency (FRA), according to which a large proportion of border guards in **Spain, Hungary, Poland and Greece** would not initiate an asylum procedure if a person expressly requested asylum or if the guards understood the individual's life was at risk.<sup>408</sup> These cases raise evident issues of *non-refoulement*, demonstrating clearly the dangers of allocating asylum responsibilities to a border authority.

### 1.2.2. Procedures which take place at the border

The use of border procedures amongst AIDA countries, whilst perhaps not as common as those lodged on the territory,<sup>409</sup> has significant ramifications on effective access to the asylum procedure. Despite the limited grounds on when border procedures can apply,<sup>410</sup> Member States have made full use of Article 43 of the recast Asylum Procedures Directive; immediately refusing further entry to the territory, undertaking *de facto* admissibility procedures as well as imposing accelerated time-limits and detention. As a matter of policy, where a person arrives at a border post in the **Netherlands, Belgium, France, Germany and Austria**, entry can be refused on grounds of a lack of documentation<sup>411</sup> and the individual is immediately detained. Both refusal and detention, which go hand in hand, can last for the duration of an examination of a claim and – prolonged for – the execution of a refusal decision in both **Belgium** and the **Netherlands**.<sup>412</sup> Not only does this systematic policy breach Recital 21 and Article 26 of the recast Asylum Procedures Directive and Articles 8 and 10 of the recast Reception Conditions Directive as well as Article 31 of the Refugee Convention, it further demonstrates that asylum applicants must undergo a separate process to prove an autonomous right of entry, independent from the procedure to determine refugee status.<sup>413</sup> The implications of such an approach are perfectly demonstrated in **Belgium**, which has been severely criticised by the ECtHR in *Singh v Belgium*<sup>414</sup> and *Josef v Belgium*<sup>415</sup> and may still pose significant problems from a human rights perspective, including on the right to an effective remedy notwithstanding legislative amendments on the matter.<sup>416</sup>

In the **Netherlands** the whole procedure, with the exception for families,<sup>417</sup> can take place within the confines of

403. AIDA Country Report Poland: Third Update, January 2015, 14. AIDA Country Report Hungary: Third Update, January 2015, 27.

404. Recital 26, Articles 6(1) and 8 recast Asylum Procedures Directive.

405. ECtHR, *Hirsi*, para 133.

406. Article 13 Law n. 2015-925 of 29 July 2015 on asylum reform.

407. EASO, *Annual Report on the Situation of Asylum in the EU 2014*, 85.

408. FRA, *Fundamental rights at land borders: findings from selected EU border crossing points*, 2014, available at: <http://bit.ly/1fPYRYj>. See also ECRE, *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 2014, 14 for further discussion.

409. FRA, *Fundamental rights at land borders: findings from selected EU border crossing points*, 2014.

410. A border procedure can only be applied to examine the admissibility of an application, or the substance of an application in the cases foreseen by Article 31(8) recast Asylum Procedures Directive.

411. This is the case in Belgium in France, whereas in the Netherlands it applies without discrimination to everyone crossing the border, thus it is unclear whether a lack of documentation is indeed pertinent.

412. In Belgium this can last for a maximum of 5 months, in France 26 days and in the Netherlands, the duration depends on the duration of the procedure.

413. V Moreno Lax, 'Beyond *Saadi v UK*: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law' (2011) 5:2 Human Rights and International Legal Discourse 166.

414. ECtHR, *Singh v Belgium*, Application No 33210/11, Judgment of 2 October 2012.

415. ECtHR, *Josef v Belgium*, Application No 70055/10, Judgment of 27 February 2014. The case was settled before the Grand Chamber delivered its ruling, Belgium recognising its violation and granting the applicant compensation and a residence permit.

416. See further AIDA Country Report Belgium: Third Update, 38.

417. AIDA Country Report Netherlands: Third Update, 24. Following the issuance of an Aliens Circular (A1/7.3) in September 2014 no families with children are detained at the border. Instead, the family is re-directed to a closed reception centre in Zeist.

border detention.<sup>418</sup> As of 20 July 2015, the Netherlands has an official border procedure. The asylum application in the border procedure is handled under the conditions of the short asylum procedure, which normally lasts up to 8 working days. If the application cannot be completed within the short time-frames of this procedure, the Immigration and Naturalisation Service (IND) is allowed to proceed to the procedure within the confines of the border detention if it suspects that the application can be rejected under Dublin grounds,<sup>419</sup> as inadmissible<sup>420</sup> or as manifestly unfounded.<sup>421</sup> When it is clear that an application cannot be handled within 4 weeks, border detention must be terminated and the asylum seeker obtains the right to legally enter the Netherlands. However, in the case of national security concerns or if there are reasons to believe that the exclusion clauses in Article 1F of the Refugee Convention are applicable, the (Assistant) District Attorney can file a request for territorial detention.<sup>422</sup>

In other instances it appears that the right to enter at the border is assessed in a preliminary examination related to the asylum application. As will be demonstrated this is in fact a *de facto* admissibility procedure and in all AIDA countries which have official border procedures this is subject to curtailed timetables as well as detention.<sup>423</sup>

While the **UK** does not have a border procedure, the initial screening of applicants at UK airports determines whether the individual should be referred to the regular or fast-track procedure, with the latter taking place in detention and under accelerated time conditions.<sup>424</sup> In both **Germany** and **France**, assessments are undertaken by the responsible determining authorities at the border as to whether the application is manifestly unfounded.<sup>425</sup> Indeed, in **France** the interview should only consist of a superficial review of the asylum application, but in practice it often covers the credibility of the account and is arguably a substantive examination of the claim.<sup>426</sup>

Given that responsible authorities located at the border are therefore examining the inadmissibility, unfoundedness or even substantive determination of a claim, the procedural guarantees under Chapter III of the recast as well as those relating to the personal interview, including the provision of an interpreter and communication with a legal advisor, must be adhered to in order for effective access to the procedure to be ensured.<sup>427</sup> Moreover Article 34 of the recast Asylum Procedures Directive, read in conjunction with the right to be heard as a general principle of EU law, signifies that Member States must guarantee every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely.<sup>428</sup>

Nonetheless, in light of reports in **Germany** stating that the quality of control of decisions has been severely lacking for airport procedures,<sup>429</sup> as well as recent case law from the **UK** documenting a complete absence of grounds or reasoning for routing someone into the detained fast track procedure at the airport,<sup>430</sup> it is doubtful whether obligations under the EU Charter of Fundamental Rights, including the right to asylum, as well as the requirements defining effective access to the procedure can be assured where procedures are undertaken at the border. Indeed, compartmentalising the whole or parts of the asylum procedure at the border is made even more legally dubious since the procedures are subject to an abbreviated timetable with the applicant held in detention. In **Germany**, a decision on whether the application is manifestly unfounded is given within 2 days, and in such cases an application to the court to suspend removal has to be lodged within 3 days.<sup>431</sup> In **France** the authorities have 4 days to rule on the unfoundedness of a claim and then provide for 2 days to lodge an appeal.<sup>432</sup> These time-limits will change with the recent asylum reform and will be determined by a decree. A request has to be made to the President of the Administrative Court to designate a lawyer for said appeal.<sup>433</sup> Given that all of the AIDA country reports testify

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418. AIDA Country Report Netherlands: Third Update, 24. Following the issuance of an Aliens Circular (A1/7.3) in September 2014 no families with children are detained at the border. Instead, the family is re-directed to a closed reception centre in Zeist.

419. Article 30 Dutch Aliens Act, as amended by Law of 8 July 2015.

420. Article 30a Dutch Aliens Act, as amended by Law of 8 July 2015.

421. Article 30b Dutch Aliens Act, as amended by Law of 8 July 2015.

422. Information received from the Dutch Refugee Council.

423. As is the case in France and Germany at the airports: FRA, *Fundamental rights at land borders: findings from selected EU border crossing points*, 2014.

424. AIDA Country Report UK: Third Update, 16.

425. AIDA Country Report France: Third Update, 33; AIDA Country Report Germany: Third Update, 36.

426. AIDA Country Report France: Third Update, 34.

427. Article 12 recast Asylum Procedures Directive specifies that with respect to the procedures provided for in Chapter III (which include inadmissible and unfounded procedures) the applicants must enjoy language guarantees, interpretation, communication with legal advisors, information which the authority has relied on in its reasoning.

428. CJEU, Case C-277/11 *MM v Minister for Justice, Equality and Law Reform*, Judgment of 22 November 2012.

429. AIDA Country Report Germany: Third Update, 36.

430. *H v Secretary of State for the Home Department* [2015] EWHC 377 (Admin), Judgment of 19 February 2015.

431. AIDA Country Report Germany: Third Update, 36.

432. AIDA Country Report France: Third Update, 35.

433. *Ibid.*

the difficulties of procedures within detention, notably access and communication with lawyers as well as compilation of necessary documentation within truncated time-tables, it is arguable whether in practice any procedure undertaken at the border can be in compliance with the EU general principle of effectiveness.<sup>434</sup> Indeed, a recent UK Court of Appeal decision on the appeal system within the Detained Fast-Track System (DFT) has found that the system places the applicant at a serious procedural disadvantage, impacting on the fairness of the proceedings to such an extent that the system for appeals within detention was found to be unlawful.<sup>435</sup>

### 1.3. Admissibility procedures and Dublin

Article 5 of the Dublin III Regulation foresees that a personal interview takes place in order to establish the determining State under the Dublin procedure. Read in conjunction with Article 4, this interview allows for a proper understanding of the Dublin system, the possibility to submit information on the presence of family relations and to challenge a transfer decision. Whilst the wording of Article 33 of the recast Asylum Procedures Directive is far from clear as to whether the assessment of another Member State's responsibility for an asylum application falls under the grounds of inadmissibility, many AIDA countries have, nonetheless, used the admissibility interview to examine applications under the Dublin procedure. As a result, the applicant is subjected to an interview which may not be tailored to the specificities of the application of the Dublin criteria and the right to raise challenges against a transfer. Indeed, in **Switzerland** the timing of the Dublin/admissibility interview is highly problematic as it takes place before the initiation of the Dublin procedure, compromising the right to be heard as required by EU primary law.<sup>436</sup>

In the **Netherlands**, the IND could until recently file a Dublin claim as soon as they had good reason to assume another Member State is responsible for the application, and the Dublin interview could take place without the results of this request being known, once again posing significant question marks over observance of the right to be heard in the Dublin interview.<sup>437</sup> Following the July 2015 reform of the Aliens Act, there is now a specific Dublin procedure specifically designed to address objections to an asylum seeker's transfer to another Member State.<sup>438</sup>

Moreover, as the interview is part of the admissibility stage it is highly unlikely that a lawyer will be present. For example in **Belgium**, a lawyer cannot be present during the interview. Indeed, the procedural requirements listed in Article 12 of the recast Asylum Procedures Directive seem to be non-existent in many of the Dublin interview procedures. Notably, in **France** the presence of an interpreter at this stage is variable and depends on the prefecture, the interview is not recorded and the form, which must be filled out during the interview, is to be completed in French.<sup>439</sup> The implication of finding the Dublin procedure to be applicable in France is the refusal of a temporary residence permit.<sup>440</sup> The lack of procedural guarantees in this process is even more troublesome given the superficial character of the questions asked and analysis undertaken. This has been perfectly demonstrated in a recent French administrative Court judgment which found that the prefecture's decision to refuse a temporary resident permit on the grounds of Italy's responsibility for the claim did not include information relating to the applicant's rights under Article 5(1) of the Dublin Regulation and was not based on a full and rigorous examination of the reception and procedural system in Italy.<sup>441</sup> Similarly, jurisprudence from the **Czech Republic** relates to the absence of a personal interview within the Dublin proceedings, thus violating the applicants' right to a fair trial and the right to raise arguments against their transfers to Bulgaria.<sup>442</sup> Indeed, there appears to be a number of rulings from **Belgium** suspending transfers under Dublin on account of the procedural deficiencies which take place within the examination of a Dublin case.<sup>443</sup>

The dangers of using the admissibility procedure for Dublin purposes as well as the scant questioning that this entails has been very recently shown in an emerging unofficial trend in several States. **Belgium**, the **Netherlands** and **Norway** appear to be sending some nationalities (Somalis and Eritreans) systematically back to Italy under

434. The general principle of effectiveness requires that procedural rules may not render practically impossible or excessively difficult the exercise of rights conferred by community law CJEU, Case C-33/76 *Rewe*, Judgment of 16 December 1976.

435. *R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634. See further Section 4.2 below.

436. AIDA Country Report Switzerland: Third Update, 30.

437. AIDA Country Report The Netherlands: Third Update, 32.

438. Information received from the Dutch Refugee Council.

439. AIDA Country Report France: Third Update, 30.

440. *Ibid*, 16.

441. Administrative Court of Nantes, Decision No 1505089, 22 June 2015. For a summary, see EDAL at: <http://bit.ly/1MybilE>.

442. Prague Regional Court, 1 July 2015, A. K. A., S. K. K., A. E. and K. B. v Ministry of the Interior, 49Az 56/2015-41. For a summary, see EDAL at <http://bit.ly/1Mnp7FU>.

443. Council for Alien Law Litigation, 22 February 2015, Decision no.138950, available at: <http://bit.ly/1TU1XZI>.

Dublin on the basis of very little circumstantial evidence.<sup>444</sup> Take charge requests are usually based on a statement where the individual has referred or even implied that he or she passed through Italy. Given that this is undertaken as part of the admissibility procedure, a transfer request can be lodged at a very early stage and is usually tacitly accepted by Italy under Article 22(7) of the Dublin III Regulation. This poses significant questions on how responsibility under the Dublin Regulation is in fact assessed and the interpretation given by Member States to circumstantial evidence in Article 22 of the Dublin Regulation. Moreover, it is in clear breach of the ECtHR's *Tarakhel* judgment, as well as the procedural guarantees in the recast Asylum Procedures Directive and under Articles 4 and 5 of the Dublin III Regulation.

#### 1.4. Access to the procedure on the territory

Against a backdrop of rising numbers of asylum applications and continuing deficiencies in reception and procedural structures, including staff and resource shortages, 2014-2015 has seen an ongoing and intensified pattern of difficulties in procedural access for applicants who are within the territory.

With arrivals averaging 1,000 per day on the Greek islands and over 200,000 in total since the beginning of 2015,<sup>445</sup> Greece's procedural and reception services are significantly below the needs of the asylum seeking population. Despite being prescribed for in law many reception structures are still non-existent, which leaves many exposed to being administratively detained for unspecified periods of time.<sup>446</sup> As described in Chapter II, Section 5, where first reception services do exist they are often characterised by a lack of staff and capacity leading to overcrowded premises and acute waiting times for registration. Permeating through to Regional Asylum Offices (RAOs), current staffing equates to major delays on the mainland and islands for registration, as described below on the RAO in Attica.<sup>447</sup> Changes to the registration procedure via Skype appointments have done little to ease this pressure with a general risk that the applicant will be detained and subject to deportation during this waiting period.<sup>448</sup>

Additionally, resource capacity continues to signify a major hurdle to access in **Italy** where there is a lack of capacity with the police to provide information to asylum seekers at the time of registration as well as a shortage of interpreters during any stage of the procedure.<sup>449</sup> Consequentially this means information guarantees provided by Article 6, 8 and 19 of the recast Asylum Procedures Directive are dispensed with.<sup>450</sup> Indeed a constant lack of information flow has been reported in **Italy**, **Malta** and **Cyprus** with reports stating that information on the applicants' rights and procedural steps has been omitted during registration. In Cyprus, for instance, there is a complete absence of written material for certain stages of the procedure, i.e. on subsequent applications and information for unaccompanied children.<sup>451</sup>

## 2. The use of accelerated and prioritised procedures

The Asylum Procedures Directive and its recast make provision for the possibility of applying special procedures to deal with specific caseloads which may warrant swifter decisions. Whereas the previous Asylum Procedures Directive drew no legal distinction between "prioritised procedures" or "accelerated procedures",<sup>452</sup> the recast Directive clearly distinguishes the two.<sup>453</sup> As explained in the Preamble to the recast Asylum Procedures Directive, prioritised procedures entail a more rapid examination of claims "without derogating from normally applicable procedural time limits, principles and guarantees",<sup>454</sup> while accelerated procedures differ from regular procedural rules

444. This information has been gathered from a series of communications by email and a meeting with the Flemish Refugee Council. Whilst Article 22 of the Dublin Regulation does allow for circumstantial evidence to be used when proving the responsible Member State, such evidence must be of an evidentiary value, namely that it is coherent, verifiable and sufficiently detailed.

445. UNHCR, *Sea Arrivals to Greece*, available at: <http://bit.ly/1KqflSU>, accessed 31 August 2015.

446. UNHCR, *UNHCR observations on the current asylum system in Greece*, December 2014, available at <http://bit.ly/1NP-Niz8>, 9.

447. AIDA Country Report Greece: Third Update, 25. UNHCR, *UNHCR observations on the current asylum system in Greece*, December 2014.

448. *Ibid.*

449. AIDA Country Report Italy: Third Update, p 37

450. *Ibid.*

451. AIDA Country Report Cyprus: Third Update, p 36.

452. Article 23(3)-(4) Directive 2005/85/EC.

453. Article 31(7)-(8) recast Asylum Procedures Directive.

454. Recital 19 recast Asylum Procedures Directive.

“in particular by introducing shorter, but reasonable time limits for certain procedural steps”.<sup>455</sup> Accelerated procedures involve appeals subject to shorter time-limits and which often have no (automatic) suspensive effect over removal decisions,<sup>456</sup> thereby exposing asylum seekers to the risk of deportation before their appeal is decided.

The recast Directive makes a more visible normative distinction between prioritisation and acceleration of processing applications in the asylum procedure. On the one hand, Member States are encouraged to favourably prioritise applications from persons with manifestly well-founded claims or vulnerabilities warranting special protection. On the other, unfounded or manifestly unfounded applications can be accelerated under a less protective procedural regime, on the assumption that they will most likely be rejected.

## 2.1. Accelerating ostensibly unfounded applications

For some countries, accelerated procedures are an integral procedural tool in the asylum process. Between March and December 2014, for instance, **France** and **Belgium** channelled approximately 30% of their caseload into the accelerated procedure, while over 50% of cases were dealt with under such a procedure in **Luxembourg**.<sup>457</sup>

The amendments brought about by the recast Asylum Procedures Directive to the scope for applying accelerated procedures raise critical questions relating to implementation in national law. At first reading, the recast Directive brought about welcome amendments by curtailing the scope for applying such procedures, as it limited the use of accelerated procedures, which was subject to 15 indicative and non-exhaustive grounds under the 2005 Directive,<sup>458</sup> to an exhaustive list of 10 grounds:

Article 23(4) Directive 2005/85/EC	Article 31(8) Directive 2013/32/EU
a. the applicant has not raised issues relevant to refugee or subsidiary protection status;	a. the applicant has only raised issues not relevant to refugee or subsidiary protection status;
b. the applicant clearly does not qualify for international protection;	<i>Deleted</i>
c. the application is unfounded due to the applicant’s coming from a “safe country of origin” or “safe third country”;	b. the applicant comes from a “safe country of origin”;
d. the applicant has misled the authorities by presenting false documents or withholding relevant information relating to identity and nationality which could adversely affect the decision;	c. the applicant has misled the authorities by presenting false documents or withholding relevant information relating to identity and nationality which could adversely affect the decision;
e. the applicant has filed another application with different data;	<i>Deleted</i>
f. the applicant has not presented information establishing with a reasonable degree of certainty his or her identity or, in bad faith, he or she has destroyed or disposed of identity or travel documents;	d. it is likely that, in bad faith, he or she has destroyed or disposed of identity or travel documents;
g. the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his or her claim unconvincing;	e. the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his or her claim unconvincing;
h. the applicant has submitted a subsequent application;	f. the applicant has filed an admissible subsequent application;
i. the applicant has failed without reasonable cause to lodge an application earlier;	h. applicant entered or stayed irregularly in the territory and, without good reasons, did not present him or herself to the authorities to file an application as soon as possible;
j. the applicant is making an application to delay or frustrate the enforcement of a return decision;	g. is making an application to delay or frustrate the enforcement of a return decision;
k. the applicant has failed without good reason to comply with obligations to present him or herself and report to the authorities;	<i>Deleted</i>

455. Recital 20 recast Asylum Procedures Directive.

456. Article 46(6) recast Asylum Procedures Directive.

457. EASO, *Annual Report on the Situation of Asylum in the EU 2014*, 90.

458. CJEU, Case C-175/11 *HID*, Judgment of 31 January 2013, para 70.

l. the applicant entered or stayed irregularly in the territory and, without good reasons, did not present him or herself to the authorities to file an application as soon as possible;	Incorporated in (h)
m. the applicant is a danger to national security or has been expelled for reasons of public security and public order;	j. the applicant is a danger to national security or has been expelled for reasons of public security and public order.
n. the applicant refuses to be fingerprinted;	i. the applicant refuses to be fingerprinted;
o. the application is made by an unmarried minor after the application of the parents responsible for him or her was rejected, and presents no new elements.	<i>Deleted</i>

The implementation of these procedures creates a number of risks of legal uncertainty and arbitrariness in practice. While some form of acceleration of certain applications is common practice across *all* countries covered by AIDA, the legal status of these procedures of expediency is not always defined with precision in domestic asylum systems. The comparison of procedural frameworks across countries reveal significant shortcomings and disparities relating to implementation. The following Member States covered by AIDA which are bound by the recast Asylum Procedures Directive and have formal accelerated procedures have complied with the exhaustive list of grounds laid down in Article 31(8) at the time of writing: **Croatia, France, and Malta**.<sup>459</sup> While **the Netherlands** does not formally have an accelerated procedure, its definition of “manifestly unfounded” applications mirrors the grounds in the recast Directive.<sup>460</sup> All others still have other grounds than the ones listed in Article 31(8) of the recast Asylum Procedures Directive in their national legislation. The real impact of the implementation of the strengthened procedural standards agreed in 2013 with respect to accelerated procedures therefore remains yet to be seen, as compliance in national legislation seems to be problematic.

Moreover, there is a gap in certain countries between acceleration prescribed by law and the use of accelerated procedures in practice. For example, certain AIDA countries have formally established accelerated procedures which remain ‘dead letter’ in practice. In a commendable approach, **Cyprus** treats applications from “safe countries of origin” under a fast-track version of the regular procedure, rather than the formal accelerated procedure. This means that such applicants in practice benefit from more generous safeguards in relation to appeal than those foreseen in the law.<sup>461</sup> To illustrate, asylum seekers have 20 days to lodge an appeal against a negative decision, rather than 10 days as set out in the accelerated procedure. Similarly, **Malta** does not apply its stricter accelerated procedure during first instance procedures in practice.<sup>462</sup>

#### *Manifestly unfounded applications and the “safe country of origin” concept*

Under Articles 36-37 of the recast Asylum Procedures Directive, Member States may designate a country as a “safe country of origin” where its nationals are “generally and consistently” at no risk of persecution or serious harm on the basis of the law, political situation and general circumstances.<sup>463</sup> The “safe country of origin” concept differs from the “safe third country” concept, which is defined under Article 38 to cover countries able to afford protection from persecution and serious harm, to which an asylum seeker has a connection and may reasonably travel.

This designation, done in a national list, is currently practiced in **Austria, Belgium, Germany, France,**<sup>464</sup> **Malta, the UK and Switzerland**, while **Hungary** only adopted a list of safe countries of origin in July 2015.<sup>465</sup> However, even countries which have not laid down or do not apply the “safe country of origin” concept tend to make determi-

459. Article 41(1) Croatian Law on International and Temporary Protection; Article L723-2 French Code on entry and residence of foreigners and asylum (Ceseda), as amended by Law n. 2015-925 of 29 July 2015 on asylum reform; Article 2(k) Maltese Refugees Act, as amended by Article 3 Act VI of 2015.

460. Article 30b Dutch Aliens Act, as amended by Law of 8 July 2015.

461. AIDA Country Report Cyprus: First Update, 21.

462. AIDA Country Report Malta: Third Update, 24, 28.

463. Annex I recast Asylum Procedures Directive.

464. The July 2015 asylum reform has brought the “safe country of origin” definition in line with Article 37 and Annex I of the recast Asylum Procedures Directive in France.

465. See AIDA, ‘Hungary adopts list of safe countries of origin and safe third countries’, 23 July 2015, available at: <http://bit.ly/1Oo7WCv>.

nations on the unfoundedness of specific nationalities as a matter of administrative practice. **Sweden**, for example, accelerates the processing of any nationalities considered manifestly unfounded, most frequently from Western Balkan countries,<sup>466</sup> thereby treated as safe countries of origin in all but name. **Greece**, on the other hand, opts for more subtle acceleration for specific nationalities, by laying down a shorter validity for permits granted to certain nationalities of asylum seekers. As opposed to a duration of validity of 4 months, certain nationals are granted a 3-month asylum seeker's card (previously this card was only valid for 45 days).<sup>467</sup> This implies a singling out of specific nationalities by the Asylum Service as subject to faster decision-making. For that reason, the use of the safe country of origin concept should be understood in a broader sense to include not only legally defined lists of safe countries but also presumptions of unfoundedness for certain nationalities in administrative practice.

The following table sketches out the main countries of origin that are determined as "safe" in EU+ countries, whether in a safe countries of origin list or as a matter of administrative practice:<sup>468</sup>

Country of origin	Listed as "safe country of origin"	Otherwise manifestly unfounded
Albania	AT, BE, DK, FR, HU, LU, UK, CH	BG, CZ, GR, SE, NO
Bosnia-Herzegovina	AT, BE, DE, DK, FR, HU, LU, UK, CH	BG, CZ, SE, NO
FYROM	BE, DE, DK, FR, HU, LU, UK, CH	BG, CZ, SE, NO
Kosovo	AT, BE, DK, HU, LU, UK, CH	CZ, SE, NO
Montenegro	AT, BE, DK, FR, HU, LU, SK, UK, CH	BG, CZ, SE, NO
Serbia	AT, BE, DE, DK, FR, HU, LU, UK, CH	BG, CZ, SE, NO
Georgia	FR	BG, GR, NO
Moldova	DK, FR, UK, CH	
Bangladesh		AT, BG, CY, GR
India	BE, FR, MT, UK, CH	BG
Pakistan		AT, CY, GR
Mongolia	DK, FR, UK	CZ, SE, NO
Senegal	DE, FR, LU, MT, CH	
Ghana	DE, FR, LU, MT, SK, CH, UK (for men)	BG
Nigeria	UK (for men)	BG
Benin	FR, LU, MT, CH	
Gabon	MT	
Botswana	MT	
Kenya	SK, UK (for men)	
Chile	MT	NO
Uruguay	MT	
Jamaica	MT, UK	
Ukraine	LU, UK	BG, NO

Sources: AIDA country reports; EMN Query on Safe Countries of origin and safe third countries, 22 December 2014; EMN Query on the concept of safe country of origin in relation to Albania, Kosovo, Macedonia (FYROM), Serbia, Montenegro, Bosnia and Herzegovina, 30 March 2015; European Commission, Information Note on the follow-up to the European Council Conclusions of 26 June 2015 on "safe countries of origin".

This overview of safe country of origin determinations indicates the piecemeal, heterogeneous approach taken by Member States and associated countries with regard to presumptions of safety. While certain nationalities are in some form deemed as manifestly unfounded by as many as 13 countries, the same is not true for other countries such as **Georgia, Moldova, Ukraine, Pakistan, Bangladesh, India, Mongolia, Nigeria** or **Senegal**.

**Albania, Bosnia-Herzegovina, FYROM, Kosovo, Montenegro** and **Serbia**, consistently grouped as "**Western Balkan** countries" by EASO, are most commonly cited as nationalities producing manifestly unfounded applications with regard to international protection by asylum authorities and EU institutions. Across a number of AIDA countries, applicants originating from these countries are faced with accelerated or otherwise expedient procedures, which in most cases result in a negative decision. Beyond adversely raising the requisite burden of proof for asylum seekers to rebut presumptions of safety, these determinations also entail short procedural time-limits and time-constrained appeal rights, which are further discussed below.

466. AIDA Country Report Sweden: Second Update, 33.

467. AIDA Country Report Greece: Third Update, 21.

468. Other countries considered "safe" in several Member States include: EEA States; USA; Canada; Australia; New Zealand; Japan.

According to EASO, as of February 2015, **Germany** only prioritises applications from Kosovars and no longer prioritises claims by FYROM, Bosnia-Herzegovina and Serbia.<sup>469</sup> These accelerated cases lead to decisions within less than 6 months; the shortest processing time in early 2015 was an average of 3.7 months for Kosovar and Serbian applicants. **Sweden**, for its part, does not apply the “safe country of origin” concept but treats applications from nationals of these countries as manifestly unfounded applications, which are subject to a 3-month procedure.<sup>470</sup> In **Austria**, under the accelerated procedure, applications from Kosovars were processed within 12 days at the end of 2014 and beginning of 2015.<sup>471</sup> Conversely, **Switzerland** expedites the processing of these applications even further, as they are examined under its 48-hour procedure, coupled with a reduction of material reception conditions. This has been described by EASO as yielding “the best results” in deterring Western Balkan applicants from seeking protection in Switzerland.<sup>472</sup>

However, there are dangers in applying a singular approach to asylum seekers from all Western Balkan countries on the basis of the assumption that they have all manifestly unfounded claims. The EU recognition rates for the different countries were not uniform for all 6 nationalities in 2014, while discrepancies were further exacerbated during the first quarter of 2015.

Country of origin	EU recognition rate in 2014	EU recognition rate in 2015 Q1
Albania	7.1%	11.6%
Bosnia-Herzegovina	4.5%	7.1%
FYROM	0.8%	0.8%
Kosovo	6.2%	1.4%
Montenegro	3.3%	1.7%
Serbia	1.7%	1%

Source: Eurostat, *First instance decisions on applications by citizenship, age and sex Quarterly data (rounded)*, migr\_asydcfstq.

For instance, in 2014, **France** granted international protection in 555 out of 5,840 first instance decisions to Albanian applicants (9.5%), and in 115 out of 890 first instance decisions during the first quarter of 2015 (12.9%). In that respect, presuming the manifest unfoundedness of applications of asylum seekers from all Western Balkan countries seems more tenuous a conclusion when looked at from the perspective of Albanian nationals, rather than Serbian or Macedonian nationals.

At the same time, discrepancies exist between “safe country of origin” determinations even within the same region. In the Western Balkan context, otherwise assumed as a paradigm of safe country of origin, Kosovo is not considered safe by **Bulgaria**, **Germany** and **France**,<sup>473</sup> while FYROM does not figure in **Austria**'s national list, and **Slovakia** only considers Montenegro to be a safe country. Advocating for a common EU approach to safe countries of origin therefore runs the risk of a ‘race to the bottom’ in protection standards by standardising presumptions of safety in the name of convergence, as discussed in Chapter II, Section 2.3.

Moreover, a common approach to “safe country of origin” determinations seems even more difficult in respect of countries beyond the Western Balkan region. Take **Senegal** for example. The protection needs of applicants originating from Senegal have been highlighted, not least with regard to persons facing persecution for reasons of sexual orientation, as recognised by the CJEU in its *X, Y & Z* ruling.<sup>474</sup> Out of a total of 3,060 decisions on applications from Senegalese applicants in 2014, 1,050 were granted international protection at first instance, thereby reaching a 34% recognition rate EU-wide. During the first quarter of 2015, 305 out of 804 first instance decisions on Senegalese applicants were positive, raising the EU recognition rate to 36%.<sup>475</sup>

Senegal figures in the safe country of origin lists of **France**, **Germany**, **Luxembourg**, **Malta** and **Switzerland**. While Germany, Switzerland and Malta have granted no protection to Senegalese applicants during this period,

469. EASO, *Asylum Applicants from the Western Balkans: comparative analysis of trends, push-pull factors and responses – Update* (hereafter “Western Balkans Update”), May 2015, available at: <http://bit.ly/1EY8NDb>, 30.

470. AIDA Country Report Sweden: Second Update, 33.

471. EASO, *Western Balkans Update*, May 2015, 27.

472. EASO, *Western Balkans Update*, May 2015, 34.

473. Kosovo was removed from the safe countries of origin list following a ruling of the Council of State, Decision Nos 375474 and 375920, 10 October 2014.

474. CJEU, Joined Cases C-199/12, C-200/12 and C-201/12 *X, Y & Z v Minister voor Immigratie en Asiel*, Judgment of 7 November 2013.

475. Eurostat, *First instance decisions on applications by citizenship, age and sex Quarterly data (rounded)*, migr\_asydcfstq.

France has granted international protection in 80 out of 290 first instance decisions in 2014 (28%), and in 15 out of 55 decisions during the first quarter of 2015 (27%). These figures indicate that almost one out of three Senegalese nationals applying in France are deemed in need of international protection.

Furthermore, some “safe country” designations by some Member States do not concern all applicants for international protection. The **UK**, for instance, deems a number of countries to be safe only for men; this includes Gambia, Ghana, Kenya, Liberia, Malawi, Mauritius, Ecuador and Sierra Leone. This creates further discrepancies in the way presumptions of safety are developed in the EU. **Ghana** is also designated as a “safe-for-men country” by **Luxembourg**, but as a generally safe country by **Bulgaria, France, Germany, Malta, Slovakia and Switzerland**.<sup>476</sup>

#### *Consequences of safe country of origin designations*

The use of accelerated procedures is constrained by procedural requirements of fairness, guaranteed under Articles 41 and 47 of the EU Charter of Fundamental Rights, which are all the more crucial given that accelerated procedures generally entail swift rejection of applications. According to EASO, 89.3% of applications examined under the accelerated procedure in the EU between March and December 2014 led to a negative decision.<sup>477</sup> The effectiveness of those procedural guarantees depends on the provision of sufficient time for asylum seekers to defend their claim and to be able to adequately prepare to appeal a negative decision.<sup>478</sup>

However, the deadlines for lodging an appeal in the accelerated procedure leave asylum seekers with very tight time-constraints to prepare their case. For instance, while in **France**, decisions in the accelerated procedure are appealable within 30 days as in the regular procedure, in **Belgium** and **Greece** the time-limit is 15 days, in **Austria** it is 14 days, and in **Hungary** only 3 days. In addition, appeals in the accelerated procedures often have no automatic suspensive effect. Therefore asylum seekers may be deported or placed in detention for that purpose pending an appeal, as was the case in **France** until the asylum reform in July 2015.<sup>479</sup>

In that respect, it is highly questionable whether the use of “safe country of origin” concepts in the asylum procedure is in line with precepts of procedural fairness but also equality before the law. Interpreting similar provisions in relation to Designated Countries of Origin in **Canada**, the Canadian Federal Court has recently delivered an interesting judgment on this issue in *YZ v Minister of Citizenship and Immigration*.<sup>480</sup> The Court found that the differential treatment afforded to nationals of Designated Countries of Origin, which meant they could not benefit from appeal rights, amounted to discrimination on grounds of “national origin” which is expressly prohibited by Article 15 of the Canadian Charter of Rights and Freedoms.<sup>481</sup> Interestingly, the claimants also referred to a breach of the non-discrimination clause in Article 3 of the Refugee Convention, which was however not commented on by the Court.

The Federal Court went on to explain that the creation of two classes of asylum seekers, those who come from “safe” countries and those who do not,

“[P]erpetuates a stereotype that refugee claimants coming from [safe countries] are somehow queue-jumpers or ‘bogus’ claimants who only come here to take advantage of Canada’s refugee system and its generosity.”<sup>482</sup>

The Canadian ruling engages in a very important legal scrutiny of the “safe country of origin” concept as one that discriminates between classes of asylum seekers and that exacerbates stereotypical presumptions of abuse. Bearing in mind the EU’s ever-heightened discourse on preventing abuses of its Member States’ asylum systems, discussed in Chapter II, Section 2.3, the Canadian Court’s observations are equally relevant to the debate on use

476. European Commission, *Information note on the follow-up to the European Council Conclusions of 26 June 2015 on “safe countries of origin”*, 18.

477. EASO, *Annual Report on the Situation of Asylum in the EU 2014*, 91.

478. See e.g. ECtHR, *IM v France*, Application No 9152/09, Judgment of 2 February 2012; *Singh v Belgium*, Application No 33210/11, Judgment of 2 October 2012; *ME v France*, Application No 50094/10, Judgment of 6 June 2013; *AC v Spain*, Application No 6528/11, Judgment of 22 April 2014.

479. Law n. 2015-925 of 29 July 2015 on asylum reform.

480. Federal Court of Canada, *YZ and the Canadian Association of Lawyers v the Minister for Immigration and Citizenship and the Minister of Public Safety and Emergency Preparedness* [2015] FC 892, Judgment of 23 July 2015, available at: <http://bit.ly/1VBbEhr>.

481. *Ibid.*, para 124. Note that, while Article 21(2) of the EU Charter prohibits discrimination on grounds of nationality “without prejudice to the special provisions” of the Treaties, nowhere does the TEU or TFEU provide for discrimination between third-country nationalities.

482. *Ibid.*

of the safe country concept in Europe.

## 2.2. Prioritising manifestly well-founded applications

The provision on prioritised procedures in Article 31(7) of the recast Asylum Procedures Directive allows Member States to fast-track the processing of claims presenting manifest protection needs under the regular procedure. The possibility of applying swifter processes for recognising international protection has already taken shape in several countries with regard to specific nationalities which are broadly agreed at EU level as needing protection such as **Syrian** or **Eritrean** applicants. Without explicitly defining nationalities, the Council Decision on relocation discussed in Chapter II, Section 2.1 impliedly confirms that these two nationalities, as well as **Iraqis**, warrant faster procedures in order to be rapidly granted protection status.

### *Nationalities presumed to present manifestly well-founded applications*

**Syrians** benefit from fast-track processing in **Germany**,<sup>483</sup> **Bulgaria**, **Cyprus**, **Greece** and the **Netherlands**, while this is no longer the case in **Sweden**.<sup>484</sup> Prioritisation occurs as a matter of administrative practice rather than law in these countries.

How 'fast' are these fast-track procedures in practice? Time-limits can vary between countries. In **Greece**, Syrians whose claims are prioritised receive a decision on the same day of the registration of their application, while in the **Netherlands** the procedure takes 4 days.<sup>485</sup>

However, priority is not always unequivocally applicable to all applicants originating from Syria. In **Greece**, for example, the fast-track processing scheme introduced in September 2014 for Syrian applicants, who are issued with a decision on the same day as their registration with the Asylum Service, is only available to Syrians who lodge their first asylum application and hold valid identification documents.<sup>486</sup> This fast-track procedure for Syrians is guaranteed through emergency AMIF funding as of June 2015,<sup>487</sup> as the Asylum Service RAO of Attica has otherwise stopped registering new applications as of May 2015 due to human resource constraints.<sup>488</sup>

For its part, **Austria** only applies fast-track processing in respect of resettled Syrians.<sup>489</sup> Beyond the AIDA context, **Spain** also provides for a fast-track procedure for Syrians, but only for those who apply in the enclaves of Ceuta and Melilla in Northern Africa.<sup>490</sup>

Beyond the 'commonly agreed' manifestly well-founded claims of Syrian and Eritrean nationals, however, the treatment of other nationalities that are largely recognised as in need of international protection is much more rarely channelled in prioritised procedures. **Iraqi** nationals are subject to fast-track procedures only in **Germany**.<sup>491</sup> On the other hand, applications from **Somali** nationals, sometimes prioritised in **Sweden**,<sup>492</sup> are no longer fast-tracked.<sup>493</sup>

The risk of "protection lottery" will therefore remain equally palpable even when the recast Asylum Procedures Directive rules are transposed into national legislation. Contrary to the Directive's aim to "limit the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks",<sup>494</sup> the heterogeneity of arrangements on procedural speed across AIDA countries makes the Member State where the application will be examined all the more relevant for applicants.

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483. EMN, *Annual Report on Immigration and Asylum 2014*, May 2015, 14.

484. Information received from Caritas Sweden.

485. AIDA Country Report Netherlands: Third Update, 37.

486. AIDA Country Report Greece: Third Update, 64.

487. Asylum Service, 'Implementation of emergency action from the Asylum Service on faster processing of applications for international protection from Syrian refugees, funded by the European Commission – HOME/2014/AMIF/AG/EMAS/08/GR', 16 June 2015, available in Greek at: <http://bit.ly/1SnL60K>.

488. AIDA, 'Greece: Asylum Service reduces operations in Athens due to staff shortage', 26 May 2015, available at: <http://bit.ly/1LhhA8G>.

489. AIDA Country Report Austria: Third Update, 54.

490. EMN, *Annual Report on Immigration and Asylum 2014*, May 2015, 14.

491. EMN, *Annual Report on Immigration and Asylum 2014*, May 2015, 14.

492. AIDA Country Report Sweden: Second Update, 33.

493. Information received from Caritas Sweden.

494. Recital 13 recast Asylum Procedures Directive.

Beyond fast-tracking applications from nationalities presumed to present manifestly well-founded claims, several countries have introduced special procedures aimed at prioritising the processing claims from vulnerable asylum seekers. An illustrative example is the case of unaccompanied children, whose applications are prioritised in **Hungary, Italy, Malta**, as well as **Turkey**.

## 3. The application of the Dublin III Regulation

### 3.1. The family unity criteria

An October 2014 study for the European Parliament stressed that the Dublin criteria are applied in a widely different manner across Member States, whereby “some Member States implement Dublin ‘by the book’, while others show greater flexibility, namely in the application of the family unity criteria.”<sup>495</sup>

The primacy of family unity amongst the responsibility criteria of the Dublin Regulation gives priority to asylum seekers’ right to family life above all other criteria relating to the issuance of residence documents or visas or irregular entry. The way in which these provisions are interpreted and applied by the different Dublin Units remains highly unclear to date, however.

One of the main critiques of the Dublin II Regulation related to the restrictive reading of family criteria in a significant number of Member States, which resulted in a marginal rate of family-related transfers across the EU.<sup>496</sup> Even under the Dublin III Regulation, however, Member States continue to adopt unduly stringent interpretations of the family unity criteria. In **Austria**, for example, the family criteria are not considered applicable unless every asylum seeker in the family has mentioned the existence of family members in the application they make in the respective Member States where they are present.<sup>497</sup> Moreover, the Office for Immigration and Asylum (BFA) may request DNA tests to substantiate family links, which need be paid for by the asylum seeker him or herself and may only be refunded after arrival in Austria, if the test is positive.<sup>498</sup>

Conversely, the majority of outgoing requests submitted by **Greece** relate to family unity criteria in respect of applicants who transit through Greece and make their first application in another Member State. Nevertheless, deficiencies in the country’s asylum procedure may hamper family reunification in practice. As regards unaccompanied children in particular, the severely dysfunctional guardianship system, as well as the shortage of staff to escort children during the transfer to another country, result in unacceptable delays in Dublin procedures.<sup>499</sup>

Under Dublin III, the case therefore remains for certain countries that the vast majority of Dublin cases were in fact decided on the basis of Eurodac data rather than family unity in 2014.<sup>500</sup>

### 3.2. The discretionary clauses

Article 17 of the Dublin III Regulation has brought together what were formerly the “sovereignty clause”<sup>501</sup> and the “humanitarian clause”<sup>502</sup> under a general rubric of “discretionary clauses”. While the structure of the new Regulation draws a clearer divide between the mandatory and optional criteria applicable in Dublin responsibility-determination, it may somewhat blur the different functions between the two provisions.

495. E Guild *et al.*, ‘New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection’, October 2014, European Parliament, PE509.989, 109.

496. ECRE *et al.*, *Dublin II Regulation: Lives on Hold*, February 2013.

497. AIDA Country Report Austria: Third Update, 27.

498. This is the case since the BFA may not impose a DNA test on asylum seekers. See Article 13(4) BFA Procedures Law.

499. AIDA Country Report Greece: Third Update, 44.

500. See e.g. AIDA Country Report Bulgaria: Third Update, 24; AIDA Country Report France: Third Update, 30. See also ECRE *et al.*, *Dublin II Regulation: Lives on Hold*, February 2013.

501. Article 3(2) Dublin II Regulation.

502. Article 15 Dublin II Regulation.

On one hand, the “humanitarian clause” in Article 17(2) triggers protective considerations relating to the individual situation of the transferred asylum seekers, where humanitarian grounds come into play. In *K v Bundesasylamt*, the CJEU found that the “humanitarian clause” should be broadly interpreted as implying an obligation to bring together family members beyond those envisioned by Articles 8-11,<sup>503</sup> so as to ensure its effectiveness,<sup>504</sup> and to guarantee applicants’ effective access to the procedure.<sup>505</sup>

On the other hand, the “sovereignty clause” in Article 17(1) appears as a free-standing discretionary provision, subject to no conditions.<sup>506</sup>

Based on an *effet utile* logic, the “sovereignty clause” and “humanitarian clause” should be construed as applicable to different situations. Yet the drafting of the Dublin Regulation leaves the choice of discretionary clause open to Member States, as long as some form of discretion is invoked to undertake responsibility for an asylum application. The lack of clarity in the boundaries between the two clauses risks resulting in opaque, non-transparent application of the provisions in practice. There is very little data available to date and apparently a reluctance amongst asylum authorities to share information on the way in which they apply the discretionary provisions in practice and on the difference in scope, if any, attributed to Article 17(1) and Article 17(2).<sup>507</sup> In **Switzerland**, for instance, the Federal Administrative Court has held that the same humanitarian considerations are used for the application of both the “sovereignty clause” and the “humanitarian clause”.<sup>508</sup>

The application of the two clauses varies significantly between AIDA countries. While the majority of Member States apply some form of discretionary provision in respect of vulnerable applicants or on health-related grounds, the choice of clause is rarely principled. For example, **Austria** used the “sovereignty clause” to preclude the transfer of a vulnerable Syrian national to Italy in 2014.<sup>509</sup> However, **Sweden** has undertaken responsibility for 37 cases in 2014 and 126 in 2015,<sup>510</sup> without any clear distinction between “sovereignty clause” and “humanitarian clause”. In its May 2015 report on the Western Balkans, EASO mentions that the Swedish Migration Agency has used the sovereignty clause in respect of Kosovar applicants transiting through Hungary, with a view to rejecting their claims and directly returning them to Kosovo rather than pursuing a Dublin transfer to Hungary.<sup>511</sup>

Austria and Germany also seem to resort to the “sovereignty clause” for practical reasons which may not necessarily involve humanitarian considerations. **Austria** has used the clause in line with the need to avoid lengthy duration of admissibility procedures determining the Member State responsible,<sup>512</sup> while **Germany** took over responsibility for 2,225 cases due to “factual impediments to transfer” in 2014.<sup>513</sup>

In other cases, the criteria for the application of the discretionary clause may vary *within* a country. In **France**, for instance, health grounds resulting in an applicant’s unfitness to travel have led the Prefectures to apply the “sovereignty clause” in Paris, but not in Nice.<sup>514</sup>

Finally, another critical issue with regard to the application of the “discretionary clauses” relates to discrepancies in whether the provision may be invoked by an individual applicant across AIDA countries. By way of example, in **Switzerland**, the “sovereignty clause” is *not* deemed self-executing, so it can only be relied upon in conjunction with another legal provision,<sup>515</sup> whereas in **Austria** asylum seekers may directly request authorities to consider applying the “sovereignty clause”.<sup>516</sup> Conversely, in the **UK**, while details of family members are routinely sought during the screening interview, the applicant is not advised of the possibility of asking for the discretionary or sovereignty clauses to be invoked. The possibility of relying on these clauses is only likely to be raised if the applicant seeks to mount a legal challenge against a Dublin decision.<sup>517</sup> Additionally, where the applicant is detained in-coun-

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503. *K*, paras 35, 40.

504. CJEU, Case C-245/11 *K v Bundesasylamt*, Judgment of 6 November 2012, para 31.

505. *K*, para 48. See also CJEU, Case C-648/11 *MA v Secretary of State for the Home Department*, Judgment of 6 June 2013, para 54.

506. CJEU, Case C-4/11 *Bundesrepublik Deutschland v Puid*, Judgment of 14 November 2013, paras 28-29.

507. See e.g. AIDA Country Report Italy: Third Update, 27; AIDA Country Report Malta: Third Update, 21; AIDA Country Report Belgium: Third Update, 27; AIDA Country Report Switzerland, 28; AIDA Country Report Germany: Third Update, 27-28.

508. BVGE 2011/9 (E-7221/2009), 10 May 2011.

509. BVwG, 205 1438717-1, 29 April 2014.

510. AIDA Country Report Sweden: Third Update, 21.

511. EASO, *Western Balkans*, Update 2015, 31-32.

512. BVwG, W 125.1257809-8, 20 January 2014.

513. AIDA Country Report Germany: Third Update, 27-28.

514. AIDA Country Report France: Third Update, 31.

515. BVGE 2010/45 (E-5644/2009), 31 August 2010.

516. AIDA Country Report Austria: Third Update, 28.

517. AIDA Country Report UK: Third Update, 26.

try and Dublin procedures are applied as a consequence of taking fingerprints and a Eurodac ‘hit’, screening may be bypassed altogether. Beyond undermining the hierarchy of Dublin criteria in practice through the omission of family unity considerations, the authorities’ failure to proactively consider the applicability of discretionary clauses renders Dublin procedures more administratively cumbersome, which is at odds with the CJEU’s prescriptions in *K* for a broad use of “humanitarian clause” which would ensure effective access to the asylum procedure.

The application of this discretionary clause is closely connected to questions of solidarity between Member States in the CEAS. While it has widely been stressed that the Dublin Regulation does not purport to establish a mechanism sharing responsibility for applications among Member States, but merely one that allocates responsibility based on objective criteria, in its European Agenda for Migration, the European Commission indicates that the Dublin system should have a responsibility-sharing component which is currently not reflected in practice: “the mechanism for allocating responsibilities to examine asylum applications is not working as it should. In 2014, five Member States dealt with 72% of all asylum applications EU-wide.”<sup>518</sup> The Commission continues by stating that Member States:

“[S]hould allocate the resources needed in order to increase the number of transfers and cut delays, consistently apply the clauses related to family reunification, and make more regular use of the discretionary clauses, allowing them to examine an asylum application and relieve the pressure on the frontline Member States.”<sup>519</sup>

In that respect, the European Agenda on Migration draws an unequivocal political linkage between the discretionary clauses and interstate solidarity. In legal terms, this linkage stems from the duty to read Article 17 of the Dublin III Regulation – as any measure of the CEAS – in line with the principle of solidarity enshrined in Article 80 TFEU.

In that respect, the recent measures taken by **Germany** with regard to the treatment of Syrian nationals in Dublin procedures demonstrate a protective and solidarity-driven approach in the application of the Dublin Regulation.

### Germany’s moratorium on Dublin procedures for Syrians

The Federal Office for Migration and Refugees (BAMF) issued internal instructions to asylum authorities on 21 August 2015. According to the instructions, asylum authorities in Germany are to suspend Dublin procedures concerning Syrian nationals. Dublin procedures that have already been initiated in relation to Syrians are to be cancelled, in order for Germany to become the Member State responsible for processing their claims under the Regulation. This entails that pending appeals against Dublin decisions before courts are to be settled in favour of appellants, while enforceable return orders for Dublin transfers to other countries are to be revoked.

Newly applying Syrian asylum seekers are to be immediately channelled into the regular asylum procedure and will not be given the Dublin questionnaires usually provided to applicants upon registration.<sup>520</sup>

## 4. Detention

### 4.1. Grounds of detention

Following on from the 2013/2014 AIDA annual report, the grounds for detention listed in Article 8(3) of the recast Reception Conditions Directive have not been transposed, either due to opt-outs or because the grounds are not considered applicable, in **Belgium**,<sup>521</sup> **Ireland** and the **UK**. In other countries where recast provisions are pending adoption (**Cyprus**, **Poland**), or where proposals are in the midst of being or have not yet been drafted (**Greece**, **Sweden**) there are clear grounds of detention in national law which go beyond those provided in the recast Reception Conditions Directive. For example in **Greece**, which appears to have mimicked the UK’s Detained Fast-Track system, the rapid and complete examination of an asylum application is also a ground for continuing the detention of an asylum seeker who applies from detention.<sup>522</sup>

518. European Commission, *European Agenda on Migration*, 13.

519. *Ibid.*

520. AIDA, ‘Germany: Halt on Dublin procedures for Syrians’, 24 August 2015, available at: <http://bit.ly/1JfBiSw>.

521. AIDA Country Report Belgium: Third Update, 75-76.

522. AIDA Country Report Greece: Third Update, 80.

Additionally in **Poland** wide definitions have been attributed to the notions of national security or public order.<sup>523</sup> Moreover, in **Malta** detention is enforced as part of a procedure related to access and admission to the territory, allowing for a systematic use of detention at the border where an individual does not have the requisite documents.<sup>524</sup>

A noteworthy commitment was made by **Greece** in February 2015 to change its detention policy and to close down the Amygdaleza Pre-Removal Detention Centre near Athens within 100 days.<sup>525</sup> This move came as a substantial shift in immigration detention policies in Greece, which have been consistently criticised as systematic and incompatible with international human rights standards.<sup>526</sup> Beyond being a catalyst for welcome improvements in the Greek asylum procedure, this policy approach could be a strong call for other countries to refrain from detaining asylum seekers. It should be noted, however, that as of August 2015 the Amygdaleza centre is still operating.

Whilst there have been welcome changes in **Greece** with a maximum period of detention being limited to 6 months and the immediate release from detention of vulnerable persons,<sup>527</sup> and in **Cyprus** where asylum seekers working in prohibited sectors are no longer detained for undeclared work,<sup>528</sup> there are also worrying legislative amendments in **Bulgaria** relating to the transposition of Article 8-11 of the recast Reception Conditions Directive. In particular, provision is made for a general detention regime of all asylum applicants with detention being a default position rather than an exception.<sup>529</sup> In obvious violation of the principle that detention must be necessary, proportional and subject to an assessment of other less coercive alternative measures, such an amendment, if adopted, would breach Article 31 of the Refugee Convention as well as Article 37 of the UN Convention on the Rights of the Child.

Detention of asylum seekers subject to transfers under the Dublin III Regulation has been the subject of litigation in several Member States. In February 2015, detention of asylum seekers pending a Dublin transfer was sanctioned as unlawful in **Austria** due to the absence of Dublin-specific grounds in the law.<sup>530</sup> This ruling has been followed by a regional court in the **Czech Republic**,<sup>531</sup> which cited both the Austrian judgment and a 2014 **German** Federal Administrative Court's judgment,<sup>532</sup> to conclude that the application of general detention provisions in Dublin procedures was unlawful. Even though Article 28 of the Dublin III Regulation has been in force since the beginning of 2014, the concept of "significant risk of absconding" for the purpose of detention in Dublin procedures has not yet been defined in the majority of AIDA countries to date, with the exception of **Austria, Germany, Croatia, the Netherlands** and **Switzerland**; while other countries such as **Poland** are currently drafting reforms aimed at interpreting this ground of detention in national law. **Hungary**, on the other hand, uses the general "risk of absconding" detention ground to detain asylum seekers in the Dublin procedures.<sup>533</sup>

The definition of the "risk of absconding" for the purposes of the Dublin Regulation varies between different countries and tends to be widely construed by reference to numerous criteria. In **Austria**, as of June 2015, such a risk exists where objective facts justify the assumption that a person will evade the procedure or deportation or will otherwise frustrate the procedure. In that assessment, particular regard is given to whether (a) the person has avoided or hampered a deportation order; (b) the person has violated a travel ban; (c) an expulsion order is made or the asylum application has been withdrawn; (d) the person is in pre-deportation detention at the time he or she lodges the application; (e) it is likely that another country is responsible under the Dublin Regulation, namely as the person has lodged multiple applications or intends to travel on to another country; (f) the person does not comply with alternatives to detention; (g) the person does not comply with cooperation or reporting duties; and (h) there is a sufficient link with Austria such as family relations, sufficient resources or secured residence.<sup>534</sup>

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523. AIDA Country Report Cyprus: Third Update, 61.

524. AIDA Country Report Malta: Third Update, 51.

525. ECRE, 'Greek government commits to end indefinite detention of migrants', 13 February 2015, available at: <http://bit.ly/1GwAZ7B>.

526. For recent critiques, see ECtHR, *Herman & Serazadishvili v Greece*, Application Nos 26418/11 and 45884/11, Judgment of 24 April 2014; *AE v Greece* Application No 46673/10, Judgment of 27 November 2014; *Al.K v Greece*, Application No 63542/11, Judgment of 11 December 2014. See also AIDA Country Report Greece: Third Update, 80 et seq.

527. A maximum of 18 months for pre-removal detention under the Returns Directive, AIDA Country Report Greece: Third Update, 79. Note, however, that in July 2015 an asylum seeker represented by GCR was found to be detained for a period exceeding 6 months, contrary to the change in detention policy: Information received from GCR.

528. Information received from Future Worlds Center.

529. AIDA Country Report Bulgaria: Third Update, 48.

530. VwGH 2014/21/00755, 19 February 2015. Austria detained applicants in Dublin procedures under the general pre-deportation grounds in Article 76 of the Austrian Foreigners Police Law, which was however amended in June 2015.

531. Krajský soud v Ústí nad Labem, 42A 12/2015-78, 5 August 2015

532. BGH, V ZB 31/14; LG Saarbrücken, 26 June 2014.

533. AIDA Country Report Hungary: Third Update, 54.

534. Article 76 Austrian Foreigners Police Law, as amended in June 2015.

In **Croatia**, the risk of absconding is also broadly defined in the law adopted in July 2015. The risk is determined with regard to previous attempts to leave the country, refusal to submit identification, provision of false information on identity or nationality, violations of house rules in the Reception and Accommodation Centre, a Eurodac ‘hit’, as well as refusal to be transferred.<sup>535</sup>

**Switzerland** also makes reference to a wide range of criteria for defining the “risk of absconding”. These include cases where the asylum seeker: (a) refuses to disclose his or her identity or to cooperate with the authorities; (b) demonstrates conduct in Switzerland or abroad which allows the authorities to believe that he or she will not comply with instructions; (c) lodges multiple applications under different identities; (d) departs from the designated area of residence or entry in a prohibited area; (e) crosses the border in violation of an entry ban and may not be immediately removed; (f) irregularly resides in the country and lodges an application with the sole purpose of frustrating a return order; (g) poses a serious threat to other persons or is being tried for a criminal offence; (h) has been convicted of a crime; or (i) denies holding or having held a residence permit or visa from another Dublin State or having lodged an asylum application there.<sup>536</sup>

The definition recently adopted by **Germany** seems equally open-ended. The risk of absconding is deemed to be present where the following criteria are applicable where a person: (a) has not disclosed his or her whereabouts or has not specified an address where he or she can be reached; (b) conceals his or her identity, in particular by destroying or disposing of identity or travel documents or by submitting a false identity; (c) refuses to disclose his or her identity and the authorities may conclude, based on the circumstances of the case, that he or she intends to frustrate a return order; (d) has paid sums of money for his or her irregular entry in Germany, which are so substantial for him or her that it may be concluded that he or she will prevent the deportation in order for these expenses not to be in vain; (e) has expressly stated that he or she wishes to avoid deportation; (f) in order to avoid the impending deportation, has made other preparatory acts of comparable weight that cannot be overcome by the use of direct coercion.<sup>537</sup>

Several of these grounds relating to irregular entry and the lack of identity of travel documents as factors conducive to a risk of absconding are particularly problematic in light of the obligation of non-penalisation of irregular entry under Article 31 of the Refugee Convention. Other objective criteria such as the existence of social ties or resources in **Austria** or the payment of money to irregularly enter **Germany** are also concerning, as they give the “risk of absconding” a considerably far-reaching scope. More generally, however, ECRE has questioned the very basis for detaining asylum seekers for the purpose of transferring them to another Member State, from the perspective of human rights and EU law.<sup>538</sup> The ECtHR has ruled that asylum seekers may not be deported before their claim has been examined in substance, and may thereby not be detained for the purpose of deportation under Article 5 ECHR. Given that asylum seekers enjoy a right to remain on the territory of a Member State pending the examination of their application,<sup>539</sup> which does not cease until they are effectively transferred to the territory of another Member State,<sup>540</sup> detaining an asylum seeker with a view to forcibly transferring him or her is not permissible under the right to liberty. Under an appropriate reading of the EU’s fundamental rights standards and the asylum *acquis*, Member States should not be allowed to apply detention in Dublin procedures.

Moreover, important developments relating to the grounds of detention have surfaced in the **UK** on the Detained Fast-Track System (DFT), which has been subject to a series of litigation of late and has resulted in the suspension of the DFT.<sup>541</sup> Indeed, the most recent Court of Appeal case has upheld the High Court’s finding that the hearing of appeals in the DFT was structurally unfair and unjust.<sup>542</sup>

The argumentation presented in both cases takes a different route from previous litigation from the NGO Detention Action, which successfully argued that the Home Office had not indicated a policy change on the criteria for detention during the appellate stage, i.e. detention on grounds of a risk of absconding to detention on the basis of administrative convenience.<sup>543</sup> Instead, the judgments from June and July of this year focus on whether the Tribunal Procedural Committee had made the Fast-Track procedural rules, which govern appeals to the First-Tier Tribunal

535. Article 54(4) Croatian Law on International and Temporary Protection.

536. Article 76a Swiss Federal Law on Foreigners, as amended in June 2015.

537. Article 2(14) German Residence Act, as amended in July 2015.

538. ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, AIDA Legal Briefing No 1, June 2015, available at: <http://bit.ly/1Jk1Ly1>.

539. Article 9(1) recast Asylum Procedures Directive.

540. CJEU, Case C-179/11 *Cimade & GISTI v Ministre de l’Intérieur*, Judgment of 27 September 2012.

541. The Minister of State of Immigration, House of Commons: Written Statement, 2 July 2015, available at <http://bit.ly/1H3ig0l>.

542. *The Lord Chancellor v Detention Action (Secretary of State for the Home Department an interested party)* [2015] EWCA Civ 840, Judgment of 29 July 2015.

543. *R (Detention Action) v Secretary of State for the Home Department*, [2014] EWCA Civ 1634, Judgment of 16 December 2014.

where the Secretary of State for the Home Department (SSHD) has refused an asylum application, accessible and fair.<sup>544</sup> Thus the reasoning of the Court is highly pertinent and could have widespread ramifications in other jurisdictions where appeals are carried out in detention and subject to truncated time-tables. This is particularly so since both the High Court and Court of Appeal surmised that the time limit of 7 days between the date of refusal of the decision and the hearing of the appeal is insufficient to argue, amongst other things, that the appeal cannot be justly determined in the curtailed time limit available and to rebut the substantive adverse findings of the SSHD on the person's asylum application. These challenges are exacerbated by the complex nature of issues raised as well as the detention itself, which constitutes a clear impediment to accessing and receiving instructions from a client.<sup>545</sup> SSHD arguments relating to the efficiency of the DFT system for appeals were discredited by both courts, who found that the system made it impossible for fair hearings to be carried out. Indeed, given that the Fast-Track Rules were held as *ultra vires*, the Court of Appeal lifted the stay on the High Court's judgment, rendering the appeal system within the DFT unlawful from 26 June 2015.<sup>546</sup>

Crucially, a recent decision regarding DFT has been handed down by the President of the First-Tier Tribunal who held that any previous determination of the First-Tier and Upper Tribunal of the Immigration and Asylum Chamber must be set aside where the appeal was previously heard in the DFT.<sup>547</sup> This consequently means that any appeal heard in the DFT can be re-considered and heard afresh.<sup>548</sup>

## 4.2. Guarantees for detained applicants and conditions of detention

Article 9(1) of the recast Reception Conditions Directive provides that detention should only be enforced for as short a period as possible and for as long as the grounds set out in Article 8(3) are applicable. Thus, in the case of an asylum application made from detention, whether it be initial or subsequent to a rejected asylum decision and prior to removal, Member States must (re)examine whether an Article 8(3) ground is applicable, if it is necessary and proportionate and if there are less coercive alternatives to continued detention. Member States are obliged to release the asylum applicant from detention where continued detention would be in dereliction of the above guarantees.

In some AIDA countries it is debatable whether this assessment is undertaken at all, rendering any continued detention unlawful. The effectiveness of review remains highly problematic in **Hungary**, where courts systematically fail to carry out an individualised assessment of necessity and proportionality of detention, while in a number of cases analysed by the Hungarian Helsinki Committee the decision of the court contained incorrect personal data of the applicants concerned.<sup>549</sup> In **Italy**, the applicant will remain in detention during the examination of a subsequent or initial asylum application made from detention, with apparently no assessment of key requirements of Article 8 and 9 of the recast Reception Conditions Directive being undertaken.<sup>550</sup> This is particularly worrying given the procedural difficulties related to an asylum application carried out in detention, mentioned above, and perfectly demonstrated, in the case of Italy, by the low recognition rates for people who applied for asylum in detention.<sup>551</sup> Similar practices are also evident in **Bulgaria** where persons who make an asylum application from pre-removal detention are held in the detention centre for the registration, interview and determination of the application, again without the requisite examination into the legality of detention under the recast Directive being carried out.<sup>552</sup>

Analogous practice is also apparent in **Austria**,<sup>553</sup> **Italy**,<sup>554</sup> **Poland**<sup>555</sup> and **Switzerland**.<sup>556</sup> However, positive chang-

544. The Tribunal Procedural Committee is tasked with drawing up Tribunal Procedural Rules with a view to securing that justice is done and that the tribunal system is accessible and fair.

545. *The Lord Chancellor v Detention Action (Secretary of State for the Home Department an interested party)* [2015] EWCA Civ 840, paras 38-42.

546. For further contextual analysis of the Detention Action litigation please see, A. Harvey, Recent challenges to accelerated procedures involving detention in the UK, 7 August 2015, accessible at <http://bit.ly/1MRBJX0>

547. UK First Tier Tribunal (IAC), DA/02456/2013, 4 August 2015, available at <http://bit.ly/1L2X1a5>

548. For further information, including a draft letter for an appeal under DFT to be set aside, please see Right to Remain, Appeals and removals in the Detain-Fast Track System, available at <http://bit.ly/1L2XZdd>.

549. AIDA Country Report Hungary: Third Update, 62.

550. AIDA Country Report Italy: Third Update, 78.

551. Ibid.

552. AIDA Country Report Bulgaria: Third Update, 53.

553. AIDA Country Report Austria: Third Update 71-72.

554. AIDA Country Report Italy: Third Update, 77.

555. AIDA Country Report Poland: Third Update, 61.

556. AIDA Country Report Switzerland: Third Update, 80. The procedural legality of keeping an asylum applicant in detention where an application for protection has been lodged is discussed in further detail in an upcoming AIDA Legal Briefing on the topic.

es on the prolonged maintenance of an asylum applicant in detention pending a (subsequent) application have been noted in **France** whereby the Minister of Interior has called for an individual assessment to be undertaken on the legality of detention where an application for asylum is made from administrative detention.<sup>557</sup> Moreover, in **Cyprus** a policy change has occurred whereby asylum applications made from detention are subject to a fast-track procedure where the examination and appeal are to be completed within 30 and 15 days respectively. Where the decisions are positive then the applicant must be released. This is also the case where a decision has not been made within 30 days due to the complexity of the applicant's dossier, although there have been concerns that these time limits are not strictly adhered to.<sup>558</sup> In **Malta**, legislative amendments have introduced a review of detention at regular intervals where the person is subject to return proceedings. Review by a Principal Immigration Officer is rendered obligatory where the detention lasts for more than 3 months.<sup>559</sup> Whilst this is principally applicable for persons who fall under the Returns Directive<sup>560</sup> and appears to specifically relate to the possibility of return to the country or origin, such reviews have been undertaken where the person is an asylum applicant and have later been followed by release.

Lastly, with regard to detention conditions, **Hungary's** new legislative amendments and practice are highly troublesome given that border detention can be carried out at police premises, in overcrowded, insalubrious conditions, with no access to drinking water for up to 36 hours.<sup>561</sup> Recent amendments are also likely to result in prolonging overcrowding in inadequate detention conditions in asylum detention, given that detention can now be extended during judicial review procedures.<sup>562</sup> Moreover, the conditions of the immigration detention regime in countries such as **Greece** and **Austria**, where immigration detainees may be held in police stations and police detention centres respectively,<sup>563</sup> is arguably in contradiction to 2014 CJEU jurisprudence on Article 16 of the Returns Directive which requires Member States, as a rule, to detain migrants pending removal in a specialised detention facility and only exceptionally in prisons if Member States cannot provide accommodation in a specialised centre.<sup>564</sup> It should be noted that the CJEU's rulings led to an end in the use of prison facilities for the purpose of pre-removal detention in **Germany**.<sup>565</sup>

## 5. Reception conditions and accommodation of families and children

The design of national reception systems varies considerably across the EU<sup>566</sup> and Schengen Associated States. In general terms, the organisation of reception facilities in the 17 EU+ countries covered by AIDA is carried out as follows:

Reception centre	Individual housing	Hybrid (collective and individual housing)
BG, CY, GR, HR, HU, IE, IT, MT, NL, PL	SE	AT, BE, DE, FR, UK, CH

While a large number of countries have adopted multi-step approaches to accommodation, distinguishing for instance between first and second-line reception, the type of facilities offered in the different stages of accommodation varies. Typically, in federal states such as **Austria**, **Belgium** and **Switzerland**, but also in the **UK**, after a first stay in an initial reception centre, second-line reception is provided in the form of individual housing at federal or cantonal level. In **Germany**, both collective and individual housing is provided following the initial reception period, depending on the region and on the capacities of the local housing market.

On the other hand, in countries such as **Italy**, first and second-line reception both consist in reception centres, although a distinction is drawn between first reception centres and other accommodation structures. In **Greece**, First

557. AIDA Country Report France: Third Update, 84.

558. AIDA Country Report Cyprus: Third Update, 62.

559. AIDA Country Report Malta: Third Update, 56.

560. 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 illegally staying third-country nationals, OJ 2008 L348/98.

561. Hungarian Helsinki Committee, Building a legal fence – Changes to Hungarian asylum law jeopardise access to protection in Hungary, 7 August 2015, available at <http://bit.ly/1KZYGEg>.

562. Ibid.

563. AIDA Country Report Austria: Third Update, 74.

564. CJEU, Joined Cases C-473/13 and C-514/13 *Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve* and Case C-474/13, *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*, Judgments of 17 July 2014.

565. AIDA Country Report Germany: Third Update, 72.

566. For a detailed overview, see also EMN, *The organisation of reception facilities for asylum seekers in different Member States*, 2014, available at: <http://bit.ly/1fiTxfz>.

Reception Centres have a mission to screen newly arriving migrants and make referrals to the relevant authorities, and therefore do not provide accommodation.

## 5.1. Reception capacity in selected Member States

Against the backdrop of increasing numbers of arrivals on their territory, Europe has encountered severe difficulties in providing appropriate reception structures to asylum seekers. A number of countries have made efforts to expand their reception capacity in order to accommodate higher numbers of persons. For example, **France** announced in June 2015 an increase of reception capacity in *Centres d'accueil pour demandeurs d'asile* (CADA) by a further 4,000 places, to be provided at the latest by early 2016.<sup>567</sup> **Belgium**, which had been consistently reducing accommodation places through successive cuts since 2012, is also enhancing the capacity of its reception system by creating an additional 2,950 places.<sup>568</sup>

**Italy** has increased its reception capacity to 81,000 reception places as of May 2015, the majority of which are provided through emergency reception centres (CAS). However, the availability of information and transparency on the operation of the CAS remains scarce, while concerns have been voiced as to the need to house asylum seekers.<sup>569</sup>

A similar increase in capacity has not been witnessed in **Greece**, though there have been recent announcements of planned reception structures in Athens, discussed in Chapter II, Section 5.

At the same time, it is crucial to recall that Member States have obligations to secure applicants adequate reception conditions throughout the asylum procedure. Merely refraining from detaining asylum seekers is not enough in itself; asylum seekers must be given access to appropriate accommodation which meets their needs in order to benefit from a dignified standard of living throughout the examination of their claim.<sup>570</sup> In that respect, significant efforts must be placed in **Greece** to ensure that applicants released from detention are accommodated in adequate facilities and are safeguarded from substandard living conditions and destitution, particularly in urban centres such as Athens. Recalling the ECtHR's strong pronouncement in *MSS v Belgium and Greece*,<sup>571</sup> which largely remains relevant to date,<sup>572</sup> both detention conditions *and* living conditions were deemed incompatible with the prohibition on torture, inhuman or degrading treatment in Article 3 ECHR.

The problems identified in Chapter II, Section 5 with regard to the Greek crisis raise alarming questions around reception conditions. A limited number of applicants arriving in Greece may benefit from the Dublin Regulation if they have close family members they can reunite with in another Member State. Others who are found to satisfy the requirement of "clear need of international protection" would be relocated in another country under the relocation scheme agreed upon by the Council as discussed in Chapter II, Section 2. Yet the vast majority of applicants entering Greece are expected to have their claim processed and, if protection is granted, settle there. For those applicants, the risk of destitution and exacerbation of vulnerabilities remains real even after the government's laudable decision to refrain from detaining them.

### First "Reception" at the First Reception Centre in Fylakio, Greece

In December 2014, ECRE visited the First Reception Centre (FRC) and the Detention Centre in Fylakio, Greece.<sup>573</sup> Migrants arriving irregularly in the Evros region, at the Greek-Turkish border, may be detained for up to 7 days in a police station, or in the Fylakio Pre-Removal Detention Centre, before they are transferred to the FRC in Fylakio. Although the facility is called a "reception centre" and the conditions are better than in the Fylakio Detention Centre, the situation is also one of detention as they are deprived of their liberty; people are

567. Circulaire relative à la mise en œuvre du plan « répondre au défi des migrations : respecter les droits – faire respecter le droit », 22 July 2015, NOR INTK1517235J, available at: <http://bit.ly/1UAYMXm>. See also Le Point, 'Cazeneuve dévoile un plan ambitieux pour l'accueil des migrants', 17 June 2015, available in French at: <http://bit.ly/1Lh2m6S>.

568. AIDA, 'Belgium: Reception capacity set to increase after successive drops', 5 August 2015, available at: <http://bit.ly/1D-JvRvJ>.

569. CIR, 'The National Asylum Table: Great concern regarding draft legislation on reception and international protection recognition procedures', 19 May 2015, available at: <http://bit.ly/1GhZ4sC>.

570. Article 17 recast Reception Conditions Directive.

571. Application No 30696/09, Judgment of 21 January 2011.

572. UNHCR, *UNHCR observations on the current asylum system in Greece*, December 2014, 37; GCR, *Submission on the execution of the ECtHR judgment in the case MSS v Belgium and Greece*, May 2015, available at: <http://bit.ly/1NEnc0C>.

573. ECRE, *What's in a name? The reality of first "reception" at Evros – AIDA Fact-finding visit in Greece*, December 2014, available at: <http://bit.ly/1GfXlzk>.

not allowed to leave without permission and the centre is secured with barbed wire and permanently guarded by the Hellenic Police. From the “First Reception Centre”, many people – including most unaccompanied children – are referred back to the Fylakio Detention Centre, or another detention centre, either for their removal, for the completion of their asylum application or because there is no appropriate open accommodation available.

A major concern is that in practice, the Regional Asylum Office for Northern Evros, which is located on the premises of the First Reception Centre is not able to register the asylum claims of the majority of people who express their wish to apply for international protection within 15 or 25 days – the maximum period that people can spend in the First Reception Centre. This means that they are considered ‘irregular migrants’ and are referred by the Director of the First Reception Centre to the Fylakio Detention Centre. Once it registers the asylum applications, the Regional Asylum Office systematically issues a recommendation to the Hellenic Police on the necessity to detain (or continue the detention of) persons applying for international protection, mostly on the basis that detention facilitates the speedy completion of the asylum procedure.

The conditions in the Fylakio Detention Centre are extremely bad, in particular as migrants may be detained for prolonged periods of time up to 18 months. The dormitories in Fylakio Detention Centre are large cells, behind bars, containing between 50 to 60 bunk beds, access to the courtyard of the detention centre is limited to 3 hours a day, weather permitting. The ECRE delegation found the place to be cold and damp. There is no doctor present in the detention centre and detainees only receive paracetamol, irrespective of any medical complaint they have. Although women with small children and babies are regularly detained there, including at the time of the ECRE visit, the detention centre neither provides baby food nor baby milk. Access to free legal assistance is very limited due to lack of funding and at the time of the visit there was only one lawyer, deployed by the Greek Council for Refugees, which is clearly insufficient to meet the needs of the persons wishing to challenge either their detention or a negative decision relating to their asylum application.

## 5.2. Special accommodation for families and children

Following the ECtHR’s ruling in *Tarakhel v Switzerland* in November 2014, the adequate provision of reception conditions for asylum seekers with special reception needs has come to the forefront of the interpretation of the Dublin Regulation. In the case of a family with six children, the Court held in *Tarakhel* that the Swiss authorities had to “obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together.”<sup>574</sup> While the ruling has been restrictively read in several countries – or even the ECtHR itself – with the aim of limiting the requirement of individual guarantees to families with children,<sup>575</sup> *Tarakhel* has clearly laid down an obligation on both sending and receiving states in the Dublin procedure to ensure that an asylum seeking family will have access to adequate reception conditions meeting its needs.<sup>576</sup>

In practice, families with children are not necessarily housed in separate facilities in most countries. In **Cyprus**, **Germany**, **Hungary** and the **Netherlands**, families tend to be accommodated in the same facilities as other asylum seekers, while in **Switzerland** their access to separate facilities depends on the provision of individual housing in certain cantons.<sup>577</sup> In **Italy**, families are often transferred from *Centri di accoglienza per i richiedenti asilo* (CARA) to *Sistema di protezione per richiedenti asilo e rifugiati* (SPRAR) facilities, which are deemed more adequate and suited to their particular needs. In **France**, families are to be accommodated by priority in *Centres d’accueil pour demandeurs d’asile* (CADA). This is not fully upheld in practice, as for example, in mid-January 2015 there were 159 persons in families temporarily left without housing in the Rhône *Département* before being oriented to either an emergency facility or a CADA.<sup>578</sup>

On the other hand, efforts to secure special accommodation for unaccompanied children are more widely practiced across AIDA countries. **Belgium** has a three-phase accommodation for unaccompanied children, including (1) a short stay at a secured Observation and Orientation Centre; followed by housing in (2) collective and then

574. ECtHR, *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014, para 120.

575. See for example ECtHR, *AS v Switzerland*, Application No 39350/13, Judgment of 30 June 2015, finding that an asylum seeker suffering from post-traumatic stress disorder could be removed to Italy.

576. Note, nevertheless, that countries such as Norway: <http://bit.ly/1OpyTFV>, or Sweden: <http://bit.ly/1JC6Pvs>, have now deemed that transfers may be carried out to Italy on the basis of Italian assurances to the Commission regarding the adequacy of reception conditions for Dublin returnees.

577. AIDA Country Report Switzerland, 62.

578. AIDA Country Report France: Third Update, 62-65.

(3) individual facilities.<sup>579</sup> A somewhat similar provision of protected accommodation is provided through the “protected reception location” in the **Netherlands**, which aims at safeguarding children suspected of being victims of trafficking.<sup>580</sup>

In **Italy**, unaccompanied children cannot be held in CARA and are only accommodated in SPRAR facilities, which are to provide an additional 1,000 places by the end of 2016 for minors.<sup>581</sup> In **France**, unaccompanied children do not constitute a specific category and are considered as “children at risk” regardless of their nationality or legal status. They are never accommodated in CADA. As a general rule, they are placed in specific children’s shelters or they may be hosted in foster families. Few dedicated centres for unaccompanied children seeking asylum have been created in recent years.<sup>582</sup>

However, in **Malta**, unaccompanied children over the age of 16 may and are often accommodated with adults.<sup>583</sup> In practice, this also occurs in **Switzerland**<sup>584</sup> and **Austria** due to a shortage of places at the initial reception centre (EAST) at the end of 2014.<sup>585</sup>

## 6. Access to the labour market

### 6.1. Reduced temporal restrictions to accessing employment

Asylum seekers’ access to employment pending a decision on their application is of paramount importance in the EU context. Even though an applicant’s status is assumed to be strictly time-limited, it is worth recalling that the examination of an asylum procedure in the EU does not necessarily entail a short process. The time-limits set by the recast asylum *acquis* could result in asylum seekers waiting long time-periods pending a decision on their claim for two main reasons.

Firstly, while Member States’ general duty is to conclude the examination of applications within 6 months,<sup>586</sup> the recast Asylum Procedures Directive leaves authorities relatively broad scope to extend the duration of procedures beyond that deadline. The authorities may extend the deadline by 9 months (thereby deciding within 15 months) where complex legal and factual issues are involved in the individual case, human resources are strained by a large number of applicants, or the delay is attributable to the applicant.<sup>587</sup> Beyond that, Member States may invoke exceptional and justified circumstances to add a further 3 months (thereby reaching 18 months) in order “to ensure an adequate and complete examination of the application”.<sup>588</sup> The provision permitting such an extension seems ambiguous, as the objective of ensuring an adequate and complete examination leaves Member States wide interpretative scope as to when such exceptional circumstances could arise. In parallel to the aforementioned possibility to extend the procedure from 6 to 18 months, Member States are also empowered to “postpone concluding the examination procedure” “due to an uncertain situation in the country of origin which is expected to be temporary.”<sup>589</sup> Given its breadth,<sup>590</sup> this criterion could in practice apply to the majority of instances of displacement, as refugeehood is by nature a “temporary” status. In that light, the ‘real’ time-limit for concluding the examination of applications is that of 21 months.<sup>591</sup>

Secondly, these time-limits are to be transposed in Member States’ domestic law by 20 July 2018.<sup>592</sup> Accordingly, until that date, a country may lawfully deliver decisions on asylum applications in procedures even exceeding 21 months.

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579. AIDA Country Report Belgium: Third Update, 63.

580. AIDA Country Report Netherlands: Third Update, 51.

581. Decree of the Ministry of Interior of 27 April 2015.

582. AIDA Country Report France: Third Update, 66.

583. AIDA Country Report Malta: Third Update, 41.

584. Depending on the cantons where they are allocated. AIDA Country Report Switzerland, 62.

585. AIDA Country Report Austria: Third Update, 58-59.

586. Article 31(3) recast Asylum Procedures Directive.

587. *Ibid.*

588. *Ibid.*

589. Article 31(4) recast Asylum Procedures Directive.

590. ECRE, *Information Note on Directive 2013/32/EU*, 35.

591. Article 31(5) recast Asylum Procedures Directive.

592. Article 51(2) recast Asylum Procedures Directive.

In practice, these provisions may leave a number of persons with a precarious “asylum seeker status” for potentially long periods of time. It is hence all the more necessary for such protection seekers to have access to the host country’s labour market to cater for their own subsistence, rebuild livelihoods and benefit from effective opportunities for integration. In that light, prompt access to the labour market seems an aim in the interest of both applicants and Member States.

Article 15(1) of the recast Reception Conditions Directive requires Member States to allow asylum seekers access to their labour market at the latest within 9 months following the lodging of the application. Currently, **Bulgaria** and **Malta** fail to observe this maximum time-limit, as they have in place restrictions on asylum seekers’ access to employment for 1 year from the application, although the proposed asylum reform in **Bulgaria** will reduce that restriction to 9 months in order to comply with the Directive.<sup>593</sup>

Beyond these countries, AIDA countries’ rules on labour market access are within the lawful boundaries of the recast Reception Conditions Directive. Yet the broad margin of discretion left by Article 15 unsurprisingly translates into wide discrepancies with regard to asylum seekers’ access to the labour market in practice. At the time of writing, only **Greece** and **Sweden** allow for immediate access to the labour market.<sup>594</sup> Restrictions then vary from 3 months in **Germany** and **Austria**,<sup>595</sup> to 6 months in **Belgium**, **Italy**, **Cyprus**, the **Netherlands** and **Poland**,<sup>596</sup> to the maximum of 9 months in **Croatia**, **France**, **Hungary**; although Hungary allows asylum seekers to work directly in the reception centres where they reside.<sup>597</sup>

As for AIDA countries not bound by the recast Directive or the 2003 Reception Conditions Directive, **Ireland** provides no access to the labour market for asylum seekers at all,<sup>598</sup> while the **UK** provides access after 1 year, in line with the 2003 Reception Conditions Directive,<sup>599</sup> and **Switzerland** allows employment after 3 months, subject to the possibility of a further 3-month restriction at cantonal level.<sup>600</sup>

These significant disparities bear severe consequences. On the one hand, a lawful 9-month restriction on applicants’ access to employment hints that asylum seekers are still not viewed as economic actors apt to independently secure their means of subsistence in the majority of Member States. While the recast Asylum Procedures Directive allows Member States to extend asylum procedures to up to 21 months,<sup>601</sup> it does so with an unequivocal affirmation that claims should only be processed for longer than 6 months when some difficulty emerges.<sup>602</sup> Accordingly, with the exception of **Sweden**, **Greece**, **Austria** and **Germany**, AIDA countries seem to generally only envisage asylum seekers having rights to employment when something ‘goes wrong’ with their application. In respect of access to the labour market, the shortcomings of the CEAS are not merely an issue of implementation. Member States may choose to impose severe restrictions on protection seekers, while fully respecting the letter of the recast Reception Conditions Directive.

On the other hand, discretion with regard to allowing applicants to work within 0 to 9 months from the lodging of the application calls into question the harmonisation of reception standards. Under the Directive, asylum seekers applying in the EU are faced with a “variable geometry” with regard to their rights to employment. Therefore, insofar as the possibility to work and earn a livelihood is concerned, the country in which a person seeks protection matters considerably. The wide spectrum of practices across AIDA countries, lawful as it is under Article 15 of the recast Reception Conditions Directive, is counter-intuitive to the aim of the Directive to “limit the secondary movements of applicants influenced by the variety of conditions for their reception.”<sup>603</sup>

593. AIDA Country Report France: Third Update, 99; AIDA Country Report Bulgaria: Third Update, 46.

594. AIDA Country Report Greece: Third Update, 74-75; AIDA Country Report Sweden: Second Update, 40-41.

595. AIDA Country Report Germany: Third Update, 64; AIDA Country Report Austria: Third Update, 67.

596. AIDA Country Report Belgium: Third Update, February 2015, available at: <http://bit.ly/1S14Qaf>, 68; AIDA Country Report Poland: Third Update, 51; AIDA Country Report Italy: Third Update, 69; AIDA Country Report Cyprus: First Update, 55; AIDA Country Report Netherlands: Third Update, 49.

597. AIDA Country Report Hungary: Third Update, 47.

598. AIDA Country Report Ireland: Third Update, 66-67.

599. AIDA Country Report UK: Third Update, 65. It should be recalled that the UK is only bound by Directive 2003/9/EC, which makes no express reference to the duty to ensure effective access to the labour market.

600. Article 43 Asylum Act. See AIDA Country Report Switzerland, 72-73.

601. Article 31(5) recast Asylum Procedures Directive.

602. Article 31(3) recast Asylum Procedures Directive.

603. Recital 12 recast Reception Conditions Directive.

## 6.2. Material restrictions to access to the labour market

Moreover, the lifting of temporal restrictions to asylum seekers' access to the labour market is far from the 'end of the road' to their effective employment. Member States maintain an array of legal and practical barriers to allowing applicants to work while their claim is processed.

In that respect, the recast Reception Conditions Directive has sought to curtail Member States' powers to impose conditions on access to employment, as Article 15(2) now introduces a duty to ensure that "applicants have effective access to the labour market." This obligation, which should be read in line with the general principle of effectiveness in EU law, poses significant constraints on the employment restrictions which may permissibly be imposed on asylum seekers. Therefore, while Member States may impose conditions for access to employment such as a labour market test, sectoral restrictions, working time restrictions or administrative hurdles, such conditions cannot render it unduly difficult for asylum seekers to find employment.

### 6.2.1. Labour market test

The possibility for Member States to conduct an examination of the situation of their labour market prior to allowing a third-country national to access employment underlies both the EU asylum *acquis* and the EU's labour migration instruments.<sup>604</sup> The labour market test enables countries to award priority to nationals, EU citizens or "legally resident third-country nationals" with regard to a specific employment opportunity, before allowing an asylum seeker to work. In the case of applicants for international protection, who are legally resident under the recast Asylum Procedures Directive, the labour market test gives priority to persons holding permanent or more secure residence statuses such as recognised refugees or beneficiaries of subsidiary protection.

The labour market test has been taken up in a number of AIDA countries, including **Germany**,<sup>605</sup> **Austria**,<sup>606</sup> **France**,<sup>607</sup> **Hungary**,<sup>608</sup> **Greece**<sup>609</sup> and **Switzerland**.<sup>610</sup> In Germany, following a November 2014 amendment to the law, the authorities are allowed to carry out such a test, called a "priority review", for a period of 12 months from the date the asylum seeker has been granted access to the labour market; 3 months after the application was lodged. Accordingly, asylum seekers' access to work is constrained during the first 15 months of their stay in Germany.

The application of the labour market test in Greece has sparked criticism from GCR<sup>611</sup> and UNHCR,<sup>612</sup> as it imposes too onerous a restriction upon asylum seekers' effective access to employment opportunities, thereby rendering the immediacy of access to the labour market meaningless in practice. In 2013, for instance, UNHCR reported a rejection of 1,620 requests for work permits, while more than 33,000 applications were pending with the police and the Asylum Service.<sup>613</sup> While the Asylum Service has committed to proposing labour-related reforms to reduce administrative hurdles for asylum seekers, which have been positively received by the Ministry of Labour, no change has been brought about to the labour market test to date.

### 6.2.2. Sector restrictions

Practice with regard to sectors of employment available to asylum seekers varies considerably across AIDA countries. In the **UK**<sup>614</sup> and **Germany**,<sup>615</sup> asylum seekers are not allowed to engage in self-employed work.

Several countries have circumscribed applicants' access to the labour market even more narrowly, by delimitating specific sectors where they may seek employment. These sectoral restrictions may raise particular concerns vis-à-

604. See e.g. Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (Blue Card), OJ 2009 L 155/17, Article 12(4); Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ 2014 L 94/375, Article 8(3).

605. AIDA Country Report Germany: Third Update, 64-65.

606. Article 4(1) Foreigner Employment Law. See AIDA Country Report Austria: Third Update, 67-68.

607. Article R 341-4 Labour Code.

608. AIDA Country Report Hungary: Third Update, 47.

609. Article 10(1) PD 220/2007, citing Article 4(1)(c) PD 189/1998.

610. Article 52 Ordinance on Admission, Period of Stay and Employment.

611. AIDA Country Report Greece: Third Update, 74-75.

612. UNHCR, *UNHCR observations on the current situation of asylum in Greece*, December 2014, 21.

613. *Ibid.*

614. Immigration Rules, para 36D.

615. Section 2 VI Residence Act provides that only persons holding a regular residence title may be self-employed.

vis the effectiveness of asylum seekers' access to labour market, as they often result in *de facto* barring applicants from any possible prospects of obtaining work. By way of example, **Cyprus** only allows applicants to engage in occupations 'at the low end' of the labour market and remuneration such as farming, agriculture and waste management.<sup>616</sup> **Austria** similarly limits access to seasonal sectors such as tourism, agriculture and forestry, subject to a federal quota for seasonal workers applicable in each region.<sup>617</sup> This has serious consequences on effective labour opportunities for applicants, as out of 10,000 permits available for asylum seekers, only 500 effectively gained access to employment in 2013.<sup>618</sup> **Switzerland** also allows cantons to limit sectors of employment, and the Zurich canton has restricted asylum seekers' access to work opportunities to the building, health, food, hotel, cleaning, sewing/ending and waste disposal sectors.<sup>619</sup>

In an even more restrictive approach, the **UK** only allows asylum seekers to work in narrowly defined listed shortage occupations. Examples of permitted employment opportunities include consultants in neuropsychology or electricity substation engineers. Coupled with the 12-month temporal restriction to applying for permission to work, through the listing of such restrictively demarcated professions, asylum seekers' access is rendered close to impossible in practice.<sup>620</sup>

By contrast, **Belgium**,<sup>621</sup> **Bulgaria**<sup>622</sup> and **Sweden** have opted for no sectoral barriers to labour market access, as they allow asylum seekers to have access to all employment sectors, including self-employment. Nevertheless, even where access to specific sectors is not formally prohibited, applicants may still be precluded from taking up certain occupations where their skills and qualifications are not recognised in the host country. This is the case in **Sweden**,<sup>623</sup> where applicants have no effective access to jobs in the health sector, as well as **Belgium**.<sup>624</sup>

### 6.2.3. Working time restrictions

Another severe legal impediment to asylum seekers' effective access to employment opportunities may stem from restrictions on working time. Several AIDA countries have laid down specific rules to condition applicants' employment to a maximum number of days, weeks or months per year.

By way of example, in the **Netherlands**<sup>625</sup> and **Austria**,<sup>626</sup> asylum seekers may not work for more than 6 months per year, while in **Hungary** applicants are only allowed to work 80 hours per month i.e. a total of 40 days per year.<sup>627</sup>

### 6.2.4. Administrative formalities

Even when the often onerous substantive conditions for labour market access have been fulfilled, the process leading to the grant of a work permit may pose additional administrative hurdles on asylum seekers before they are able to take up employment. This issue has been recurrent across more than one AIDA country. In the **Netherlands**, the procedure for employers to secure a work permit for an asylum seeker may take up to 5 weeks and requires a job offer, along with a number of other forms of documentation.<sup>628</sup> The need for a job offer is also seen in **France**,<sup>629</sup> whereby the work permit's duration does not exceed 3 months, as it is linked to the asylum seeker's residence permit. This means that applicants must go through a renewal process to be able to continue working.

In that respect, the approach followed in **Sweden** and **Croatia** has significant merits. Sweden has opted for a light-touch administrative framework relating to asylum seekers by exempting them from the obligation to obtain a work permit prior to taking up employment.<sup>630</sup>

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616. AIDA Country Report Cyprus: First Update, 55-57.

617. Ordinance GZ 435.006/6-II/7/2004 of 11 May 2004.

618. AIDA Country Report Austria: Third Update, 67-68.

619. AIDA Country Report Switzerland, 72.

620. AIDA Country Report UK: *Third Update*, 65. It should be recalled that the UK is only bound by Directive 2003/9/EC, which makes no express reference to the duty to ensure effective access to the labour market.

621. Article 3 Royal Decree on Foreign Workers.

622. AIDA Country Report Bulgaria: Third Update, 46.

623. AIDA Country Report Sweden: Second Update, 40-41.

624. AIDA Country Report Belgium: Third Update, 68-69.

625. AIDA Country Report Netherlands: Third Update, 53.

626. AIDA Country Report Austria: Third Update, 67-68.

627. AIDA Country Report Hungary: Third Update, 47.

628. AIDA Country Report Netherlands: Third Update, 53.

629. AIDA Country Report France: Third Update, 73.

630. AIDA Country Report Sweden: Second Update, 40-41.

Beyond these *legal* barriers to employment, practical obstacles such as language, remote location of reception centres and discrimination in the labour market should not be overlooked. Moreover, asylum authorities' practice may also bear adverse impact on asylum seekers' effective access to the labour market in practice. In **Italy**, for instance, delays in the registration of asylum applications result in precluding asylum seekers from applying for work permits for want of proper documentation,<sup>631</sup> whereas in **Malta**, widespread detention has an evident impact on applicants' possibility to take up employment.<sup>632</sup>

Therefore the transposition of Article 15 of the recast Reception Conditions Directive raises questions at different levels. While the time-limit for restricting asylum seekers' access to the labour market under Article 15(1) is likely to be complied with by the majority of Member States, the effectiveness of access to employment under Article 15(2) requires more structural changes to labour provisions across AIDA countries, which to date remain highly restrictive for applicants seeking work opportunities. Yet the express reference to "effective access" in the Directive offers an opportunity for putting labour regimes under careful scrutiny.

## 7. Legal assistance and information

Any overview of the situation of asylum in Europe cannot be complete without paying due regard to the paramount importance of legal assistance to asylum seekers. The asylum process, a fundamentally legal one, is marked by considerable complexity and expediency. Some of the elements of the European asylum systems discussed above can only echo the hurdles faced by those seeking protection when entering the procedure.

Within days – if not hours – of arrival, following difficult and often life-threatening journeys, people uprooting their lives to flee from persecution become legal actors in overly complex interactions with the host authorities: they are expected to comprehend special procedures applied at the border, where they are deemed not to have formally entered the country in which they find themselves in; to navigate through the operation of the Dublin system, a system whose precise modalities often evade even the expert mind; or even to understand the reason why they may be placed in an accelerated procedure and why their predicament may be assessed within as short as 48 hours in some cases.

Without adequately front-loaded legal assistance and information, asylum seekers are expected to develop trust in a system which they do not necessarily understand. This is too onerous a requirement on the part of Member States. The notion of trust in the asylum system as the key to a collaborative disposition on both ends of the process, the asylum seeker and the authorities, has been underscored by research at various instances.<sup>633</sup>

Front-loading legal assistance and information has obvious advantages for asylum systems. It ensures swifter refugee status determination processes to the benefit of both asylum seekers and states, as they would draw less financial resources from national administrations. A fair and well-understood first instance procedure, which gives the asylum seeker a proper opportunity to present his or her case, is more likely to lead to a more rapid collection of information and result in a swift positive decision. At the same time, even in the case of a negative decision, asylum seekers are more likely to comply with the outcome of a procedure which they comprehend and deem fair, rather than one they have had no time or help navigating through. Questions such as the effectiveness of voluntary departure or the phenomenon of subsequent applications are inextricably linked to the quality of first instance procedures.

In that light, early and appropriate legal assistance can ensure that first instance procedures become a proper forum for refugee status determination, rather than a merely preparatory stage for appeals. Regrettably, the approach taken by the recast Asylum Procedures Directive,<sup>634</sup> which makes the provision of free legal assistance and representation mandatory only at the appeal stage, only confirms the view that an appeal against the decision-maker's determination becomes almost a necessary step in the asylum process.

631. AIDA Country Report Italy: Third Update, 70.

632. AIDA Country Report Malta: Third Update, 45.

633. See e.g. C Costello and E Kaytaz, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, UNHCR Legal Policy and Protection Series, PPLA/2013/02, June 2013; B Anderson and S Conlan, *Providing Protection: Access to early legal advice for asylum seekers*, 2014, available at: <http://bit.ly/117X9dz>; E Guild et al, *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection*, European Parliament, PE509.989, October 2014; M Noferi, *A Humane Approach can Work: The effectiveness of alternatives to detention for asylum seekers*, American Immigration Council, July 2015.

634. Article 20 recast Asylum Procedures Directive.

A fair, well-understood first instance procedure, even if it leads to rejection of the asylum application, is more likely to be complied with, as it fosters greater trust between the asylum seeker and the decision-making authorities.

For these reasons, the question of legal assistance remains a recurrent theme in the work of AIDA. Both the 2012/2013 and the 2013/2014 AIDA Annual Reports have undertaken a thorough examination of the availability of legal assistance and representation across AIDA countries in various types of procedures.<sup>635</sup> This report reiterates these concerns, while noting that the situation of legal aid has largely remained intact in the previous year. Asylum seekers are not entitled to free state-funded legal assistance in first instance regular procedures in **Cyprus**,<sup>636</sup> **Germany**,<sup>637</sup> **Greece**,<sup>638</sup> **Croatia**,<sup>639</sup> **Italy**,<sup>640</sup> and **Malta**,<sup>641</sup> and may only rely on the limited resources of NGOs providing legal aid. The availability of such assistance is even scarcer in accelerated, border or Dublin procedures.<sup>642</sup>

Even in countries where state-funded legal assistance is provided, legal and practical barriers thereto significantly hinder the provision of quality advice to asylum seekers. A number of AIDA countries make the provision of free legal aid conditional upon a “merits test”, establishing that the applicant’s case has a reasonable prospect of appeal. At the same time, the level of requisite qualifications for legal aid lawyers, as well as the level of compensation for their work, is not sufficient to guarantee appropriate expertise in legal aid provision.<sup>643</sup> Another problem is that often lawyers do not speak foreign languages, which complicates necessary basis interaction with asylum seekers thereby further undermining their ability to represent asylum seekers in practice, in particular where no interpretation is available to ensure communication between lawyers and asylum seekers.<sup>644</sup>

However, positive developments are reported in Switzerland and Poland in this respect. In **France**, following the asylum reform adopted in July 2015, free legal assistance is now automatically granted for appeal procedures before the National Court of Asylum without a prior ‘means’ test to assess the asylum seeker’s resources.<sup>645</sup>

In **Switzerland**, free legal assistance was denied in first instance procedures on the ground that the “necessity of legal representation” was not established in asylum cases.<sup>646</sup> Since February 2014, the Asylum Act specifically regulates the right to free administration of justice. Following these amendments, the law no longer requires asylum seekers to meet a “necessity of legal representation” test in order to benefit from legal aid in the appeals procedure.<sup>647</sup> However, appeals against Dublin decisions must still satisfy the necessity criterion.

In **Poland**, currently debated amendments to the Law on Granting Protection to Foreigners, transposing the recast Asylum Procedures Directive and recast Reception Conditions Directive, aim at introducing a state legal aid system. According to version of the draft as of 13 July 2015, free legal aid will be provided by the state during the first instance procedure.<sup>648</sup>

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635. See AIDA, *Not There Yet*, 64-70; *Mind the Gap*, 57-59.

636. AIDA Country Report Cyprus: First Update, 25.

637. AIDA Country Report Germany: Third Update, 25.

638. AIDA Country Report Greece: Third Update, 42. State-funded legal aid is not provided in either first instance or appeal procedures in Greece.

639. AIDA Country Report Croatia: First Update, 23.

640. AIDA Country Report Italy: Third Update, 24.

641. AIDA Country Report Malta: Third Update, 19.

642. On Dublin procedures, see e.g. AIDA Country Report Belgium: Third Update, 25.

643. AIDA Country Report Austria: Third Update, 24-25; AIDA Country Report Belgium: Third Update, 26.

644. See e.g. AIDA Country Report Hungary: Third Update, 18.

645. Law n. 2015-925 of 29 July 2015 on asylum reform.

646. AIDA Country Report Switzerland, 26.

647. AIDA Country Report Switzerland, 25.

648. AIDA Country Report Poland: Third Update, Annex. See also Draft Law amending the Law on Granting Protection to Foreigners, version of 13 July 2015, available in Polish at: <http://bit.ly/1MtaGQl>.

## CONCLUSION

This third AIDA Annual Report has focused in particular on the statistical trends in 2014 and the first half of 2015, key aspects of the policy debates at EU level with a particular focus on solidarity debate following the publication of the European Agenda on Migration, and the transposition and implementation of the legal framework of the CEAS in practice. Here, a number of key observations and recommendations are made with regard to each of these three areas.

### *Asylum in Europe: the need to put numbers into perspective*

Since the AIDA project started in 2012, EU Member States, as well as the wider Europe, have seen a steady increase in the number of people seeking protection from conflict and human rights violations. If anything, it is likely that this trend will continue in the foreseeable future as the world is witnessing the biggest refugee and internal displacement crisis since World War II, according to UNHCR.

However, while the number of asylum seekers arriving in the EU in 2014 and the first half year of 2015 has reached historical proportions from an EU perspective, the real refugee crisis is not in the EU, despite the efforts of some governments to make us believe otherwise. The almost 2 million Syrian refugees hosted by Turkey, which was added to the AIDA project this year, is just one example of that simple truth. As highlighted in the statistical analysis of this report, despite the 626,000 asylum applicants in the EU in 2014, the 28 Member States continue to receive a more than manageable part of the refugee movements worldwide. Moreover, from a global perspective, year after year, UNHCR reports that the vast majority of the world's refugees are hosted by the least developed countries. This year is no different, even though the continuing dramatic press reports on arrivals in Greece, Italy and at the Eastern borders of the EU create the false image of Europe being overwhelmed and the situation becoming unmanageable.

This is not to say that the increased numbers of asylum seekers arriving in Europe do not create specific challenges for the asylum systems in the EU Member States and the Common European Asylum System in general. While it first and foremost affects the Member States of first entry in the EU that are increasingly confronted with a reception crisis, it is clear that also other EU Member States seem to struggle with the pressure on their asylum systems and shortages in reception accommodation

At the same time, the fact that the vast majority of asylum applications in the EU continued to be lodged in only 5 EU Member States in 2014, while some of those Member States take in the highest numbers of refugees through resettlement or humanitarian admission programmes throughout the EU, has become a key political stumbling block and is likely to remain high on the EU's political agenda in the coming years.

Nevertheless, Europe and the EU Member States in particular have the resources to respond to the increasing numbers of arrivals of persons in need of international protection in a humane manner in line with their obligations under international and European law. The EU, as one of the richest regions in the world, has a legal and moral obligation to lead by example and to show solidarity with refugees by developing effective responses that are based on protection and full respect of human rights.

### *The road to Europe: the need for credible policies on safe and legal channels to protection*

Despite the establishment of a new legal framework for the CEAS, getting access to protection remains a life-threatening undertaking for too many men, women and children fleeing persecution, war and serious human rights violations. While the EU is flexing its muscles by declaring a war on smuggling and launching a military operation in the Mediterranean aimed at destroying boats, it fails to develop a credible and concerted policy so as to provide those having no other option than to risk their lives at sea and use irregular means to come to Europe with an alternative. One such alternative is the use of resettlement as one of the durable solutions to refugeehood promoted by UNHCR. The commitment by EU Member States and Schengen Associated States to resettle 22,000 refugees in 2015 and 2016 on a voluntary basis is certainly laudable and a step in the right direction, but in light of the global resettlement needs much more can and must be done. Individual EU Member States must provide additional places under national programmes, while the numbers involved in the joint resettlement programme agreed upon should be significantly increased and turned into a permanent scheme in close consultation with UNHCR.

In addition to resettlement, other legal avenues including private sponsorship programmes, humanitarian visa or protected entry procedures, flexible use of family reunification procedures as well as labour mobility schemes or

programmes for researchers and students must be offered by European States to reduce the need for refugees and migrants to resort to irregular and often life-threatening ways to reach Europe.

Continued investment in search and rescue capacity in the Mediterranean at a minimum at the level of the Mare Nostrum operation carried out by Italy until November 2014 is crucial to avoiding the loss of life at sea as much as possible. Saving lives at sea must remain the priority and respect of the principle of *non refoulement* must be ensured in line with obligations under international maritime and human rights law and EU law, including in the context of Frontex-coordinated joint operations at sea.

#### *Relocation: the road to real solidarity?*

Recent discussions on internal solidarity within the EU, triggered by the Commission's European Agenda on Migration and the political debate on relocation of 40,000 "persons in clear need of international protection" from Italy and Greece, has shown how sensitive the issue of solidarity still is in the asylum field. Despite the fact that the principle of solidarity and fair responsibility in this area of European policy making is enshrined in Article 80 TFEU, a considerable 'coalition of the unwilling' showed very little appetite to engage in this effort. This episode in the development of the Common European Asylum System may have repercussions on the longer term as the unwillingness of certain Member States to show concrete solidarity in the area of asylum has triggered fierce reactions from those Member States in the EU that have been receiving the majority of asylum applications in the EU in recent years.

In this regard, it seems almost ironic that a proposal aiming at organising concrete solidarity with two EU Member States at a fairly modest level in terms of the numbers persons involved appears to have increased the level of distrust between EU Member States at the political level instead. This included another uneasy episode of Member States taking unilateral measures such as reintroducing border controls and identity checks at the internal borders of the Schengen area or the refusal to receive Dublin transfers on their territory, as discussed in Chapter II, Section 6. This is not encouraging in particular in light of the upcoming Commission proposal on a permanent relocation scheme that is announced in the European Agenda on Migration for the end of this year. It certainly adds to the impression of the European Union as being at a turning point with regard to its common policy on asylum as it is in many other areas of policy making. If the EU does not manage to re-establish such trust and heal the wounds from the past months, it may shelve ambitions to take further steps in harmonising asylum practices and policies for a considerable amount of time.

However, the implementation of the soon to be adopted Council Decision in practice should be used to test and assess the overall effectiveness of the relocation mechanism on a larger scale than within the relocation project carried out in the past with Malta, and evaluate its impact on the fundamental rights of the persons concerned. The implementation of a screening system which aim will be to determine whether arriving migrants are in need of international protection or should be deported back to their country of origin or transit needs to be carefully monitored and scrutinised in order to ensure that all persons in need have effective access to asylum procedures. In order to maximise the relief provided by the relocation scheme to the asylum systems of Italy and Greece, relocation procedures will have to be swift and Member States of relocation will have to adopt a sufficiently flexible approach to avoid that the procedure becomes too cumbersome. At the same time, the relocation procedure must provide the necessary guarantees to ensure in practice a proper assessment of whether special needs of the persons concerned can effectively be met in the Member State of relocation, and ensure that special links beyond family ties or specific skills of an applicant are duly taken into account. Whereas this is not provided for in the draft Council Decision at the time of writing, Member States should take into account as much as possible the preference of the individual applicants for a specific Member State and refrain from imposing relocation without their consent as this is likely to be counterproductive in the longer term.

#### *Addressing the gaps in the CEAS: enhancing fairness and fundamental rights protection in practice*

The analysis of key aspects of the asylum systems of the countries included in AIDA in this third annual report reveals once more persistent protection gaps with regard to asylum seekers' access to the territory and the procedure, reduced procedural safeguards in the context of accelerated, border and Dublin procedures, as well as continuing difficulties in accessing legal assistance. The growing reliance on the safe country of origin concept and the recent initiatives taken to further promote the use of common lists of safe countries of origin at the EU level is a particularly worrying trend in this respect as it further undermines access to a fair and full individualised examination of the merits of the application and adds to unhelpful stereotypical discourse about "abuse of the asylum system". Any legislative initiative by the European Commission to further amend relevant provisions in the recast Asylum Procedures Directive must be consistent with the EU Charter of Fundamental Rights and refrain from fur-

ther reducing the level of procedural guarantees for asylum seekers from such countries, in particular with regard to their access to an effective remedy.

Moreover, the growing number of vulnerable asylum seekers, including persons who have gone through extremely traumatic experiences, families with children and unaccompanied children, poses specific challenges as asylum systems in many EU Member States remain ill-equipped to address their special needs, despite the existence of specific guarantees in EU asylum legislation. As regards access to the labour market, transposition has reduced the temporal restrictions for asylum seekers to take up employment in most AIDA countries, but within the limitations set by the recast Reception Conditions Directive, important variances continue to exist in this regard, as well as with regard other aspects such as the application of labour market tests or sector or working time restrictions, which may undermine asylum seekers' effective access to the labour market in practice.

Some of the general recommendations made in the two previous AIDA Annual Reports drawn from the AIDA research with regard to the implementation of standards laid down in the EU asylum *acquis* in practice remain valid and are worth summarising here as they relate to issues that require permanent attention of EU institutions and relevant national authorities.

- Measures must be taken to ensure full respect of the principle of *non-refoulement* at the borders and effective access to the territory and the asylum procedure, including the clarification of the role of border guards and the provision of accessible information to those arriving at the border about the possibility to apply for international protection.
- Access to quality free legal assistance must be guaranteed at all stages of the asylum procedure as an essential safeguard to ensure access to asylum seekers human rights under EU asylum law and international human rights law, which increases both the fairness and effectiveness of the asylum process. This implies that necessary resources are made available to ensure sufficient capacity with NGOs and legal practitioners to provide accurate legal information to and represent asylum seekers in the asylum procedure.
- States must provide asylum seekers access in practice to an effective remedy with automatic suspensive effect which guarantees a full and *ex nunc* examination of both facts and points of law and provides for reasonable time limits, including where procedures are accelerated or expedited on the basis of presumptions of safety of the country of origin or transit of the applicants.
- The general presumption against the detention of asylum seekers, laid down in international human rights law and in EU asylum law standards must be enshrined in national legislation, while the detention of particularly vulnerable groups of asylum seekers, such as children whether unaccompanied or with families, should be prohibited by law. Where they are being detained, asylum seekers must have access in practice to the range of procedural guarantees laid down in EU and international human rights law and standards that protect them from arbitrary detention.
- States must ensure applicants for international protection effective access to material reception conditions that ensure an adequate standard of living which guarantees their subsistence and protects their physical and mental health. Sufficient reception capacity must be created to enable swift responses to evolutions in the number of asylum seekers, taking into account their special reception needs. Furthermore, as access to the labour market is an important tool to promote the self-sufficiency of applicants, States should ensure such access as early as possible after the application was lodged and in any case no later than 6 months after such date as this is in the interest of both asylum seekers and States.

A key problem remains the lack of reliable and accurate statistical and numerical data with regard to various crucial aspects of the CEAS. Crucial data such as with regard to the application of the Dublin Regulation or the use of detention or accelerated procedures are often very incomplete or even not available for certain Member States. The persisting lack of a harmonised approach to the definitions and criteria for collecting data remains a deficiency. This prevents a reliable and proper analysis of real and perceived outputs of the EU's asylum instruments, while analysis of statistical data is becoming more and more important in the development of the EU's asylum as well as border management policy.

A more accurate and systematic collection of more sophisticated data on the implementation of key aspects of the EU asylum *acquis* is essential to supporting evidence-based policy making and EASO's ongoing efforts in this field. The Commission in particular should take further steps to ensure that Member States comply with their obligations to communicate statistical data in accordance with the Migration Statistics Regulation, as well as their obligation to submit information on changes in law and practice on specific provisions of the recast Reception Conditions Directive according to its Annex I in particular, such as access to the labour market and the identification of persons with special needs. Detention of asylum seekers should be added to this list. Current data on detention

of asylum seekers is very incomplete and inaccurate in many Member States, or often part of general statistical information on the detention of third-country nationals in an irregular situation, making it difficult to assess the scale of detention practices in EU Member States and Schengen Associated States. The collection of specific data on the legal grounds, frequency, duration and conditions of detention of asylum seekers pending the examination of their asylum application and during Dublin procedures, as well as the availability and use of alternatives of detention, should be added to Member States' reporting obligations if the EU asylum *acquis* is to be properly monitored.

### *Completing the CEAS: the next steps*

In addition to effective implementation of existing standards, further reform of the legal framework for the CEAS is needed in light of its structural weaknesses that have been identified in this and other reports. A key priority in this regard is the fundamental revision of the Dublin system. Its flaws and deficiencies are widely documented, including in this Annual Report, and do not need to be restated here. Suffice it here to remind the extremely low number of transfers effected under the Dublin Regulation and the growing number of suspensions of Dublin transfers ordered by national courts on human rights grounds.

The coming years may be decisive in this regard, as the comprehensive fitness check of the Dublin III Regulation that is underway constitutes a unique opportunity to fundamentally rethink the system of allocating responsibility for asylum applications and its underlying principles. This further supported by the public acknowledgment by the Commission that the Dublin III Regulation is not working as it should. Whereas the current system works against solidarity and undermines the human rights of asylum seekers and results in a "protection lottery", it must be replaced with a rights-based system of responsibility-sharing that takes the individual circumstances of the asylum seeker as the starting point for allocating responsibility and takes asylum seekers' preferences duly into account. In this respect, it must be reminded that the soon to be adopted Council Decision on relocation is the first legal instrument adopted at EU level that partially derogates from the Dublin III Regulation by breaking the link between responsibility for a person's entry on the common territory and responsibility for examining that person's asylum application, while it cautiously introduces the personal skills, family and cultural ties and integration perspectives of the individual as a factor to be taken into account when deciding on the Member State of relocation.

Finally, it is important for the Commission to launch the debate on the mutual recognition of positive asylum decisions and an EU-wide framework for the transfer of protection status between EU Member States as this is the next logical step in the harmonisation of asylum policies in the EU. This would be a way to address existing barriers to free movement for persons granted international protection in one Member State and establish a uniform status of asylum, valid throughout the Union, as is required under Article 78(2)(a) TFEU.

## ANNEX I: LEGISLATIVE AMENDMENTS TRANSPOSING THE EU ASYLUM ACQUIS

### CEAS measures transposed into national legislation

Directive / Regulation	Country	Date of transposition	Official title of corresponding act (EN)
Directive 2013/32/EU Recast Asylum Procedures Directive	 Austria	18 Jun 2015	Federal Act amending the BFA Procedures Act, the Asylum Act 2005, the Foreigners Police Act 2005 and other measures BGBl. I Nr. 70/2015 (DE)
	 Belgium	1 Mar 2012 1 Sep 2013 1 Jun 2014 10 Aug 2015	Law of 19 January 2012 amending Law of 15 December 1980 (FR, NL) Law of 8 May 2013 amending Law of 15 December 1980 (FR, NL) Law of 10 April 2014 amending Law of 15 December 1980 (FR, NL) Law of 10 August 2015 amending Law of 15 December 1980 (FR, NL)
	 Croatia	2 Jul 2015	Law on International and Temporary Protection, NN 70/15 (HR)
	 France	29 Jul 2015	Law n. 2015-925 of 29 July 2015 on Asylum Reform (FR)
	 Hungary	8 Jul 2015 6 Jul 2015	Act CVI of 2015 amending the Asylum Act (HU) Act CXXVII of 2015 amending the Asylum Act (HU)
	 Malta	10 Mar 2015	Act No VI of 2015, an Act to amend the Refugees Act, Cap. 420 (EN)
	 Netherlands	8 Jul 2015	Law of 8 July 2015 amending the Aliens Act 2000 for the implementation of Directive 2013/32/EU and Directive 2013/33/EU (NL)
Directive 2013/33/EU Recast Reception Conditions Directive	 Belgium	1 Sep 2013	Law of 8 May 2013 amending Law of 15 December 1980 (FR, NL)
	 Croatia	2 Jul 2015	Law on International and Temporary Protection, NN 70/15 (HR)
	 France	29 Jul 2015	Law n. 2015-925 of 29 July 2015 on Asylum Reform (FR)
	 Germany	5 Nov 2014	Law on classification of further states as safe countries of origin and on the facilitation of access to the labour market for asylum seekers and tolerated foreigners (DE)
	 Hungary	1 Jul 2013	Act XCIII of 2013 amending the Asylum Act (HU)
	 Netherlands	8 Jul 2015	Law of 8 July 2015 amending the Aliens Act 2000 for the implementation of Directive 2013/32/EU and Directive 2013/33/EU (NL)
Regulation 604/2013 Dublin III Regulation	 Austria	18 Jun 2015	Federal Act amending the BFA Procedures Act, the Asylum Act 2005, the Foreigners Police Act 2005 and other measures BGBl. I Nr. 70/2015 (DE)

	 Croatia	2 Jul 2015	Law on International and Temporary Protection, NN 70/15 (HR)
	 France	29 Jul 2015	Law n. 2015-925 of 29 July 2015 on Asylum Reform (FR)
	 Germany	27 Jul 2015	Law on the redefinition of the right to stay and on the termination of stay (DE)
	 Switzerland	1 Jul 2015	Order adapting legislative acts due to developments related to the Dublin/Eurodac acquis (FR)

### Pending transposition and reforms into national legislation

Directive / Regulation	Country	Official title of corresponding act (EN)
Directive 2013/32/EU Recast Asylum Procedures Directive	 Italy	Legislative Decree implementing Directive 2013/33/EU laying down standards for the reception of applicants for international protection and Directive 2013/32/EU on common procedures for granting and withdrawing international protection status (IT)
	 Poland	Law amending the Law on Granting Protection to Foreigners (PL)
	 Sweden	Law amending the Aliens Act, Ds 2015:37 Implementation of the recast Asylum Procedures Directive (SE)
Directive 2013/33/EU Recast Reception Conditions Directive	 Bulgaria	Law amending the Law on Asylum and Refugees (BG)
	 Italy	Legislative Decree implementing Directive 2013/33/EU laying down standards for the reception of applicants for international protection and Directive 2013/32/EU on common procedures for granting and withdrawing international protection status (IT)
	 Poland	Law amending the Law on Granting Protection to Foreigners (PL)
Regulation 604/2013 Dublin III Regulation	 Italy	Legislative Decree implementing Directive 2013/33/EU laying down standards for the reception of applicants for international protection and Directive 2013/32/EU on common procedures for granting and withdrawing international protection status (IT)
	 Poland	Law amending the Law on Granting Protection to Foreigners (PL)

### Other pending asylum-related legislation

	 Ireland	International Protection Bill (General Scheme) (EN)
	 Switzerland	Agreement between the European Union and the Swiss Confederation on the modalities of its participation in the European Asylum Support Office (EASO) (FR)

## ANNEX II: SELECTED EUROPEAN JURISPRUDENCE ON ASYLUM

This Annex lists relevant judgments by the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR) on asylum law. Links to case summaries from the European Database of Asylum Law (EDAL) are provided where available.

### A. Court of Justice of the European Union

#### (1) Qualification

- Case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, Judgment of 17 February 2009.
- Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi, Dier Jamal v Bundesrepublik Deutschland*, Judgment of 2 March 2010.
- Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, Judgment of 17 June 2010.
- Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v B and D*, Judgment of 9 November 2010.
- Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, Judgment of 5 September 2012.
- Case C-277/11, *M. M. v Minister for Justice, Equality and Law Reform, Ireland and Attorney General*, Judgment of 22 November 2012.
- Case C-364/11, *Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal*, Judgment of 19 December 2012.
- Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie en Asiel*, Judgment of 7 November 2013.
- Case C-285/12, *Aboubacar Diakite v Commissaire général aux réfugiés et aux apatrides*, Judgment of 3 January 2014.
- Case C-604/12, *H. N. v. Minister for Justice, Equality and Law Reform and Others*, Judgment of 8 May 2014.
- Case C-481/13, *Mohammad Ferooz Qurbani*, Judgment of 17 July 2014.
- Cases C-148, C-149 and C-150/13, *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, Judgment of 2 December 2014.
- Case C-542/13, *Mohamed M'Bodj v Conseil des ministres*, Judgment of 19 December 2014.
- Case C-562/13, *Abdida v Centre public d'action sociale d'Ottignies-Louvain-La-Neuve*, Judgment of 19 December 2014.
- Case C-472/13, *Andre Lawrence Shepherd v Federal Republic of Germany*, Judgment of 26 February 2015.
- Case C73/13, *H.T. v Land Baden-Württemberg*, Judgment of 24 June 2015.

#### *Pending references:*

- Case C-560/14, *MM v Minister for Justice and Equality, Ireland and the Attorney General*.
- Case C-573/14, *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani*.
- Case C-150/15, *Der Bundesbeauftragte für Asylangelegenheiten v N*.

#### (2) Asylum Procedures

- Case C-133/06, *European Parliament v Council of the European Union*, Judgment of 6 May 2008.
- Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment of 28 July 2011.
- Case C-431/10, *European Commission v Ireland*, Judgment of 7 April 2011.
- Case C-175/11, *H.I.D., B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 31 January 2013.

*Pending references:*

- Case C-239/14 *Abdoulaye Amadou Tall v CPAS de Huy*, 14 May 2014.

(3) Dublin Regulation

- Case C-19/08, *Migrationsverket v Edgar Petrosian and Others*, Judgment of 29 January 2009.
- Joined Cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011.
- Case C-620/10, *Migrationsverket v Nurije Kastrati and Others*, Judgment of 3 May 2012.
- Case C-245/11, *K v Bundesasylamt*, Judgment of 6 November 2012.
- Case C-528/11, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, Judgment of 30 May 2013.
- Case C-648/11, *MA, BT, DA v Secretary of State for the Home Department*, Judgment of 6 June 2013.
- Case C-4/11, *Kaveh Puid v Bundesrepublik Deutschland*, Judgment of 4 November 2013.
- Case C-394/12, *Shamso Abdullahi v Bundesasylamt*, Judgment of 12 December 2013

*Pending references:*

- Case C-63/15 *Mehrad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, 12 February 2015.
- Case C-155/15 *Karim*, 11 May 2015.

(4) Reception Conditions Directive

- Case C-179/11 *Cimade & GISTI v Ministre de l'Intérieur*, Judgment of 9 November 2012.
- Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Saciri*, Judgment of 27 February 2014.

(5) Return and detention

- Case C-357/09, *Said Shamilovich Kadzoev (Huchbarov)*, Judgment of 30 November 2009.
- Case C-61/11 PPU, *Hassen El Dridi, alias Karim Soufi*, Judgment of 28 April 2011.
- Case C-329/11, *Alexandre Achughbajian v Préfet du Val-de-Marne*, Judgment of 6 December 2011.
- Case C-430/11, *Md Sagor*, Judgment of 6 December 2012.
- Case C-522/11, *Abdoul Khadre Mbaye*, Judgment of 21 March 2013.
- Case C-534/11, *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie, Czech Republic*, Judgment of 30 May 2013.
- Case C-383/13 PPU, *M. G., N. R. v Staatssecretaris van Veiligheid en Justitie*, Judgment of 10 September 2013.
- Case C-297/12, *Gjoko Filev and Adnan Osmani*, Judgment of 19 September 2013.
- Case C-146/14, *Direksia 'Migratsia' pri Ministerstvo na vatreshnite raboti v Bashir Mohamed Ali Mahdi*, Judgment of 5 June 2014.
- Joined Cases C-473/13 and C-514/13, *Adala Bero and Ettayebi Bouzalmate v Regierungspräsidium Kassel & Kreisverwaltung Kleve*, Judgment of 17 July 2014.
- Case C-474/13, *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*, Judgment of 17 July 2014.
- Case C-166/13, *Sophie Mukarubega v Préfet de police and Préfet de la Seine-Saint-Denis*, Judgment of 5 November 2014.
- Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, Judgment of 11 December 2014.
- Case C-562/13, *Abdida v Centre public d'action sociale d'Ottignies-Louvain-La-Neuve*, Judgment of 18 December 2014
- Case C-554/13, *Zh. and O. v Staatssecretaris van Veiligheid en Justitie*, Judgment of 10 June 2015.

*Pending references:*

- Case C-38/14, *Subdelegación del Gobierno en Gipuzkoa Extranjería v Samir Zaizoune*.
- Case C-290/14, *Skerdjan Celaj*.
- Case C-390/14, *Astinomikos Diefthintis Larnakas v Masoud Mehrabipari*.

(6) Family reunification

- Case C-540/03, *European Parliament v Council of the European Union*, Judgment of 27 June 2006.
- Case C-578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken*, Judgment of 4 March 2010.
- Joined Cases C 356/11 and C 357/11, *O, S v Maahanmuuttovirasto and Maahanmuuttovirasto v L*, Judgment of 6 December 2012.
- Case C-338/13, *Noorzia v Bundesministerin für Inneres*, Judgment of 17 July 2014.
- Case C-153/14, *Minister van Buitenlandse Zaken v K and A*, Judgment of 9 July 2015.

*Pending references:*

- Case C-527/14, *Ukamaka Mary Jecinta Oruche and Nzubechukwu Emmanuel Oruche v Germany*.
- Case C-558/14, *Mimoun Khachab v Delegación de Gobierno en Álava*.

**B. European Court of Human Rights**

(1) *Non-refoulement*

- *Soering v UK*, Application no. 14038/88, Judgment of 7 July 1989.
- *Cruz Varas and Others v Sweden*, Application no. 15576/89, Judgment of 20 March 1991.
- *Vilvarajah and others v UK*, Application nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991.
- *D. v UK*, Application no. 30240/96, Judgment of 2 May 1997.
- *Jabari v Turkey*, Application no. 40035/98, Judgment of 11 July 2000.
- *Said v the Netherlands*, Application no. 2345/02, Judgment of 5 July 2005.
- *Bader v Sweden*, Application no. 13284/04, Judgment of 8 November 2005.
- *Salah Sheekh v the Netherlands*, Application no. 1948/04, Judgment of 11 January 2007.
- *Saadi v Italy*, Application no. 37201/06, Judgment of 28 February 2008.
- *N. v UK*, Application no. 26565/05, Judgment of 27 May 2008.
- *N.A. v UK*, Application no. 25904/07, Judgment of 17 July 2008.
- *N. v Sweden*, Application no. 23505/09, Judgment of 20 July 2010.
- *Sufi and Elmi v UK*, Application nos. 8319/07 and 11449/07, Judgment of 28 June 2011.
- *Othman (Abu Qatada) v UK*, Application no. 8139/09, Judgment of 17 January 2012.
- *S.F. v Sweden*, Application no. 52077/10, Judgment of 15 May 2012.
- *S.H.H v UK*, Application no. 60367/10, Judgment of 29 January 2013.
- *I.K. v Austria*, Application. no. 2964/12, Judgment of 28 March 2013.
- *H. and B. v UK*, Application nos. 70073/10 and 44539/11, Judgment of 9 April 2013.
- *Aswat v UK*, Application no. 17299/12, Judgment of 16 April 2013.
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